NORTH CAROLINA REPORTS
Vol. 271

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1967
FALL 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:

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

Report		Volume	
1 and 2 Martin, Taylor & Conf.	as	1	N.C.
1 Haywood	“	2	“
2 “	“	3	“
1 and 2 Car. Law Repository & N. C. Term	“	4	“
1 Murphey	“	5	“
2 “	“	6	“
3 “	“	7	“
1 Hawks	“	8	“
2 “	“	9	“
3 “	“	10	“
4 “	“	11	“
1 Devereux Law	“	12	“
2 “ “	“	13	“
3 “ “	“	14	“
4 “ “	“	15	“
1 “ Eq.	“	16	“
2 “ “	“	17	“
1 Dev. & Bat. Law	“	18	“
2 “ “	“	19	“
3 & 4 “ “	“	20	“
1 Dev. & Bat. Eq	“	21	“
2 “ “	“	22	“
1 Iredell Law	“	23	“
2 “ “	“	24	“
3 “ “	“	25	“
4 “ “	“	26	“
5 “ “	“	27	“
6 “ “	“	28	“
7 “ “	“	29	“
8 “ “	“	30	“
9 Iredell Law	as	31	N.C.
10 “ “	“	32	“
11 “ “	“	33	“
12 “ “	“	34	“
13 “ “	“	35	“
1 “ Eq.	“	36	“
2 “ “	“	37	“
3 “ “	“	38	“
4 “ “	“	39	“
5 “ “	“	40	“
6 “ “	“	41	“
7 “ “	“	42	“
8 “ “	“	43	“
Busbee Law	“	44	“
“ Eq.	“	45	“
1 Jones Law	“	46	“
2 “ “	“	47	“
3 “ “	“	48	“
4 “ “	“	49	“
5 “ “	“	50	“
6 “ “	“	51	“
7 “ “	“	52	“
8 “ “	“	53	“
1 “ Eq.	“	54	“
2 “ “	“	55	“
3 “ “	“	56	“
4 “ “	“	57	“
5 “ “	“	58	“
6 “ “	“	59	“
1 and 2 Winston	“	60	“
Phillips Law	“	61	“
“ Eq.	“	62	“

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

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

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

SUPREME COURT OF NORTH CAROLINA.

CHIEF JUSTICE:

R. HUNT PARKER.

ASSOCIATE JUSTICES:

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

EMERGENCY JUSTICES:

EMERY B. DENNY,
WILLIAM B. RODMAN, JR.

JUDGES OF THE COURT OF APPEALS.

CHIEF JUDGE:

RAYMOND B. MALLARD,

HUGH B. CAMPBELL,
JAMES C. FARTHING,[1]
WALTER E. BROCK,
DAVID M. BRITT,
NAOMI E. MORRIS.

DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE COURTS:

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RAYMOND M. TAYLOR.

CLERK OF THE COURT OF APPEALS:

THEODORE C. BROWN, JR.

[1]Deceased 6 December 1967.

JUDGES OF THE SUPERIOR COURT OF NORTH CAROLINA.

FIRST DIVISION

Name	*District*	*Address*
Walter W. Cohoon	First	Elizabeth City.
Elbert S. Peel, Jr.	Second	Williamston.
William J. Bundy	Third	Greenville.
Howard H. Hubbard	Fourth	Clinton.
Rudolph I. Mintz	Fifth	Wilmington.
Joseph W. Parker	Sixth	Windsor.
George M. Fountain	Seventh	Tarboro.
Albert W. Cowper	Eighth	Kinston.

SECOND DIVISION

Hamilton H. Hobgood	Ninth	Louisburg.
William Y. Bickett	Tenth	Raleigh.
James H. Pou Bailey	Tenth	Raleigh.
Harry E. Canaday	Eleventh	Smithfield.
E. Maurice Braswell	Twelfth	Fayetteville.
Coy E. Brewer	Twelfth	Fayetteville.
Edward B. Clark	Thirteenth	Elizabethtown.
Clarence W. Hall	Fourteenth	Durham.
Leo Carr	Fifteenth	Burlington.
Henry A. McKinnon, Jr.	Sixteenth	Lumberton.

THIRD DIVISION

Allen H. Gwyn	Seventeenth	Reidsville.
Walter E. Crissman	Eighteenth	High Point.
Eugene G. Shaw	Eighteenth	Greensboro.
James G. Exum, Jr.	Eighteenth	Greensboro.
Frank M. Armstrong	Nineteenth	Troy.
Thomas W. Seay, Jr.	Nineteenth	Spencer.
John D. McConnell	Twentieth	Southern Pines.
Walter E. Johnston, Jr.	Twenty-first	Winston-Salem.
Harvey A. Lupton	Twenty-first	Winston-Salem.
John R. McLaughlin	Twenty-second	Statesville.
Robert M. Gambill	Twenty-third	North Wilkesboro.

FOURTH DIVISION

W. E. Anglin	Twenty-fourth	Burnsville.
Sam J. Ervin, III	Twenty-fifth	Morganton.
Francis O. Clarkson	Twenty-sixth	Charlotte.
Fred H. Hasty	Twenty-sixth	Charlotte.
Frank W. Snepp, Jr.	Twenty-sixth	Charlotte.
P. C. Froneberger	Twenty-seventh	Gastonia.
B. T. Falls, Jr.	Twenty-seventh	Shelby.
W. K. McLean	Twenty-eighth	Asheville.
Harry C. Martin	Twenty-eighth	Asheville.
J. W. Jackson	Twenty-ninth	Hendersonville.
T. D. Bryson	Thirtieth	Bryson City.

Special Judges:

J. William Copeland, Murfreesboro; Hubert E. May, Nashville; Fate J. Beal, Lenoir; James C. Bowman, Southport; Robert M. Martin, High Point; Lacy H. Thornburg, Sylva; A. Pilston Godwin[1], Raleigh.

Emergency Judges:

H. Hoyle Sink, Greensboro; W. H. S. Burgwyn, Woodland; Q. K. Nimocks, Jr., Fayetteville; Zeb V. Nettles, Asheville; Walter J. Bone, Nashville; Hubert E. Olive, Lexington; F. Donald Phillips, Rockingham; Henry L. Stevens, Jr., Warsaw; George B. Patton, Franklin; Chester R. Morris, Coinjock.

[1]Appointed 16 October 1967.

DEPARTMENT OF ATTORNEY GENERAL.

ATTORNEY-GENERAL:

THOMAS WADE BRUTON.

DEPUTY ATTORNEYS-GENERAL:

HARRY W. McGALLIARD,
RALPH MOODY,
HARRISON LEWIS,
JAMES F. BULLOCK.

ASSISTANT ATTORNEYS-GENERAL:

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ANDREW H. McDANIEL,
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BERNARD A. HARRELL,
GEORGE A GOODWYN,
MILLARD R. RICH, JR.,
HENRY T. ROSSER,
ROBERT L. GUNN,
MYRON C BANKS[1].

SOLICITORS.

Eastern Division: Herbert Small, First District, Elizabeth City; Roy R Holdford, Jr., Second District, Wilson; W. H. S. Burgwyn, Jr., Third District, Woodland; Archie Taylor, Fourth District, Lillington; Luther Hamilton, Jr., Fifth District, Morehead City; Walter T. Britt, Sixth District, Clinton; William G. Ransdell, Jr., Seventh District, Raleigh; William Allen Cobb, Eighth District, Wilmington; Doran J. Berry, Ninth District, Fayetteville; John B. Regan, Ninth-A District, St. Pauls; Dan K. Edwards, Tenth District, Durham; Thomas D. Cooper, Jr., Tenth-A District, Burlington.

Western Division: Thomas W. Moore, Jr., Eleventh District, Winston-Salem; Charles T. Kivett, Twelfth District, Greensboro; M. G. Boyette, Thirteenth District, Carthage; Henry M. Whitesides, Fourteenth District, Gastonia; Elliott M. Schwartz, Fourteenth-A District, Charlotte; Zeb A. Morris, Fifteenth District, Concord; W. Hampton Childs, Jr., Sixteenth District, Lincolnton; J. Allie Hayes, Seventeenth District, North Wilkesboro; Leonard Lowe, Eighteenth District, Caroleen; Clyde M. Roberts, Nineteenth District, Marshall; Marcellus Buchanan, Twentieth District, Sylva; Charles M. Neaves, Twenty-first District, Elkin.

[1]Appointed 1 October 1967.

FIRST DIVISION

First District—Judge Cowper.
Camden—Apr. 1.
Chowan—Mar. 25; Apr. 22†.
Currituck—Jan. 22†; Feb. 26.
Dare—Jan. 8†(2); May 20.
Gates—Mar. 18; May 13†.
Pasquotank—Jan. 1†; Feb. 12*(2); Mar. 11†; Apr. 29†(2); May 22*; June 3†.
Perquimans—Jan. 29†; Mar. 4†; Apr. 8.

Second District—Judge Cohoon.
Beaufort—Jan. 15*; Jan. 22; Jan. 29†; Feb. 12†(2); Mar. 11*; Apr. 8†; Apr. 29†(2); June 3†; June 24.
Hyde—May 13.
Martin—Jan. 1†; Mar. 4; Apr. 1†; May 27†; June 10.
Tyrell—Apr. 15.
Washington—Jan. 8; Feb. 5†; Apr. 22.

Third District—Judge Peel.
Carteret—Jan. 29†(A); Feb. 19†(A); Mar. 4†(2); Mar. 25; Apr. 22†(A)(2); June 3(2).
Craven—Jan. 1(2); Jan. 29†(2); Feb. 19†(A); Mar. 4(A); Apr. 1; Apr. 29†(2); May 20(2); June 10†(A).
Pamlico—Jan. 15(A); Apr. 8.
Pitt—Jan. 15†; Jan. 22; Feb. 19†(2); Mar. 11(A); Mar. 18; Apr. 8†(A); Apr. 15; May 13; May 20†(A); June 24.

Fourth District—Judge Bundy.
Duplin—Jan. 15*; Feb. 26*(A); Mar. 4†(2); May 6*; May 13†(2).
Jones—Jan. 8†; Feb. 26.
Onslow—Jan. 1; Feb. 5†; Feb. 19; Mar. 18†(2); Apr. 8(A); May 13(A); June 10†.
Sampson—Jan. 22(2); Apr. 1†(2); Apr. 22*; Apr. 29†; May 27†(2).

Fifth District—Judge Hubbard.
New Hanover—Jan. 8*; Jan. 15†(2); Feb. 5†(2); Feb. 19*(2); Mar. 4†(2); Mar. 25*(2); Apr. 8†(2); Apr. 29†(2); May 13*(A)(2); May 20†(2); June 3*; June 10†; June 24†.
Pender—Jan. 1; Jan. 29†; Mar. 18(A); Apr. 22†.

Sixth District—Judge Mintz.
Bertie—Feb. 5(2); May 6(2).
Halifax—Jan. 22(2); Feb. 26†; Apr. 22; May 20†(2); June 3*.
Hertford—Feb. 19; Apr. 8(2).
Northampton—Jan. 15†; Mar. 25(2).

Seventh District—Judge Fountain.
Edgecombe—Jan. 15*(A); Feb. 5†(A); Feb. 19*(A); Apr. 15*; May 13†(2); June 3(A).
Nash—Jan. 1*; Jan. 22†; Jan. 29*; Feb. 26†(2); Mar. 25*; Apr. 29†(2); May 27*; June 10†(A); June 24†(A).
Wilson—Jan. 8†(2); Feb. 5*(2); Feb. 26†(A)(2); Mar. 11*(2); Apr. 1†(2); Apr. 29*(A)(2); June 3†(2); June 24*.

Eighth District.
Greene—Jan. 1†; Feb. 19; June 10(A).
Lenoir—Jan. 8*; Jan. 15†(A); Feb. 5†(2); Mar. 11(2); Apr. 8†(2); May 13†(2); June 10*; June 24*.
Wayne—Jan. 15*(2); Jan. 29†(A)(2); Feb. 26†(2); Mar. 25*(2); Apr. 29†(2); May 27†(2).

SECOND DIVISION

Ninth District—Judge McKinnon.
Franklin—Jan. 29*; Feb. 19†; Apr. 15†(2); May 6*.
Granville—Jan. 15; Jan. 22†(A); Apr. 1(2).
Person—Feb. 5; Feb. 12†; Mar. 18†(2); May 13; May 20†.
Vance—Jan. 8*; Feb. 26*; Mar. 11†; June 3†; June 24*.
Warren—Jan. 1*; Jan. 22†; Apr. 29†; May 27*.

Tenth District—Wake.
Schedule "A"—Judge Hobgood.
Jan. 1†(2); Jan. 15†(3); Feb. 5*(2); Feb. 19†(2); Mar. 4†(A); Mar. 11†(2); Mar. 25†(2); Apr. 8*(2); Apr. 22†(2); May 13†(2); May 27*(2); June 10†; June 24†.
Schedule "B"—Judge Bickett.
Jan. 1*(2); Jan. 8(A)(2); Jan. 15*(3); Feb. 5†(2); Feb. 12(A)(2); Feb. 19*(2); Mar. 11*(2); Mar. 11(A)(2); Mar. 25*(2); Apr. 8†(2); Apr. 8(A)(2); Apr. 22*(2); May 6(A); May 13*(2); May 27†(2); May 27(A); June 10*; June 10(A); June 24*; June 24(A).

Eleventh District—Judge Canaday.
Harnett—Jan. 1*; Jan. 8†(A); Feb. 5†(A)(2); Feb. 19†; Mar. 11*; Mar. 18†(A)(2); Apr. 15†(2); May 13*; May 27†(A); June 3†(2).
Johnston—Jan. 8†(2); Jan. 22†(A)(2); Feb. 5(2); Feb. 26†(2); Mar. 25†(2); Apr. 8*(A); Apr. 29†(2); May 27; June 24*.
Lee—Jan. 22*; Jan. 29†; Feb. 26†(A); Mar. 18*; Apr. 22†(A)(2); May 20†.

Twelfth District—
Judge Brewer.
Cumberland—Jan. 1*(2); Jan. 15†(2); Jan. 29*(2); Feb. 12†(2); Mar. 4*(2); Mar. 25†(2); Apr. 8*(2); Apr. 29†; May 13*(2); May 27†(2); June 10*; June 24*.
Hoke—Feb. 26†; Apr. 22.
Judge Braswell.
Cumberland—Jan. 1†(2); Feb. 12*(2); Feb. 26(2); Mar. 25*(2); May 6†(2); June 10; June 24.
Hoke—Jan. 22.

Thirteenth District—Judge Clark.
Bladen—Feb. 12; Mar. 11†; Apr. 15; May 13†.
Brunswick—Jan. 15; Feb. 19†; Apr. 22†; May 6(A); May 27†(2).
Columbus—Jan. 1†(2); Jan. 22*(2); Feb. 5†; Feb. 26†(2); Apr. 1†(2); Apr. 29*; May 20†; June 24.

Fourteenth District—Judge Hall.
Durham—Jan. 1*(2); Jan. 1†(A)(2); Jan. 15†; Jan. 22*(3); Jan. 22†(A); Feb. 12*(2); Feb. 12†(A)(2); Feb. 26†(2); Mar. 4*(A)(3); Mar. 18†(2); Apr. 1*(2); Apr. 15†(2); Apr. 15*(A); Apr. 29*; Apr. 29†(A); May 13†(2); May 20*(A); May 27*; June 3†(2); June 3*(A)(2); June 24†.

Fifteenth District—Judge Bailey.
Alamance—Jan. 1†(2); Jan. 15*(A)(2); Jan. 29†(2); Feb. 26*(2); Mar. 25†(A); Apr. 1*(A); Apr. 8†(2); Apr. 29*; May 13†(2); June 3*(2).
Chatham—Feb. 12; Mar. 11†; May 6; May 27†.
Orange—Jan. 8*; Jan. 15†(2); Feb. 19†; Mar. 18†(2); Apr. 22*; June 3†(A)(2); June 24*.

Sixteenth District—Judge Carr.
Robeson—Jan. 1*(2); Jan. 15†(2); Feb. 19†(2); Mar. 4*; Mar. 18†(2); Apr. 1*(2); Apr. 15†; Apr. 29*(2); May 13†(2); June 3*(2).
Scotland—Jan. 29†; Mar. 11; Apr. 22†(A); June 24.

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

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

THIRD DIVISION

Seventeenth District—Judge Gwyn.
Caswell—Feb. 19†; Mar. 18.
Rockingham—Jan. 15*(2); Feb. 12†(A)(2); Mar. 4†(2); Mar. 25*(A)(2); Apr. 8†(2); May 13†(2); June 10; June 24.
Stokes—Jan. 29; Apr. 1; June 24(A).
Surry—Jan. 1*(2); Feb. 5†; Mar. 25†; Apr. 29*(2); May 27†(2).

Eighteenth District—
Schedule "A"—Judge Shaw.
Greensboro—Jan. 15†(2); Jan. 29*(2); Feb. 12*(2); Mar. 4†(2); Mar. 18*; Apr. 8†; Apr. 29*(2); May 13†(2); May 27†(2); June 10†; June 24†.
High Point—Jan. 1†(2); Mar. 25†(2); Apr. 15†.
Schedule "B"—Judge Lupton.
Greensboro—Jan. 1*(2); Jan. 15*; Jan. 22; Jan. 29†(2); Feb. 26*(2); Mar. 18†(3); Apr. 8*(2); Apr. 22†(2); May 27*(2).
High Point—Feb. 12†(2); May 13†(2); June 10†; June 24†.
Schedule "C"—Judge Crissman.
Greensboro—Jan. 1†(2); Feb. 12†; Mar. 11; Mar. 25*(2); Apr. 15†(2); May 13; May 20*; June 10*; June 24*.
High Point—Jan. 15*; Feb. 5*; Mar. 4*; Apr. 8*; May 6*; June 3*.

Nineteenth District—
Judge Seay.
Cabarrus—Jan. 1*; Jan. 8†; Feb. 26†(2); Apr. 15; June 3†(2).
Montgomery—Jan. 15; May 20†.
Randolph—Jan. 22*; Jan. 29†(2); Apr. 1†(2); June 24*.
Rowan—Feb. 12*(2); Mar. 11†(2); Apr. 29(2); May 13†.
Judge Exum.
Cabarrus—Jan. 29†(2); Mar. 18†; May 13.
Montgomery—Apr. 1.
Randolph—Jan. 1†(2); Feb. 26†(2); Mar. 25*; Apr. 29†(2); May 27†(2).
Rowan—Jan. 22†; June 10*.

Twentieth District—Judge Armstrong.
Anson—Jan. 8*; Feb. 26†; Apr. 8(2); June 3*; June 10†.
Moore—Jan. 15†; Jan. 22*; Mar. 4†(A); Apr. 22*; May 13†.
Richmond—Jan. 1*; Feb. 5†; Mar. 11†(2); Apr. 1*; May 20†(2); June 24†.
Stanly—Jan. 29†; Mar. 25; May 6†.
Union—Feb. 12(2); Apr. 29(A).

Twenty-First District—Forsyth.
Schedule "A"—Judge McConnell.
Jan. 1†(3); Jan. 22†(3); Feb. 12(2); Feb. 26(2); Mar. 18†(2); Apr. 1(2); Apr. 15†(2); Apr. 29(A); May 6†(3); May 27(2); June 10†; June 24†.
Schedule "B"—Judge Johnston.
Jan. 1(2); Jan. 1(A); Jan. 15(2); Jan. 29; Feb. 5; Feb. 12†(2); Feb. 26(A); Mar 4†(2); Mar. 18†(2); Apr. 1; Apr. 1†(A)(2); Apr. 15†(2); Apr. 29(3); May 20†(3); May 27(A); June 10; June 24.

Twenty-Second District—
Judge McLaughlin.
Alexander—Mar. 4; Apr. 8(A).
Davidson—Jan. 8†(A)(2); Jan. 22; Feb. 12†(2); Mar. 4†(A); Mar. 11; Mar. 25†(2); Apr. 15†(A); Apr. 22; May 6†; May 13†(A); June 3†(2); June 24.
Davie—Jan. 15*; Feb. 26†; Apr. 15.
Iredell—Jan. 29(2); Mar. 11†(A); Mar. 18*; Apr. 29†; May 13(2).

Twenty-Third District—Judge Gambill.
Alleghany—Mar. 18; May 13.
Ashe—Mar. 25; May 20.
Wilkes—Jan. 8†(2); Feb. 12*; Mar. 4†(2); Apr. 8; Apr. 29†; May 27†(2); June 10*; June 24.
Yadkin—Jan. 29(2); May 6.

FOURTH DIVISION

Twenty-Fourth District—Judge Anglin.
Avery—Apr. 22(2).
Madison—Feb. 19; Mar. 11†(2); May 20(2); June 24†.
Mitchell—Apr. 1(2).
Watauga—Jan. 15; Mar. 25; June 3†.
Yancey—Feb. 26(2).

Twenty-Fifth District—Judge Falls.
Burke—Feb. 12; Mar. 4; Mar. 11(A); Apr. 29†(2); May 27(2).
Caldwell—Jan. 15†(2); Feb. 19(2); Mar. 18†(2); May 13(2).
Catawba—Jan. 1†(2); Jan. 29(2); Mar. 11(A); Apr. 1(2); Apr. 15†(A); Apr. 22†; June 10†; June 24†.

Twenty-Sixth District—Mecklenburg.
Schedule "A"—Judge Ervin.
Jan. 1*(2); Jan. 15†(2); Jan. 29*(3); Feb. 26†; Mar. 4†(2); Mar. 18†(2); Apr. 1†(2); Apr. 15†(2); May 6*(3); May 27†(2); June 10†; June 24†.
Schedule "B"—Judge Hasty.
Jan. 1†(2); Jan. 15†(2); Jan. 29*(3); Feb. 19†; Mar. 4*(2); Mar. 18†(2); Apr. 1*(2); Apr. 15†(2); May 6*(3); May 27†(2); June 10*; June 24*.
Schedule "C"—Judge Clarkson.
Jan. 1*(2); Jan. 15†(2); Jan. 29†(2); Feb. 12†(3); Mar. 11*; Mar. 18†(2); Apr. 1*(2); Apr. 15†(2); Apr. 29†(2); May 13†(2); May 27†(2); June 10*; June 24*.
Schedule "D"—Judge to be Assigned.
Jan. 1†(A)(2); Jan. 1*(A)(2); Jan. 15†(A)(2); Jan. 29†(A)(2); Jan. 29*(A)(3); Feb. 12†(A)(3) Mar. 11†(A)(3); Apr. 1†(A)(2); Apr. 15†(A)(2); Apr. 15*(A)(2); Apr. 29†(A)(2); May 13†(A)(2); May 20*(A)(2); May 27†(A)(2); June 10†(A); June 10*(A); June 24†(A); June 24*(A).

Twenty-Seven District—
Schedule "A"—Judge Snepp.
Cleveland—Feb. 12†; Apr. 22(2).
Gaston—Jan. 1*(A)(2); Jan. 15†(2); Jan. 29*(2); Feb. 19†(3); Mar. 11†; Mar. 25*(2); Apr. 8*(2); May 20*(2); June 3*(2); June 24†.
Lincoln—May 6.
Schedule "B"—Judge Froneberger.
Cleveland—Jan. 22; Mar. 18†(2).
Gaston—Jan. 1†; Jan. 15*(A)(2); Jan. 29†; Feb. 5†(2); Feb. 19*(3); Apr. 1†; Apr. 8†(2); Apr. 22*(2); Apr. 29†(A); May 6†(2); May 20†(A); May 27†(3); June 24*.
Lincoln—Jan. 8(2).

Twenty-Eighth District—Buncombe.
Judge Martin.
Jan. 1*(2); Jan. 15†(3); Feb. 5*(2); Feb. 19†(3); Mar. 11*(3); Apr. 1†; Apr. 8*(2); Apr. 22†(2); May 6*(2); May 20*(2); June 3*(2); June 24*.
Judge McLean.
Jan. 1†(2); Jan. 22*; Feb. 5†(2); Feb. 19*(2); Mar. 4#; Mar. 11†(3); Apr. 8†(2); Apr. 22#;; May 6†(2); May 20†; May 27†(2); June 10†; June 24†.

Twenty-Ninth District—Judge Jackson.
Henderson—Feb. 5(2); Mar. 11†(2); Apr. 29*; May 20†(2).
McDowell—Jan. 1*; Feb. 19†(2); Apr. 8*; June 3(2).
Polk—Jan. 22; Jan. 29†(A)(2); June 24.
Rutherford—Jan. 8†*(2); Mar. 4*†; Apr. 15†*; May 6*†(2).
Transylvania—Jan. 29; Mar. 25; Apr. 1†(A).

Thirtieth District—Judge Bryson.
Cherokee—Mar. 25(2); June 24†.
Clay—Apr. 22.
Graham—Mar. 11; May 27†(2).
Haywood—Jan. 1†(2); Jan. 29(2); Apr. 29†(2).
Jackson—Feb. 12; May 13; June 10†.
Macon—Apr. 8(2).
Swain—Feb. 26(2).

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.

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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.
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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1967

NORTH CAROLINA STATE HIGHWAY COMMISSION v. ARNOLD H. NUCKLES AND WIFE, ELSIE P. NUCKLES; R. D. DOUGLAS, JR., TRUSTEE; HOME FEDERAL SAVINGS AND LOAN ASSOCIATION; GEORGE W. GORDON, TRUSTEE FOR JULIUS M. OZMENT AND WIFE, CLARA C. OZMENT; JULIUS M. OZMENT AND WIFE, CLARA C. OZMENT; GEORGE W. GORDON, TRUSTEE FOR H. L. WELBORN; H. L. WELBORN; THE TEXAS COMPANY, A CORPORATION; AMERICAN COMMERCIAL BANK; AND ROY M. BOOTH, TRUSTEE.

(Filed 24 July, 1967.)

1. **Constitutional Law § 24; Eminent Domain § 7d—**

The provision of G.S. 136-108 that in condemnation proceedings all questions raised by the pleadings as to parties, title, estates condemned, and area taken, should be determined by the court without a jury, reserving only the amount of damages for the determination of the jury, is constitutional, the adjudication by the court of such questions being conclusively solely for the purpose of condemnation.

2. **Same; Appeal and Error § 6—**

The right of appeal in condemnation proceedings is the same as in any other civil action, G.S. 136-119, and appeal lies in such proceedings from a final judgment and also from an interlocutory order which affects a substantial right and which would result in injury if not corrected before final judgment, G.S. 1-277.

3. **Same—**

When an interlocutory order in condemnation proceedings adjudicates that respondents own the land involved in the proceeding, the Highway Commission must appeal immediately if it wishes to litigate its contention that it had acquired in prior proceedings practically all the land in question, since trial of the issue of damages would be a futile thing if respondents did not own the land.

4. Judgments § 28; Courts § 9; Eminent Domain § 7d—

Order in condemnation proceedings adjudicating respondents' title to virtually all of the land in dispute in the proceedings, and adjudicating that the Highway Commission had not obtained any right thereto in prior condemnation proceedings, *held* a final adjudication as to such title, and in the subsequent proceedings another judge of the Superior Court may not modify, reverse or set aside such order.

5. Appeal and Error § 57—

The court's findings of fact are conclusive when supported by competent evidence even though there also be evidence which would support a contrary finding.

6. Eminent Domain § 7d; Pleadings § 24; Limitation of Actions § 16—

G.S. 136-19 is a statute of limitations and not a condition precedent, and the trial court's discretionary action in refusing to permit the Highway Commission to amend to plead the statutory limitation a year and a half after the original pleadings had been filed is not reviewable in the absence of a showing of abuse. Whether G.S. 47-27 applied to the Highway Commission prior to the 1959 amendment, and the sufficiency of the descriptions in recorded instruments purporting to convey easements and rights of way, *quære?*

7. Eminent Domain § 7d—

Where, in condemnation proceedings, the court has adjudicated that the Highway Commission did not obtain a right of way over the land in question by prior condemnation proceedings, it is prejudicial error for the court, in the subsequent trial of the issue of damages, to permit, over respondents' objection, the introduction of testimony in support of the Highway Commission's contention that it had acquired the land in the prior condemnation proceedings and to submit such contention to the jury in the court's charge.

8. Eminent Domain § 6—

Testimony as to the price paid by respondents for the tract of land some four years prior to the condemnation of a part of the tract is properly admitted upon the question of the amount of damages when there is no suggestion of any physical change in the tract or any substantial change in the vicinity of the property which might have affected its value from the time of the purchase by plaintiffs to the time of condemnation.

9. Eminent Domain § 2; Appeal and Error § 25—

Where the owners are afforded direct access from their land to a service road connected with the lanes of travel for one direction on a limited access highway, with crossover points to the lanes of travel in the other direction, the owners are not entitled to compensation for mere inconvenience as distinguished from denial of access, and therefore an instruction leaving it to the jury to say whether, under the circumstances, respondents had reasonable access to the highway, and authorizing the assessment of damages for loss of access if the jury should find that they did not have reasonable access, cannot be prejudicial to them.

10. Appeal and Error § 50—

Instructions to the jury, even though technically erroneous, will not warrant a new trial when such instructions could not have adversely affected the verdict.

APPEAL by plaintiff from judgment entered by *McLaughlin, J.*, on 27 May 1965, and by defendants Arnold H. Nuckles and wife from *McConnell, J.*, 7 March 1966 Regular Civil Session of GUILFORD (Greensboro Division). Both appeals were docketed and argued at the Fall Term as Case No. 693.

Condemnation proceedings under G.S. 136-19 and G.S. 136-103 *et seq.* instituted by plaintiff on 18 April 1961 to condemn a right-of-way over defendants' property for Project No. 8.15364 — the improvement of U. S. Highway No. 29 (No. 29) from Greensboro to the Rockingham County line. Defendants' property is located at the intersection of No. 29 and McKnight Mill Road. It is partly within and partly without the northern city limits of Greensboro.

These facts are stipulated or uncontroverted: During 1948 and 1949, as Project 53-54 (grading, completed 20 May 1948) and Project 53-55 (paving, completed 31 May 1949), plaintiff constructed 10¼ miles of No. 29 and assumed the maintenance of it on 16 January 1950. The paved portion of the highway was 24 feet wide, and it then carried two-way traffic. That portion is now the lane for southbound traffic only. This construction went diagonally through a rectangularly-shaped tract of land belonging to defendants. The west line of this tract (1,399 feet) was Spring Street; the south line (390 feet), McKnight Mill Road. No. 29 had not previously crossed this land. Under Project 8.15364 (hereinafter referred to as Project No. 2), plaintiff constructed the northbound lane of No. 29, together with grade separations, service, and access roads, and this section of No. 29 became "a controlled access facility." G.S. 136-89.49(2). The northbound lane, last constructed, is located 30 feet east of the southbound lane. In 1950, Projects 53-54 and 53-55 (Projects 54 & 55) affected only defendants' rectangular tract described above. In 1961, Project No. 2 affected two additional tracts (tracts 3 and 4) belonging to defendants. Reference is made to the illustrative map incorporated in this opinion.

No. 29 divides the rectangular tract into two parts: a 6.96-acre tract on the west side of the highway and a 1.32-acre tract on the east side. A third tract, to which defendants obtained a deed 2 January 1957, is located entirely within the *present* right-of-way of No. 29. Tract 3 is a rectangle 100′ x 250′, containing .57 acre. Tract 4, located on the north side of No. 29, and on which is situated a filling station, contains .95 acre. It is a triangle bounded on the

PROPERTY DESCRIBED IN CIVIL ACTION
ENTITLED
NORTH CAROLINA STATE HIGHWAY COMMISSION
VS
ARNOLD H. NUCKLES, et ux, et al
GILMER TWP. GUILFORD COUNTY
PROJECT 8.15364

P.S.D. 632
A.G.D. 3369-Z
Par. 13

TABLE OF AREAS		
R/W		
TRACT 1	1.58	ACRES±
TRACT 2	2.17	"
TRACT 3	0.57	"

STATE of NORTH CAROLINA
STATE HIGHWAY COMMISSION
LOCATION DEPARTMENT
LLOYD H. COOK
Chief Locating Engineer

Surveyed 5/1/62 by
PROPERTY SURVEY SECTION
F.E. JAMES R.L.S. No. L-990
Locating Engineer
P.E. FERGUSON Surveyor
JOE BEANE Compiler
P.A. BRITT Draftsman

east by No. 29 (407 feet), and on the north by the McKnight Mill Road (240 feet). Its third side is 361.28 feet in length. Defendants acquired tract 4 in November 1947. Plaintiff has taken no part of this tract; only its access to No. 29 has been affected.

McKnight Mill Road no longer crosses No. 29. From the east, it affords access to the northbound lane of No. 29, to the service road into defendants' 1.32-acre tract, and to a two-way service road to the south. From the west, it now affords access only to the southbound lane of No. 29 and to the two-way service road which parallels that lane and the east property lines of defendants' tract 4 and the 6.96-acre tract. This service road extends from McKnight Mill Road south about one-fourth mile to the access to Cone Boulevard. The record does not disclose the distance it extends north from the intersection. Access to the main-traveled lanes of No. 29 from service roads is only at designated points, shown as "C/A" on the map.

When plaintiff instituted this proceeding, it paid into court, under provisions of G.S. 136-103, $31,709.00 as its estimate of just compensation for the land it purported to be taking under Project No. 2. The complaint and declaration of taking stated that Exhibit B, attached to the complaint, contained the description of the property being condemned. Exhibit B was a series of four very small maps showing the property of numerous persons. Except, perhaps, to a highway engineer "in the know," Exhibit B was totally unintelligible as a description of the property being taken. Upon defendants' motion, on 29 July 1963, Judge Crissman entered an order directing that defendants' property be considered as four separate tracts, designated as tracts 1, 2, 3 and 4 on the map. He also ordered plaintiff to file (1) a detailed description of the land and all property rights it purported to take in this proceeding; (2) a description of the access provided to each of defendants' tracts; and (3) a description by metes and bounds of any rights-of-way it claimed to have previously acquired over defendants' property.

Plaintiff's bill of particulars, prepared on 20 September 1963, disclosed: The lands which plaintiff sought to condemn in this proceeding were tracts A and B as shown on the map. Tract A is a triangle with a curved base, containing .02 acre. One side of it (51.03 feet) is the eastern line of No. 29; another, the northern line of the McKnight Mill Road (51.03 feet); and the third is an arc of 62.36 feet connecting the other two. Tract A was formerly the southwest corner of defendants' present 1.32-acre tract. Tract B, the southeastern corner of defendants' tract 3, is also a triangle. It contains .01 acre. One side of it (51.47 feet) is the east line of No. 29; the other two sides are 45.53 feet and 24.02 feet respectively.

Since the completion of both lanes of No. 29, the 6.96-acre tract

has no direct access to either the northbound or southbound lanes of No. 29, but it has access to the southbound lane of No. 29 and to McKnight Mill Road West by means of the service road constructed parallel to the southbound lane. The 1.32-acre tract has direct access to McKnight Mill Road East, its south boundary, and to the northbound lane of No. 29 by way of McKnight Mill Road. This tract, of course, has no direct access to the southbound lane. (A service road from the McKnight Mill Road intersection extends approximately 320 feet into this tract, parallel with the northbound lane of No. 29.) Tract 4 has no direct access to the northbound lane of No. 29. It has direct access to the southbound lane, and southbound traffic has direct access to it.

Plaintiff claims as an existing easement (acquired during construction of Projects 54 & 55) all that portion of defendants' large, rectangular tract which is now covered by the 250-foot wide right-of-way for No. 29, north of the McKnight Mill Road. This right-of-way is shown on the map as the two shaded areas within the figures 1-2-3-4-5 which are separated by the 24-foot southbound lane of No. 29. (The shaded area of tract 1 contains 1.58 acres; tract 2, 2.17 acres.)

Defendants, by answer, denied that plaintiff, prior to the commencement of this action, had any existing right-of-way over any of their property. They averred that plaintiff had never paid them any compensation for a right-of-way or for any previous taking, and denied that $31,709.00 was just compensation for the property which plaintiff had appropriated. After the pleadings and the bill of particulars were filed, it was apparent that an issue of title as to the easement claimed by plaintiff had been raised. On 27 March 1964, Judge Armstrong entered an order that all issues of title be determined by the court before issues of damages were submitted to the jury. G.S. 136-108. For this purpose, the case came on for hearing before Judge McLaughlin at the January 1965 Term. At this hearing, it was stipulated, *inter alia* (enumeration ours):

(1) The Nuckles property consisted of the rectangular lot and tracts 3 and 4.

(2) Defendants have never conveyed to plaintiff any right-of-way whatever over their lands for either of the two projects, and plaintiff has paid no money to defendants for any land which it has taken from them for highway purposes.

(3) Maps of Project 53-54 were posted at the Guilford County Courthouse in Greensboro on 31 March 1947.

(4) Plaintiff has taken no land from tract 4. If there has

been a taking with respect to this tract, it is a taking of access rights only.

(5) During construction under Projects 54 & 55, and before their completion, defendants built on that portion of their large, rectangular lot which is located east of the present southbound lane of No. 29 and north of the McKnight Mill Road, a building used as a restaurant known as Nuckles Barbecue. The greater portion of this building was on the 1.32-acre tract, but a portion of it was on the tract 2 right-of-way, which plaintiff claims it had then appropriated.

At the hearing on issues other than damages before McLaughlin, J., plaintiff offered evidence tending to show: When Projects 54 & 55 were completed, the State claimed a right-of-way 250 feet wide across defendants' large, rectangular tract, *i. e.*, the shaded areas (tracts 1 and 2) and the southbound lane dividing them. Right-of-way signs were posted, and the right-of-way was marked with concrete markers, six inches square, which protruded six inches above the ground. There was one such marker, at least, on defendants' property in October 1960, but when it was put there, plaintiff's witnesses could not say. Mr. Nuckles knew that plaintiff claimed a 250-foot right-of-way because its agents had explained this to him. As late as 1955, one had unsuccessfully attempted to settle with him for the right-of-way for the sum of $1,000.00. In February 1955, plaintiff informed Mr. Nuckles that federal funds were being held up on Projects 54 & 55 because he had a sign on the right-of-way. At its request, he moved the sign. Until construction began under Project No. 2, traffic headed both north and south on No. 29 had direct access to the restaurant. Northbound traffic can still turn directly into the restaurant by way of the McKnight Mill Road intersection, but traffic passing it on the southbound lane must continue south for one-half mile to Cone Boulevard, turn east on Cone to the northbound lane or to the service road which parallels that lane, and then back to McKnight Mill Road, a distance of about 1¼ miles. To leave the restaurant and go south, one would go north on No. 29 about 3/10 of a mile to a crossover.

In 1949, defendants gave Duke Power Company a right-of-way over their property on the east side of No. 29. It provided: "Power line shall be located approximately one foot off highway right-of-way." Prior to the commencement of Project No. 2, power poles were located on defendants' property on the west side of the southbound lane 87 feet from the west edge of the pavement; on the east side, they were 141 feet from the east edge of the southbound lane.

Defendants' evidence tended to show: After the construction of

the first lane of No. 29, they operated the barbecue restaurant and a mobile home sales lot on their property east of the pavement. They paved, graveled, and landscaped the land between the traveled portion of the highway and the restaurant. They used this area for parking, and maintained it exclusively. They also constructed two drives directly connecting the restaurant with No. 29 and another connecting it with McKnight Mill Road. Lights on white columns, 15-20 feet from the pavement, illuminated the drives. No right-of-way markers or signs were ever placed on their property until after the completion of Project No. 2. When plaintiff asked defendants to move their neon sign so that it might obtain federal funds, defendants, under the impression that the request had reference to a right-of-way for Project No. 2, moved it solely as a matter of accommodation. Defendants used their property on the west side of No. 29 as a residential mobile home park and maintained it "right up to the ditch-edge of the paved street." They graded down a bank 15-20 feet from the pavement and made a drive. It was not until 1961 that they "became familiar with the extent of the right-of-way on this last project."

The foregoing evidence pertained only to tracts 1 and 2. As the basis of its claim to a right-of-way over tract 3, plaintiff introduced the following document, which has never been recorded:

STATE OF NORTH CAROLINA PROJECT 5354
COUNTY OF Guilford SURVEY LINE

RIGHT OF WAY AGREEMENT

Jay Duggins and wife Nellie E. Duggins
Rt. # 5, Box # 360, Greensboro, N. C. , the undersigned property owner on State Highway Project 5354, recognizing the benefits to the said property by reason of the proposed highway development in accordance with the survey and plans proposed for the said project and in consideration of the early construction of the said project, hereby releases and relinquishes the State Highway and Public Works Commission from all claims for damage by reason of the right of way for the said project across the lands of the undersigned and the past and future use thereof by the State Highway and Public Works Commission, its successors and assigns, for all purposes for which the State Highway and Public Works Commission is authorized by law to subject such right of way; said right of way being the

width indicated and between the approximate survey stations as follows:

LEFT OF SURVEY CENTER LINE	RIGHT OF SURVEY CENTER LINE
Station Station	Station Station
125.0 ft. wide 116+10 and 118+05	125.0 ft. wide 116+10 and 118+05

as shown in said survey, subject to the following provisions only:

The State Highway Commission will purchase lot size 100′ x 320′ from L. E. Sikes and same to be deeded to the undersigned. Also move dwelling and garage onto new lot and provide new well. Six pieces of shrubbery to be moved over to new lot, also privy.

It is understood that construction of this project may be delayed on account of the present war emergency and any obligation assumed by the State Highway and Public Works Commission will not accrue until the construction of the project is actually begun.

There are no conditions to this agreement not expressed herein.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my seal, this the 1 day of April, 1946.

WITNESS:

M. T. Adkins — J. Duggins (SEAL)

M. T. Adkins — Nellie E. Duggins (SEAL)

At the conclusion of the evidence before Judge McLaughlin, plaintiff's counsel moved that the Highway Commission be allowed to amend its complaint, or to file a reply, in order to plead the statute of limitations, G.S. 136-19 as it appears in Vol. 3B, N. C. Gen. Stat. (1958 repl.), in bar of any claim by defendants for compensation for the 250-foot right-of-way allegedly taken under Projects 54 & 55. Judge McLaughlin denied this motion, and plaintiff excepted.

Thereafter, the judge found facts in accordance with the stipula-

tions and the recitals heretofore made in this statement of facts. In addition, he found (enumeration ours):

1. Defendants used the building which housed Nuckles Barbecue until it was removed subsequent to April 1961 during the construction of Project No. 2.

2. From 1950 until Project No. 2 was begun in 1961, on both sides of No. 29, defendants used and maintained their property adjoining the paved highway and paid taxes on the property plaintiff claimed as a right-of-way.

3. Upon the completion of Projects 54 & 55, some concrete markers and right-of-way signs were installed along the right-of-way, but none were placed on defendants' property. Signs were placed at each end of the project.

4. That portion of plaintiff's alleged right-of-way lying west of the 24-foot lane first paved is 86 feet wide; that portion lying east of it is 140 feet wide.

Upon the facts found, the judge concluded as a matter of law, *inter alia* (enumeration ours):

1. Plaintiff, by paving a roadway 24 feet wide across defendants' large, rectangular tract during the construction of Projects 54 & 55, acquired a 24-foot easement over the land occupied by the paved strip. Defendants are not entitled to recover any compensation for this 24-foot wide easement.

2. Plaintiff did not take or occupy any other property of defendants in such a manner as to constitute an appropriation, and defendants had no actual or constructive notice of any taking of their land adjacent to the paved portion of the highway.

3. Upon the institution of this action on 18 April 1961, plaintiff acquired a right-of-way easement for the 250-foot right-of-way as shown on the map. It also acquired the two small, triangular tracts designated as lots A and B, shown as hatched areas on the map. In addition, plaintiff acquired the right to exclude direct access to U. S. Highway 29 from defendants' 6.96-acre tract, the 1.32-acre tract, and tract 4, the .95-acre tract.

He thereupon adjudged that defendants were entitled "to just compensation for all the areas of their property" taken and designated on the map as tracts A, B, 1, 2, and all of 3, except that portion embraced by the 24-foot paved southbound lane, and that just compensation should include any damages resulting to the 6.96-acre tract, the 1.32-acre tract and tract 4 from loss of access to U. S. Highway 29. He directed that tract 1 should be considered a part

of defendants' 6.96-acre tract and tract 2, a part of the 1.32-acre tract.

Defendants took no exception to Judge McLaughlin's order.

Plaintiff excepted to each of the court's findings of fact and each conclusion of law except those relating to defendants' ownership of the land involved, but gave no notice of appeal. Plaintiff also excepted to the court's final adjudication as to defendants' rights to compensation.

Upon the trial of the issues of damages before Judge McConnell at the 3 March 1966 Session, defendants offered evidence which tended to show that the difference in the value of tract 1 immediately before and after the taking on 18 April 1961 was from $32,915.00 to $19,740.00; that the difference in value of tract 2 was from $78,310.00 to $21,700.00; that the difference in the value of tract 4 ranged from $24,415.00 to $15,000.00. With reference to tract 4, their evidence tended to show that it is leased to the Texas Company, which has erected a service station thereon; that, at the time of the trial, this lease had "eleven more years to go" but that after the expiration of the lease, tract 4 had very little value for commercial purposes. All of defendants' witnesses fixed the value of tract 3, before it was taken for the right-of-way, at $10,000.00.

Over defendants' objection and exception, on cross examination, five of their witnesses were asked, and required to answer, questions substantially as follows: "If the State Highway Commission had a right-of-way agreement granting it a 250-foot right-of-way which took all of tract 3 except tract B as shown by the map, would that, in your opinion, reduce the value of tract 3?" Each witness indicated that the value of the tract would be reduced, but all were reluctant "to put a value on a piece of land that the highway owned." One suggested that, encumbered by the right-of-way, the lot had no sale value. Defendants objected to these questions on the ground that whether plaintiff had acquired a right-of-way before the institution of this action was not an issue in the trial; that Judge McLaughlin's order had adjudicated that plaintiff had no right-of-way over tract 3 except the paved southbound lane of No. 29.

With reference to tract 3, Mr. Nuckles testified that when he bought it from J. Duggins and wife on 2 January 1957, at a figure which he could not remember, Mr. Duggins told him he owned the lot. Upon cross-examination, Mrs. Nuckles was asked if she knew how much her husband had paid for tract 3. Over defendants' objection and exception, she was required to answer. Her answer was: "We paid $50.00 for it. . . . In 1957 we checked the title to that property, and there was no recorded encumbrance against tract 3."

Plaintiff offered the testimony of one real estate appraiser, Mr.

H. D. Jones of Winston-Salem, which tended to show that the difference in the value of tract 1 immediately before and after the taking on 18 April 1961 was $10,342.00; the difference in the value of tract 2, $27,320.00; that the value of tract 3 without the 250-foot right-of-way was $10,000.00. Over defendants' objection and exception, Mr. Jones was permitted to testify that with the right-of-way the value of tract 3 was $394.00, since tract B "was just large enough to put a couple of signs on it." As a witness for plaintiff, J. Duggins testified, over defendants' objection, that he signed plaintiff's Exhibit 9 (introduced in evidence at the trial as plaintiff's Exhibit No. 1) upon its promise to purchase a certain lot and to move his house, garage, and shrubbery to that lot. After the move was made, Mr. Nuckles told Duggins that he wanted to buy what was left of lot 3 so that he could "put a signboard up there," and he sold it to him for $50.00. Over defendants' objection, John B. Fox, a building inspector supervisor for the city of Greensboro, was permitted to testify that prior to 18 April 1961, plaintiff claimed a right-of-way 250 feet wide along No. 29 as it intersects with McKnight Mill Road in Greensboro.

Issues were submitted to the jury and answered as follows:

> "1. What sum are the defendants entitled to recover of the plaintiff, State Highway Commission, as just compensation for the appropriation of their property for highway purposes?
> "(A) For tract No. 1. ANSWER: $15,000.00.
> "(B) For tract No. 2. ANSWER: $28,000.00.
> "(C) For tract No. 3. ANSWER: $394.00.
> "(D) For tract No. 4. ANSWER: NONE."

Judgment establishing plaintiff's right-of-way and defendants' right to compensation was entered upon the verdict. Plaintiff and defendants appealed.

T. W. Bruton, Attorney General; Harrison Lewis, Deputy Attorney General; T. Buie Costen, Staff Attorney; Eugene Shaw, Jr., Associate Counsel, for plaintiff.

Thomas Turner; Seymour, Rollins & Rollins for Arnold H. Nuckles and wife, Elsie P. Nuckles, defendants.

SHARP, J.

PLAINTIFF'S APPEAL.

After the complaint, answer, bill of particulars, and plat were filed, it was revealed that, as to each of defendants' four tracts of land, there were two basic issues: (1) What land and appurtenances

thereto, if any, was plaintiff taking in this action, and (2) what was just compensation for the property taken. With reference to (1), G.S. 136-108 provides:

> "Determination of issues other than damages. — After the filing of the plat, the judge, upon motion and ten (10) days' notice by either the Highway Commission or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken."

Defendants moved, under G.S. 136-108, that the judge determine question (1), and, on 27 May 1965, Judge McLaughlin made that determination. He adjudged that plaintiff was taking from tracts 1 and 2 the shaded areas shown on the map; tract A; and all of tract 3 (including tract B), except that portion covered by the paved southbound lane of No. 29, which is shown in white on the map. Judge McLaughlin had the authority to determine these issues. *Kaperonis v. Highway Commission*, 260 N.C. 587, 133 S.E. 2d 464. In addition to just compensation for the taking of these tracts, he decreed the defendants were entitled to any damages which had resulted to tract 4 from loss of access to U. S. 29.

Plaintiff's appeal and assignments of error relate only to Judge McLaughlin's findings of fact and conclusions of law as contained in his order determining issues other than damages. G.S. 136-119 provides that, when the State Highway Commission condemns property under Article 9, Chapter 136 of the General Statutes of North Carolina, either party in the proceeding "shall have a right of appeal to the Supreme Court for errors of law committed in any (of the) proceedings in the same manner as in any other civil actions. . . ." Appeals in civil actions are governed by G.S. 1-277, which permits an appeal from every judicial order involving a matter of law which affects a substantial right. Ordinarily, an appeal lies only from a final judgment, but an interlocutory order which will work injury if not corrected before final judgment is appealable. *Steele v. Hauling Co.*, 260 N.C. 486, 133 S.E. 2d 197. "(A) decision which disposes not of the whole but merely of a separate and distinct branch of the subject matter in litigation" is final in nature and is immediately appealable. 4 Am. Jur. 2d, Appeal and Error § 53 (1962).

Judge McLaughlin's order established that, before the institution of this action, the only right-of-way which plaintiff had over defendants' land was the 24-foot lane of No. 29, which was paved in

1949. It, therefore, affected plaintiff's substantial rights. After it was filed, Judge McLaughlin's adjudication became the law of the case until reversed on appeal. It was immediately appealable, and — if plaintiff was unwilling to abide by it — plaintiff was required to give timely notice of appeal and to docket its appeal by 10:00 a.m. on Tuesday 26 October 1965. Rules of Practice in the Supreme Court of North Carolina, 5 and 17. Instead, plaintiff proceeded to trial upon the issue of damages and docketed its appeal with that of defendants at the Fall Term 1966.

Immediate appeal was the procedure followed in *Johnson v. Highway Commission,* 259 N.C. 371, 130 S.E. 2d 544, a case involving a situation similar to this one. In *Johnson,* plaintiff landowners sued the Highway Commission for damages for an alleged taking of their property in relocating a highway. By answer, the State Highway Commission alleged, as here, that it owned a previously existing right-of-way over plaintiffs' property and that it was taking only an additional .15 acre. After a hearing under G.S. 136-108, the court adjudged that .15 acre was all the additional land the Highway Commission was taking in the relocation project. Upon plaintiffs' appeal, we found error and remanded the case with no question raised as to his right of immediate appeal. In *Highway Commission v. Farmers Market,* 263 N.C. 622, 139 S.E. 2d 904, the landowner appealed from an adjudication made under G.S. 136-108 that it was entitled to compensation only for land taken and that its loss of access to U. S. Highway 1-A was not compensable. The court, noting that the question whether the appeal was premature had not been raised, reversed the ruling that defendant was not entitled to damage for its loss of access, and remanded the case for the assessment of all damages.

One of the purposes of G.S. 136-108 is to eliminate from the jury trial any question as to what land the State Highway Commission is condemning and any question as to its title. Therefore, should there be a fundamental error in the judgment resolving these vital preliminary issues, ordinary prudence requires an immediate appeal, for that is the proper method to obtain relief from legal errors. G.S. 1-277. It may not be obtained by application to another Superior Court judge. A judgment entered by one Superior Court judge may not be modified, reversed, or set aside by another. *Nowell v. Neal,* 249 N.C. 516, 107 S.E. 2d 107.

Obviously, it would be an exercise in futility, completely thwarting the purpose of G.S. 136-108, to have the jury assess damages to tracts 1, 2, 3, and 4 if plaintiff were condemning only tracts A and B, and the verdict would be set aside on appeal for errors committed by the judge in determining the "issues other than damages." As

Bobbitt, J., said in *Light Company v. Creasman*, 262 N.C. 390, 397, 137 S.E. 2d 497, 502, "A controversy as to what land a condemnor is seeking to condemn has no place in a condemnation proceeding." For failure to perfect its appeal within the time required by our rules, plaintiff's appeal is dismissed.

In dismissing plaintiff's appeal, we deem the following comments pertinent: Notwithstanding evidence to the contrary, Judge McLaughlin's findings of fact were all supported by competent evidence. They are, therefore, conclusive on appeal. *Highway Com. v. Brann*, 243 N.C. 758, 92 S.E. 2d 146; McIntosh, North Carolina Practice and Procedure § 1782(6) (2d Ed., 1956). Furthermore, his findings support his legal conclusions. *Browning v. Highway Commission*, 263 N.C. 130, 139 S.E. 2d 227. The finding that under previous projects plaintiff had taken only the 24-foot strip which it had paved rendered a plea of the applicable statute of limitations (G.S. 136-19 as it read prior to 1 July 1960) immaterial, since defendants sought no compensation for the original 24-foot right-of-way. G.S. 136-19 was a statute of limitations "rather than a condition precedent." *Lewis v. Highway & Public Works Comm.*, 228 N.C. 618, 620, 46 S.E. 2d 705, 707. In all events, however, the judge's refusal to permit plaintiff to plead the statute a year and a half after the pleadings were filed was a matter entirely within his discretion and not reviewable. 3 Strong, N. C. Index, Pleadings § 24 (1960).

With reference to tracts 1 and 2, plaintiff's theory of this action seems to be this: In 1948-1949, under Projects 54 & 55, it had acquired a 250-foot right-of-way over defendants' rectangular tract even though it had paid them nothing. Because of the lapse of time, defendants could recover nothing from plaintiff for it in this action. Their only right to compensation was for the two small triangles A and B, worth (according to plaintiff's evidence at the trial) not over $788.00. Yet at the time of the institution of this action, plaintiff deposited in court as its estimate of just compensation $31,709.00!

The dismissal of plaintiff's appeal also makes it unnecessary to decide (1) whether G.S. 47-27 applied to the State Highway Commission prior to its 1 July 1959 amendment, or (2) — if it did — what the effect of Exhibit 9 would have been had it been recorded. G.S. 47-27 makes deeds and conveyances of easements and rights-of-way invalid as to creditors and purchasers for value prior to recordation. The amendment involved makes this section expressly applicable to the Highway Commission. The first question was debated in the briefs. Plaintiff contends that before 1 July 1959 it was not required to register any deed or agreement for a right-of-way or easement. Defendants contend that, by the amendment, the legislature merely made explicit that which was already implicit in the

statute and was attempting to force the Highway Commission to comply with the registration laws. They also point out that land titles would have been in an uncertain state, and the public policy with reference to registration frustrated, if the State and all its agencies were not required to record the conveyances under which they claim title to an interest in land. Plaintiff cites *Browning v. Highway Commission, supra; Kaperonis v. Highway Commission, supra; Yancey v. Highway Commission,* 222 N.C. 106, 22 S.E. 2d 256. Defendants cite, *inter alia, Williams v. Board of Education,* 266 N.C. 761, 147 S.E. 2d 381; *Best v. Utley,* 189 N.C. 356, 127 S.E. 337; *Collins v. Davis,* 132 N.C. 106, 43 S.E. 579. Suffice it to say, no decision determinative of the question has been called to our attention. See also *Bailey v. Highway Com.,* 230 N.C. 116, 52 S.E. 2d 276.

DEFENDANTS' APPEAL.

Notwithstanding Judge McLaughlin's adjudication in May 1965 that defendants owned tract 3 free and clear of any right-of-way except the 24-foot paved southbound lane of No. 29, at the trial in March 1966, Judge McConnell, over defendants' objections: (1) permitted plaintiff's witness Fox to testify that plaintiff claimed a 250-foot right-of-way over the property (defendants' assignment of error 17); (2) permitted J. Duggins, defendants' grantor, to testify that he had signed plaintiff's Exhibit 9 in order to give plaintiff a right-of-way over tract 3 and to get his house moved therefrom to another lot, which plaintiff was to purchase for him; and that he had thereafter sold defendants "what was left" of tract 3 (only tract B, according to plaintiff's contentions) (assignment of error 14); (3) required five of defendants' witnesses on cross-examination to reply to a hypothetical question, the answer to which was that *if* plaintiff did have a 250-foot right-of-way across tract 3, which left only tract B unencumbered, the value of tract 3 would not be $10,000.00 — the value which *all* the witnesses had placed upon tract 3 unencumbered (defendants' assignments of error 2, 4, 5, 7, 8, 9, 12); (4) permitted Mr. Jones to testify that, with the 250-foot right-of-way, Tract B was worth $394.00 (assignment of error 18). The effect of Mr. Jones' evidence is clearly reflected in the verdict. The jury awarded defendants $394.00 as just compensation for tract 3.

After admitting the evidence above referred to, Judge McConnell charged the jury:

> "The State Highway contends they already had a right-of-way over Tract No. 3, having been assigned by Mr. Duggins. . . . The defendants contend that they took all of Tract No. 3, and the State contends that it took only a small portion, con-

taining approximately .01 of an acre or 675 square feet, which was a small triangular portion, as the State contends they took. . . . I instruct you that where only a part of a tract of land was taken, as in Tract 1, Tract 2, and Tract 3, after you consider that, taking into consideration the difference in the contentions of the parties, I instruct you that where only a portion of a tract of land is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to the taking — and in this case, the land was appropriated April 18, 1961. . . . The question of the effect of the right-of-way is a question for you to determine. You have heard the evidence and the contentions of the parties, and it is a matter for you to determine where the truth lies."

In addition to the portion of the charge quoted above, in stating the contentions of the parties, the court elaborated further upon plaintiff's contention that it owned a 250-foot right-of-way across tract 3 at the time defendants acquired it. (Assignments of error 20 and 21 relate to the charge with reference to tract 3.)

In his rulings upon the admissibility of evidence and in his charge, Judge McConnell utterly disregarded Judge McLaughlin's adjudication that plaintiff had only a 24-foot right-of-way across tract 3 at the time defendants acquired it. Right or wrong, Judge McLaughlin's order was the law of the case, and Judge McConnell could neither ignore it nor change it. In no event, however, should it have been left to the jury to say whether plaintiff had a right-of-way over tract 3. The construction and effect of plaintiff's Exhibit 9, upon which plaintiff relied for its 250-foot right-of-way, was a legal question to be determined by the judge *before* submitting any issue of damages to the jury — and Judge McLaughlin had made that determination.

It is obvious that all controversy with reference to tract 3 could have been avoided had the Highway Commission done two things on 1 April 1946 when it completed its negotiations with the Duggins: (1) procured their signatures to a right-of-way agreement which conformed to rudimentary rules of conveyances and (2) then recorded it. *Borders v. Yarbrough*, 237 N.C. 540, 75 S.E. 2d 541. Exhibit 9, although labeled "Right of Way Agreement", merely releases plaintiff from all claims of damage by reason of a right-of-way for Project 53-54 across the lands of Duggins, the right-of-way being 125 feet on each side of the center line, "Station 116+10 and Station 118+05." The words of Denny, C.J., in *Browning v. Highway Commission, supra* at 134, 139 S.E. 2d at 229, are once again appropriate:

> "The rather careless and haphazard manner in procuring rights of way, together with the lack of clarity and accurateness in the preparation of right of way agreements by the Commission through the years, has been a source of much litigation."

Defendants' objection to the question put to Mrs. Nuckles and to Mr. Duggins with reference to the purchase price which Mr. Nuckles paid Duggins for tract 3 was properly overruled. Nuckles purchased this tract on 2 January 1957; plaintiff condemned it on 18 April 1961, approximately four years later. "It is accepted law that when land is taken in the exercise of eminent domain it is competent, as evidence of market value, to show the price at which it was bought if the sale was voluntary and not too remote in point of time." *Palmer v. Highway Commission*, 195 N.C. 1, 2, 141 S.E. 338, 339. "The reasonableness of time is dependent upon the nature of the property, its location, and the surrounding circumstances, the criterion being whether the evidence fairly points to the value of the property at the time in question." *Highway Commission v. Coggins*, 262 N.C. 25, 29, 136 S.E. 2d 265, 267-68. In *Shopping Center v. Highway Commission*, 265 N.C. 209, 212, 143 S.E. 2d 244, 246, Moore, J., said:

> "Some of the circumstances to be considered are the changes, if any, which have occurred between the time of purchase by condemnee and the time of taking by condemnor, including physical changes in the property taken, changes in its availability for valuable uses, and changes in the vicinity of the property which might have affected its value. The fact that some changes have taken place does not *per se* render the evidence incompetent. But if the changes have been so extensive that the purchase price does not reasonably point to, or furnish a fair criterion for determining, value at the time of taking, when purchase price is considered with other evidence affecting value, the evidence of purchase price should be excluded."

In this case, there is no suggestion that there has been any physical change in tract 3 or any substantial changes in the vicinity of the property which might have affected its value — except those resulting from the completion of Project No. 2. Therefore, the voluntary sale between Duggins and Nuckles was not too remote in point of time to be admissible. Defendants' reluctance to have the jury know that they seek to have the State pay them $10,000.00 for a tract of land which they purchased for $50.00 four years earlier is understandable. Notwithstanding, nothing appears which would render this evidence incompetent.

With reference to tracts 1, 2, and 4, defendants complain that the court failed to charge the jury correctly upon their right to compensation for the taking of, or injury to, the uncontrolled access which these tracts had to No. 29 prior to Project No. 2. When the charge is considered as a whole, the court instructed the jury substantially as follows:

The owner of property abutting a highway has a right in the street beyond that which is enjoyed by the general public, since egress and ingress to his property is a necessity peculiar to himself. His right of access is an easement appurtenant which cannot be taken from him without just compensation, but he has no right to insist that the entire volume of traffic which would naturally flow over a highway in which he owns the fee pass by undiverted. Therefore, defendants are not entitled to recover damages for the diversion and diminution of traffic by their property which resulted when the lane which had formerly carried two-way traffic was converted into a lane for southbound traffic only, *provided* direct access to the southbound lane is afforded them. If the Highway Commission takes away a landowner's direct access, as it has a right to do, he is entitled to recover the diminution in market value which results to his land from the taking. There has been no taking, however, if the Highway Commission affords him reasonable access to the highway. Mere inconvenience because the owner is compelled to use a longer and more circuitous route in reaching the highway is not compensable provided it gives him reasonable access. It is for the jury to determine whether or not plaintiff has provided defendants reasonable access to their remaining property, *i. e.*, tracts 1, 2, and 4. If plaintiff has not, defendants are entitled to reasonable compensation for that taking.

With reference to tract 1, the court instructed the jury that it could answer the issue in any amount it found to be fair and just compensation not to exceed $32,915.00; as to tract 2, any amount not to exceed $78,310.00; as to tract 4, any amounts from zero to $24,415.00. He summarized plaintiff's contentions in substance as follows:

(1) Tract 4, because of its location in the southwest corner of the intersection of McKnight Mill Road and No. 29, and as a result of the service road which parallels its property line and the southbound lane of No. 29, has direct access to that lane in a manner which enables a motorist to drive directly into the service station and out again to continue his journey south. (2) Tract 1, by way of Spring Street and the two-way public service road, which parallels its eastern line and the southbound lane of No. 29, has direct access to both No. 29 and McKnight Mill Road on the south

and to the northbound lane of No. 29 by way of a crossover to the north. Used as a trailer park prior to the taking, it is still so used. (3) Tract 2 likewise has both direct and reasonable access to the northbound lane of No. 29, which it adjoined, by virtue of its location in the northeast corner of the intersection of McKnight Mill Road and No. 29. Defendants still operated Nuckles Barbecue on this tract, and their customers, traveling north on No. 29, had direct and immediate ingress and egress. It was only the loss of area which had caused defendants to terminate the trailer sales agency which they had formerly operated on tract 2.

The court summarized defendants' contentions as follows:

In addition to the acreage taken from both tracts 1 and 2, defendants had had to exchange unlimited and unrestricted access along the entire boundaries of their tracts 1, 2, and 4, which abutted No. 29, for restricted access at limited points designated by plaintiff. These points do not constitute "reasonable access."

Plaintiff took no property right from defendants when it separated the lanes for northbound and southbound traffic so that each of defendants' tracts had access to one lane only. *Moses v. Highway Commission*, 261 N.C. 316, 134 S.E. 2d 664; *Barnes v. Highway Commission*, 257 N.C. 507, 126 S.E. 2d 732. Defendants likewise had no vested interest in having McKnight Mill Road continue uninterruptedly across both lanes of No. 29. Plaintiff, therefore, took nothing from them when it gave McKnight Mill Road East access only to the northbound lanes of No. 29 and McKnight Mill Road West access only to the southbound lanes. *Wofford v. Highway Commission*, 263 N.C. 677, 140 S.E. 2d 376; *Snow v. Highway Commission*, 262 N.C. 169, 136 S.E. 2d 678.

With reference to access, G.S. 136-89.53 provides in pertinent part:

> "The Commission may designate and establish controlled-access highways as new and additional facilities or may designate and establish an existing street or highway as included within a controlled-access facility. When an existing street or highway shall be designated as and included within a controlled-access facility the owners of land abutting such existing street or highway shall be entitled to compensation for the taking of or injury to their easements of access."

This statute was applied in *Highway Commission v. Farmers Market, supra*. In that case, the construction of the Belt Line around Raleigh deprived Farmers Market of access to Race Track Road which had formerly been a portion of its northern boundary and had

given it access to U. S. Highway 1-A. The Highway Commission provided no service road. After the construction of the Belt Line, to obtain access to 1-A from the northern portion of its property (in effect, a separate tract from the southern portion), Farmers *itself* would have to construct a road 3,000 feet or more in length over a difficult terrain. The Court, citing G.S. 136-89.53, held that Farmers' access to 1-A had been substantially diminished and that it was entitled to compensation for the loss of its access to Race Track Road. Rodman, J., stated the rule as follows (citations omitted):

> "Repeated decisions by this Court have established the right of a property owner to reasonable access to a public highway which abutts his land. That is a property right which cannot be taken without compensating the owner. . . .
>
> * * *
>
> "While the abutting owner has a right of access, the manner in which that right may be exercised is not unlimited. . . . To protect others who may be using the highway, the sovereign may restrict the right of entrance to reasonable and proper points. . . .
>
> "If the abutting owner is afforded reasonable access, he is not entitled to compensation merely because of circuity of travel to reach a particular destination. . . ."

In *Moses v. Highway Commission, supra,* plaintiffs, who operated a motel, sought damages because they were denied immediate access from their property to Interstate Highway I-95, a controlled access road. Although plaintiffs had access by a service road which abutted their property and connected with points fixed for entrance and departure from the Interstate Highway, a motorist traveling south on the inner lane of I-95 traveled 1.65 miles farther to reach plaintiffs' motel than he would if allowed direct access to the property; one traveling north traveled .65 mile farther. In holding that plaintiffs were not entitled to compensation, this Court said:

> "If the denial of immediate access to the inner traffic lane is a taking of property compensation must be paid. . . . (B)ut if the substitution of a service road for the direct access theretofore enjoyed is an exercise of the police power, any diminution in the value of petitioners' property is *damnum absque injuria.* . . .
>
> * * *
>
> "Petitioners do not claim a denial of access; they merely assert access to a portion of the highway is less convenient now

> than in 1957 when they acquired a right-of-way across land subsequently acquired by respondent. . . .
>
> * * *
>
> "(A)n abutting property owner is not entitled to compensation because of the construction of a highway with different lanes for different kinds and directions of traffic, if he be afforded direct access by local traffic lanes to points designated for access to through traffic. . . .
>
> "* * * That access is provided by the service roads. These service roads are part of the highway system. They serve not only the petitioners but any member of the public who desires to use the same." *Id.* at 318, 320, 321.

In the *Farmers Market* case, where the landowner was held entitled to compensation for its loss of access, no service road was provided to give him access to the Belt Line which abutted his property. In the *Moses* case, in which a motel owner was denied compensation, access was provided by service roads. In the latter case, as in this case, the landowoners were "afforded direct access by local traffic lanes to points designated for access to through traffic."

In this case, the judge left it to the jury to say whether defendants had been afforded reasonable access to No. 29 and instructed them to award such damages as would make defendants whole if they had been deprived of it. They have no cause to complain of the charge with reference to access for it contains no error prejudicial to them. The judge should have charged the jury that, under the law, defendants' access to No. 29 had not been taken. In their brief, defendants request a new trial as to all four tracts, but we note that when they moved the court to set aside the verdict, they moved to set it aside only as to tracts 3 and 4.

Defendants' other assignments of error have all been considered — including the assignment relating to the charge on general benefits as affecting the measure of damages for tracts 1 and 2. Conceding that there was no evidence upon which to base a charge on general benefits and that, at best, it was an inadequate statement of the law relative to general benefits as an offset to damages, it is inconceivable to us that this portion of the charge adversely affected the verdict. A new trial will be granted only for errors which were prejudicial and harmful to appellant. 1 Strong, N. C. Index, Appeal and Error § 40 (1957).

The decision is this:

Plaintiff's appeal is

Dismissed.

Defendants' Appeal — as to tracts 1, 2, and 4, issues 1 (A), (B), and (D)

No error.

Defendants' appeal as to tract 3, issue 1 (C)

New trial.

STATE OF NORTH CAROLINA v. JOSEPH EUGENE SPENCE, AND GLENN O'NEIL WILLIAMS.

(Filed 24 July, 1967.)

1. **Indictment and Warrant § 1—**
   An indictment will not be quashed because of absence of preliminary hearing.

2. **Criminal Law § 98—**
   Motion to sequester witnesses is addressed to the discretion of the trial court, and denial of the motion is not reviewable in the absence of a showing of abuse.

3. **Criminal Law § 29—**
   Defendant's motion that his plea of mental incapacity to plead to the indictment and to conduct a rational defense be determined prior to the trial upon the indictment, is addressed to the discretion of the trial court and is not reviewable in the absence of a showing of abuse.

4. **Jury § 3—**
   In a criminal prosecution it is not error for the court to permit the solicitor to challenge prospective jurors for cause on the ground of conscientious scruples against the infliction of the death penalty.

5. **Same—**
   A juror passed by the State and the defendant, but not impanelled, may be excused by the court in the exercise of its discretion upon suggestion to the court that the juror might be guilty of a crime of moral turpitude disqualifying him.

6. **Indictment and Warrant § 13—**
   Motion for a bill of particulars is addressed to the discretion of the trial court and is not reviewable in the absence of a showing of abuse. G.S. 15-143.

7. **Same; Constitutional Law § 31—**
   A list of prospective witnesses furnished by the solicitor to defendants prior to trial is not technically a bill of particulars, and the fact that the solicitor called two witnesses not listed will not be held for prejudicial error when it appears that the solicitor listed all of the witnesses of which he had knowledge on the date he filed the list, and that defend-

ant was apprised of the name of one of the witness on the *voir dire* examination of the jurors and could have ascertained the purport of such witness' testimony by inquiry, and that the solicitor did not have the name of the other witness until the day before his testimony was offered.

8. Criminal Law § 75—

The constitutional safeguards governing the admissibility of confessions do not apply to free and voluntary statements made by defendants to a cellmate in jail, and such statements volunteered to a person unconnected with law enforcement and not in consequence of any interrogation are competent.

9. Homicide § 17—

Testimony of statements by defendants to the effect that their unarmed victim begged for his life prior to the fatal shooting is competent upon the question of premeditation and deliberation in showing want of provocation.

10. Constitutional Law § 31; Criminal Law § 99—

The fact that the court and the solicitor confer in the absence of defendants' attorney and decide to exclude evidence highly prejudicial to defendants, could not be prejudicial to defendants.

11. Constitutional Law § 31—

The fact that the witness' testimony on the *voir dire* is read to the jury upon the ruling by the court that the testimony is competent, *held* not error in depriving defendants of their right to confrontation when it appears from the record that the witness thereafter testified to the same effect in the presence of the jury.

12. Criminal Law § 102—

The court properly stops counsel for defendant from arguing the facts of other cases to the jury.

13. Same—

While counsel have wide latitude in their argument to the jury, counsel are not entitled to travel outside the record and argue facts not included in the evidence, and what constitutes improper argument must ordinarily be left to the sound discretion of the trial court.

14. Same—

In a capital prosecution, the solicitor is entitled to argue to the jury that the jury should return a verdict that carries mandatory sentence of death. G.S. 15-176.1.

15. Same—

The solicitor's improper argument to the jury to the effect that if they did not render a verdict without recommendation of life imprisonment the police department's hands would be tied and that the police would not afford protection to the citizenry, *held* cured by the action of the court in stopping the argument and instructing the jury not to consider it.

16. Criminal Law § 166—

Exceptions not set out in appellant's brief or in support of which no argument is stated or authority cited will be taken as abandoned. Rule of Practice in the Supreme Court No. 28.

17. Criminal Law § 5—

The test of mental responsibility for crime is the capacity to distinguish between right and wrong at the time and in respect of the matter under investigation.

APPEAL by defendants from *Johnston, J.*, 11 July 1966 Criminal Session of GUILFORD — Greensboro Division.

Criminal prosecution upon two bills of indictment which were consolidated for trial, one charging defendant Spence on 26 February 1966 with murder in the first degree of Alton Artamous Maynard, and the other charging defendant Glenn O'Neil Williams with the same offense.

Plea: Not guilty. Verdict: Joseph Eugene Spence is guilty of murder in the first degree, and Glenn O'Neil Williams is guilty of murder in the first degree. There was no recommendation that the punishment shall be imprisonment for life in the State's prison.

From a judgment of death pronounced by the court against each defendant, each defendant appeals.

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

Jack W. Floyd for Glenn O'Neil Williams, defendant appellant.

George W. Gordon for Joseph Eugene Spence, defendant appellant.

PARKER, C.J. The State's evidence tends to show the following facts: On 4 January 1966 defendant Spence visited the office of Dr. Jerome Rex Eatman in the city of Raleigh. At that time he had in his possession a .38 caliber Smith and Wesson pistol with a stag horn type handle. The pistol contained six bullets, two of which had been fired. Dr. Eatman unloaded it, and placed it and the empty shells in his desk. This pistol was in his possession on the morning of 26 February 1966. About 2:30 in the afternoon of that day defendants Spence and Williams came into the office, and took the pistol and left. He turned the bullets over to Detective Larry Smith of the Raleigh Police Department on 1 March 1966.

About 6 p.m. on 26 February 1966 defendants Spence and Williams entered the men's department in W. T. Grant Company, Lakewood Shopping Center in Durham, and purchased therein certain articles of clothing, including pants, sweaters, and shirts. Mrs. Shirley Lorene Blaylock was employed as a supervisor in the store. She watched the defendants while they were there, because they were drinking and acting "funny." She saw defendant Williams had a pint bottle of vodka, and saw it fall out from under his shirt. The

bottle did not fall all the way to the floor because Spence caught it just as it fell out. After putting on the new clothes they bought in the Grant's store in a rest room there, they entered a Broadway Yellow taxi in the parking center, and departed; Spence carried their old clothing in a bag furnished by the store.

The taxi stopped at a grill located on Old Highway #70 on the outskirts of Durham, and then the taxi proceeded westwardly to Greensboro and stopped at McCuiston's Gulf Service Station at the intersection of Asheboro and Gorrell Streets in Greensboro, arriving there about quarter to eight in the evening. At the service station the taxi driver and both defendants got out of the taxi. Cordice Goins, who is the service station attendant at McCuiston's Gulf Service Station, noticed that there were some holes in the windshield in the taxi in which the taxi driver and Spence and Williams were. After they left, Goins called the police department in Greensboro and reported that there was a Yellow Cab and a cab driver from Durham and two men in the cab and one of them had a gun. He thought they were holding him as a hostage. Defendant Spence asked for the key to the men's rest room, and the taxi driver and defendant Williams went inside the service station with the attendant who was on duty when defendant Spence returned from the rest room. He gave the key to the attendant and as soon as he had done so he left the service station to walk down Gorrell Street, leaving behind him the taxi driver and defendant Williams. After Spence departed from the service station, the taxi driver and defendant Williams remained at the service station for awhile, and then the taxi driver and defendant Williams in the taxi proceeded down Gorrell Street in the same direction which Spence had walked.

On 26 February 1966 Homer Diggs was a taxi driver for United Taxi Company in the city of Greensboro. Between 8:10 and 8:20 p.m. on 26 February 1966 he was in the vicinity of Martin and Gorrell Streets. He kept straight across Gorrell Street on Martin Street and just as he was passing the office he detected an out-of-town taxi sitting beside their office, somewhat down from the office on the right-hand side of the street. The taxicab was parked. Just as he approached the taxi, he detected three white males sitting in the cab. One white male was sitting on the front seat beside the driver, and the other was sitting behind the driver, directly behind the driver. The meter seemed to be in an earning position. There was a light on the meter with an "R" on it. The next time he saw this cab was on the same night in the 800 block of Bellevue Street. There were a lot of Homicide Squad policemen and a lot of spectators around it, and the area was roped off when he arrived. This was pretty close to 10 p.m. The taxicab was yellow in color.

About 8:50 p.m. on 26 February 1966 Lilly Ann Thompson and Earline Gainey went to 830 Bellevue to get a hot plate. About four houses from 830 Bellevue Street they saw a yellow cab with a person in the driver's seat with his head lying up against the window. The motor was running, and the taxicab was parked. The windshield had several holes in it. They went home and told Earline's sister, Ola Gainey, that they had seen the taxicab with holes in the windshield. About 15 minutes later the taxicab was still there, and she went up to it. She looked in it and all the windows were up, and the man did not look around. She saw blood running out of his mouth. She called the police.

About 8:50 p.m. on 26 February 1966 Dr. Allen B. Coggeshall, a practicing physician in Greensboro, was called by the Greensboro Police Department, and informed that there was a dead man in a taxicab in the 800 block of Bellevue Street. When he arrived there was quite a large crowd there and numerous police on the scene. The door on the driver's side was opened so that he could get a better view. He saw in it a small brunette man with blood on his face and clothes, lying with the left side of his head over towards the door. A cursory examination showed that he had been shot in the right side of the head and that he was dead. He suggested that the body be removed to the morgue at the Wesley Long Hospital in Greensboro, where it could be examined more carefully, and that was done. An examination at the morgue showed that he had two bullet holes in his head approximately the size of a .38 caliber pistol bullet. One wound was in the right side of the head with the bullet going down through the ear lobe right directly into the bone there, and the other wound on the top of his head admitted a .38 caliber bullet from the officer's belt as they held one in the right side. The bullet from the side appeared to be going directly transverse from this side over towards the left ear. The body was identtified as that of Alton Artamous Maynard. He drove a Yellow taxicab in Durham.

A Carolina Trailways bus left Greensboro about 9:35 p.m., and defendants Spence and Williams purchased tickets to Raleigh, and boarded the bus. They got off the bus in Burlington and the bus left without them.

Thomas Franklin on the night of 26 February 1966 had an old model Chevrolet, License No. B-5780, parked on Maple Avenue in Burlington. It was parked about 50 yards from the bus station. That night the car was stolen. About 3 a.m. on the same night the police department in Raleigh called his house. The next day he went to Raleigh and saw his automobile.

Defendants Spence and Williams were arrested at the Chic Chic Grill about 1 a.m. on 27 February 1966 by the Raleigh Police De-

partment for the larceny of an automobile. Williams had in his possession about $156 in money and some change. The defendants were later turned over to Guilford County upon a capias for their arrest upon a charge of murdering Alton Artamous Maynard, the taxicab driver.

Elbert Spencer Smith, a man with a long criminal record, on 2 March 1966 was in the jail of Guilford County. On that day defendants Spence and Williams were put in the cell he was occupying. Only three of them were in the cell. Williams and Spence engaged in many conversations on the first night and every night afterwards. Williams talked freely the first night. Spence talked very little. On the night of 2 March 1966 Williams said in substance: They left the hospital about noon on 26 February 1966, went to a doctor's office, and stole a pistol that Spence had previously left with the doctor; that they left the doctor's office and stole a Comet automobile; they proceeded to a place north of Raleigh, and drove into a filling station. Williams got out of the automobile and went into the service station and robbed a man there of about $300. He held the pistol on this man and forced him to get in the car with Spence driving. A short distance up the road they pulled the car to the side of the road, and put the man out and told him to run, and as he ran, they fired two shots at him. They then decided to go to Durham. On the way to Durham they picked up a hitchhiker and rode into a small town. They let the hitchhiker out, and went into a store and bought cartridges for the pistol. Leaving there, they decided they had better get rid of the Comet, because the station attendant would possibly be turning them in to the law, and the law would be looking for that automobile. Then he and Spence went to a shopping center in Durham, purchased clothes, and then they got into a taxicab at the shopping center and hired the driver to bring them to Greensboro. Shortly after he left Durham, Williams threw out a bag of clothing. Then during the ride he shot through the windshield several times. They proceeded on to Greensboro and stopped at a filling station. Something was said about going to a rest room at the service station, and someone appeared, and they got a little nervous about the situation because the attendant asked them something about the windshield being shot out, and then they left the station. From there they pulled onto a street and decided to kill the driver. As he was getting out of the left rear door in the taxi, he fired a shot into the head of the driver, and the driver fell against the left door into the door glass. He asked Williams if the man knew he was going to shoot him. Williams said he must have known it because he was begging for his life; he said, "Don't kill me. Put me out in the country, turn me loose anywhere. Just take the cab

and go on but spare my life. I have a wife and children." They shot him anyway. Before walking down the street, he tossed the gun into the front seat where Spence was sitting. Spence placed the gun against the driver's right ear, and fired a shot in the driver's ear, and then he joined Williams a short ways down the street. Williams took the pistol from Spence and used both hands to wipe the hand prints off with his T-shirt. A short distance away he deposited the gun in a sewer. They went to the bus station and purchased tickets to Raleigh. They got off the bus in Burlington and stole an old model Chevrolet and proceeded to Raleigh. The first time he heard any mention of the gun being put in the sewer was on the second night. They did not tell about the sewer on the first night. Thereafter, Spence became a little more talkative. Many times later they both told him the same story. On redirect examination, Smith testified in substance as follows: They did most of their talking at night. Sometimes they were up all night and slept in the daytime. Three or four nights later he was very tired and nervous and he had heard this story many, many times, and he asked Williams one night how it felt to kill a man, and he said, "There's nothing to it." Then he said, "Well, now that you have killed a man, would you do it again?" He said, "Yes, I'd do it again." Spence was lying on his bunk face down with a book of crossword puzzles, working the puzzles, which he did many nights, and he looked back over his shoulder to where they were sitting about six or eight feet away, and he stated, "Yes, I'd do it again." Williams never at any time told him that he could not remember some of the events of February 26, although he stated at one time that his memory was not clear about some of the things that happened that day.

Grover F. Minor, a policeman in the city of Greensboro, conducted certain searches in the area where the Yellow cab was located on the 800 block of Bellevue. On 1 March 1966 about 1:20 p.m. he lifted the lid from a storm sewer at the corner of Bragg and Arlington Streets and observed a pistol and one cartridge in the storm sewer. The pistol was a .38 caliber Smith and Wesson, and was eventually turned over to Sergeant Thomas of the Greensboro Police Department. Dr. Jerome Rex Eatman was shown this pistol by Sergeant Thomas of the Greensboro Police Department, and Dr. Eatman testified in substance that it was similar in size and shape and general over-all appearance to the pistol Spence had left with him, but he cannot positively say that it is the same pistol.

Joseph Samuel Christopher is a truck driver for Pilot Freight Carriers. On 26 February 1966 he left Durham going towards Greensboro. He saw a large paper sack lying on the side of the road between the guard rail and the road, with something red sticking out

of it. He went around and picked it up, and it turned out to be two sweaters and two pairs of pants. He picked up the package and put it in his truck to carry to a little boy he knows that goes to the same church he goes to. About an hour later he was caught for speeding just before he got into High Point. He gave the package of clothes to Trooper Strong who had apprehended him. He put his initials on the clothes. The paper bag containing these clothes was identified by Frank Ray Dombroski, manager of W. T. Grant Company in the Lakewood Shopping Center in Durham. He testified when defendants purchased new clothes from his store in Durham on 26 February 1966, he gave them a bag of this type to put their old clothes in. Defendants went into the men's rest room, took off their old clothes, and put on their new outfits, and came out wearing them.

Defendant Spence introduced evidence tending to show the following facts: He lives in Raleigh. In August or September 1965 he went to see Dr. Jerome Rex Eatman stating that his drinking problem resulted in getting him into trouble with the legal authorities, and on occasions of excessive drinking he would end up in other cities with no recollection of having gone there. He expressed fear to Dr. Eatman of what he might do while in a state of intoxication, and was afraid he might do something to injure himself or someone else. In September 1965 he went to the Wake County Mental Health Clinic in Raleigh and stated to Dr. James Nunnally, III, that he needed advice and help. He told Dr. Nunnally that he had a drinking problem and that when he drank he did not recall what he had done. On 4 January 1966 he went to see Dr. Eatman and had a pistol with him. On this occasion he had been drinking and expressed the fear he might commit suicide or hurt someone including Dr. Eatman. Dr. Eatman made arrangements for him to enter Dorothea Dix Hospital. He entered Dorothea Dix Hospital on 6 January 1966. He stated to the officials there that when he drank excessively he would get into trouble and did not remember what he did. He expressed fear of what he might do and that he had entertained suicidal thoughts, and that he came to the hospital to find out why he does things he does. On 11 February 1966 he was given an electroencephalogram. About 1 or 2 p.m. on 26 February 1966 defendant Spence started consuming alcoholic beverages and mellaril tablets on the premises of the hospital with defendant Williams, who entered the hospital on 7 February 1966 for treatment of essentially the same problems as defendant Spence. After consuming alcoholic beverages on the premises and taking pills, the defendants left the hospital and during the afternoon hours the defendants continued to consume alcoholic beverages and engaged in various and sundry

criminal acts during the itinerary starting in Raleigh and covering several counties.

Defendant Spence offered the testimony of six witnesses, five of whom were doctors, and defendant Williams offered the testimony of eight witnesses. Neither defendant Spence nor defendant Williams testified in his own behalf.

Defendant Williams offered evidence tending to show the following: On 7 February 1966 he was admitted to Dorothea Dix Hospital. Admission summary of the hospital stated that he was unable to control his drinking and that the reason he came to the hospital was the fear that he might kill someone. During his course at Dorothea Dix Hospital, defendant was administered the drug dilantin, an anti-convulsant having the same physical effect as alcohol, and submitted to an electroencephalogram test to determine whether or not he suffered from epilepsy. The result of the test was normal. The final diagnosis of the hospital staff was "anti-social reaction." In the morning hours of 26 February 1966, in company with defendant Spence defendant Williams obtained two pint bottles of vodka which were consumed on the grounds of Dorothea Dix Hospital. His regular dosage of dilantin was administered to him on the morning of that day. Shortly after noon on that day they left the hospital grounds without authority, and continued drinking and taking pills.

Both defendants were represented by court-appointed counsel. Counsel for Spence filed for him a 47 page brief. Counsel for Williams filed for him a 49 page brief.

The record contains 406 pages and 268 exceptions. Defendants have 81 assignments of error.

Defendant Williams assigns as error the denial of his motion to quash the indictment and remove this case to municipal-county court for a preliminary hearing. This assignment of error is overruled upon authority of *S. v. Hargett,* 255 N.C. 412, 121 S.E. 2d 589; *S. v. Overman,* 269 N.C. 453, 153 S.E. 2d 44.

Both defendants assign as error the overruling of their motion for sequestration of the State's witnesses. This was in the trial court's discretion and no abuse of discretion has been shown. This assignment of error is overruled upon authority of *S. v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670; *S. v. Love,* 269 N.C. 691, 153 S.E. 2d 381.

Defendant Williams assigns as error the overruling of his motion for a bifurcated trial in order that the issues of law of an unlawful homicide and insanity might be tried by different juries. This was a matter within the discretion of the trial judge, and the exercise of that discretion is not reviewable unless there appears that there has been an abuse of the discretion. No abuse appears here. This as-

signment of error is overruled. *S. v. Sullivan*, 229 N.C. 251, 49 S.E. 2d 458.

Defendant Williams assigns as error that the court permitted the solicitor to challenge for cause 79 jurors because they had conscientious scruples against the infliction of the death penalty. This assignment of error is overruled upon authority of *S. v. Childs*, 269 N.C. 307, 152 S.E. 2d 453; *S. v. Bumpers*, 270 N.C. 521, 155 S.E. 2d 173.

Defendant Williams assigns as error the court's excusing in its discretion the juror, Charlie Hairston, who had been passed as a juror by the State and the defendant Spence, but had not been impanelled. The court excused him upon a statement made by the solicitor for the State to him in the presence of counsel for the defendants, and not in the hearing of the prospective jurors, as follows:

> ". . . (T)hat this man was living with another man's wife, and that the man was so concerned about it that he and his family had gotten rather upset about it, that they had knowledge of that, that after the man went to his reward and that this juror, or this prospective juror, was a prime suspect, but they never could gather enough evidence in the thing, and it was one of those things that remains on the books today as unsolved."

No prejudice to the defendant Williams has been shown. The court was correct in exercising its discretion in such a case. This assignment of error is overruled.

Defendants assign as error the denial of their motion for a bill of particulars. This is said in 2 Strong's N. C. Index, Indictment and Warrant, § 13: "Motion for a bill of particulars is addressed to the discretion of the trial court, and is not subject to review except for palpable and gross abuse thereof." In accord, G.S. 15-143; *S. v. Overman, supra.* This assignment of error is overruled. Notwithstanding the denial of the motion, the solicitor did assist the defense attorneys by filing in court several weeks before the trial a list of all contemplated witnesses known to him at that time to be available to the State of North Carolina in the forthcoming trial of these defendants, along with a brief summary of the testimony the State anticipated eliciting from each witness; and the statement further states in substance: It is noted in several instances the specific name was omitted because it was not available to him at the time but is readily ascertainable to anyone desiring said information, *i.e.*, the Superintendent of Dorothea Dix Hospital. Likewise, it will be noted no proposed facts to be elicited are set forth for the F.B.I. laboratory technicians because copies of their reports have already

been given the attorneys for the defense by the undersigned, along with the Greensboro Police Department's letter of transmittal showing all items of evidence forwarded to the F.B.I. laboratory for examination. Contained on this statement are the names of some 60 witnesses.

Defendants assign as error the court's failure to exclude the testimony of Elbert Spencer Smith and Homer Diggs, for the reason that their names do not appear on the list of prospective witnesses to be furnished to them by the solicitor for the State. This is stated in the brief of defendant Williams' counsel: "In fairness to the able solicitor, on July 11, he revealed Smith's name (but not his evidence) on *voir dire* examination of the jurors in response to an inquiry concerning any additional witnesses. . . . The solicitor stated that he did not have the name of Diggs until the day before his testimony was offered, although the witness had been questioned by the police on February 26, 1966." There is not one iota of evidence that the solicitor was not speaking truthfully when he furnished the list of witnesses to the defendants. As set out above, Smith's evidence was the strongest evidence against the defendants in that it consisted in effect of a statement by each defendant that he was guilty of murdering Alton Artamous Maynard. It is also true that the State's witness Diggs testified, as set forth above, that he saw an out-of-town Yellow cab in the general vicinity where the homicide was committed occupied by three white male persons just before the homicide occurred.

"The function of a bill of particulars is (1) to inform the defense of the specific occurrences intended to be investigated on the trial, and (2) to limit the course of the evidence to the particular scope of the inquiry." *S. v. Lea,* 203 N.C. 13, 164 S.E. 737. It appears clearly from the defendant Williams' brief that during the examination of jurors upon the *voir dire* in this trial, which began 11 July 1966 and ended Saturday morning, 30 July 1966, in which the State used 54 witnesses and Elbert Spencer Smith was the fifty-fourth witness, they had knowledge that the State intended to use as a witness Elbert Spencer Smith. A simple inquiry of the solicitor by defendants' counsel, or either of them, would have shown what Elbert Spencer Smith knew about the case and his long criminal record, and that the only persons present when defendants made their statements of guilt to Smith were defendants and Smith. Defendants' lawyers failed to inquire as to what Smith knew about the case. Neither defendant saw fit to go on the witness stand and deny in whole or in part what Smith testified they said to him. It is hard to see how defendants under the circumstances were prejudiced by the admission of Smith's testimony. We think it is reasonable and fair

that the State should not be held to the narrow limitations of a bill of particulars and adjudicate the legal effect of the information furnished by the solicitor to the defendants to be a bill of particulars, but rather it should be taken for what on its own face it purports to be, nothing more nor less than a statement by the solicitor of witnesses he knew about on the date he filed the list. Taken in that light, the court did not err in not excluding the testimony of Smith and Diggs, and even if the court did err in admitting such testimony, which we do not concede, the testimony under the totality of the circumstances here is not sufficient to warrant a new trial.

Defendants further assign as error the admission of Smith's testimony as to what defendants told him, and particularly as to the taxi driver's begging for his life. It appears manifest that the statements of defendants were free and voluntary. Defendants contend that the principles announced in the case of *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, are applicable to this case. We do not agree. That case, expressing the views of five members of the Court, in summary deals with the admissibility of statements obtained from an individual who was subjected to custodial police interrogation and the necessity for procedures which assure that an individual is accorded his privilege against self-incrimination. The Supreme Court of the United States has not, as yet, held that the free and voluntary statements of a defendant to a cell-mate in jail are incompetent. The testimony that the taxi driver begged for his life is thoroughly competent as showing want of provocation for the killing, and it is thoroughly settled that among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are want of provocation on the part of the deceased. *S. v. Matheson,* 225 N.C. 109, 33 S.E. 2d 590; *S. v. Hammonds,* 216 N.C. 67, 3 S.E. 2d 439; *S. v. Buffkin,* 209 N.C. 117, 183 S.E. 543. The assignments of error in respect to the admission in evidence of the testimony of Smith are overruled.

Defendants assign as error this statement of the court appearing on page 257 of the record:

> "I want to make this entry in the record. In the absence of the jury, at some time before the commencement of the introduction of evidence for the State, the Solicitor discussed with the court privately the propriety of certain evidence pertaining to two murder indictments against these same defendants in Granville County and the other evidence which the State proposed to offer in this trial. The discussion led to the conclusion between the court and the State's attorney as to whether the evidence pertaining to these two indictments was competent;

that the evidence which the State otherwise had was such as to render it unnecessary to pursue the evidence with reference to these two indictments and that the end result may be that the only thing to be accomplished would be of such an inflammatory nature that it would be best that the State not use it, and it was agreed by the Solicitor and the court that this line of evidence would not be pursued in developing the State's case. This is inserted in the record to explain the Solicitor stopping this witness at a point when he was relating to the jury certain statements that the defendants made in his presence while they were in the same jail cell in the Guilford County Jail."

The defendant contends that:

> "The court erred in conducting a pre-trial conference with the solicitor for the State and not including the defense counsel, during which conference the court and the solicitor agreed in advance as to the admissibility of evidence to be offered for the State."

This assignment of error is overruled. Certainly, it did not prejudice defendants.

Dr. James Nunnally in the absence of the jury testified in substance as follows: It is his opinion that a pathologically intoxicated person can lose contact with reality. At this point the judge stated that he would let the jury hear this line of questioning. The jury then returned to the courtroom and the court permitted the court reporter to read to the jury the questions propounded to the witness by counsel for defendant Williams and the answers of the witness. Defendant Williams assigns this as error. Nothing else appearing, such would constitute error under the holdings in *S. v. Payton,* 255 N.C. 420, 121 S.E. 2d 608; *S. v. Wilson,* 269 N.C. 297, 152 S.E. 2d 223. However, an examination of the record shows that Dr. Nunnally in the presence of the jury in response to questions asked him by counsel for defendant Williams in the absence of the jury, which questions were read to him by the court reporter from her notes, testified at length to the same effect in the presence of the jury. This testimony of Dr. Nunnally was heard by the jury from the lips of the witness himself, and the jury was able to observe his demeanor at the time he testified. In addition, Dr. Nunnally's testimony in the absence of the jury covered about three-fourths of a page. When the jury was recalled to the courtroom, his answers to questions read to him by the court reporter covered over three pages in the record. The last testimony of Dr. Nunnally was this: "In my opinion, there is a point which a person with acute brain syndrome would not be

able to comprehend the nature and consequences of his act." At this point counsel was asked, "Do you have any other questions that you want to ask him at this time?" Counsel for defendant Spence replied, "No, sir." This assignment of error is overruled.

Counsel for defendant Williams in his argument said this:

> ". . . Now, I think this is significant, and this along with the other little inconsistencies, I hope will show you the danger in convicting a man on trial for his life on circumstantial evidence. You are all familiar with the Sacco-Vanzetti trial in New York, where they had an eye witness there and executed a man. It is common literature, and the books are still pouring out because there was a witness who came in and said, 'No, these men - - -' "

Upon objection of the State's counsel, the court stopped his argument in reference to the Sacco-Vanzetti trial. He assigns this as error. Further on, counsel for Williams in his argument made this statement: ". . . Now, the court is going to instruct you as to the law of insanity. He is going to give you what is called the McNaughton [M'Naghten] Test of Insanity. McNaughton [M'Naghten] was a fellow who shot and killed a prime minister in England." Upon objection, the court said, "Let's stay away from other cases." Counsel for the defendant said, "Will the court not let me give the history of the McNaughton [M'Naghten] Rule?" The court replied, "I won't let you give the facts of the case. That has always been improper, Mr. Floyd." Defendant Williams assigns as error the court's refusing to let him argue the facts of the *Sacco-Vanzetti* case and the history of the M'Naghten Rule. These assignments of error are overruled.

In this jurisdiction wide latitude is given to counsel in the argument of hotly contested cases. Moreover, what constitutes an abuse of this privilege must ordinarily be left to the sound discretion of the trial judge. *S. v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466. Counsel is not entitled to travel outside the record and argue facts not included in the evidence. *S. v. Christopher,* 258 N.C. 249, 128 S.E. 2d 667.

". . . (N)or will counsel be permitted to read cases which tend to distract the attention of the jury from the case in hand without throwing any light upon it. Likewise, the reading of facts for the purpose of prejudicing the jury should not be permitted, as, for example, the reading of facts for the purpose of contrasting them with those of the case at bar." 53 Am. Jur., Trial, § 494. It is apparent from the statement of Mr. Floyd, counsel for defendant Williams, that he was arguing the facts of the *Sacco-Vanzetti* case

not from an appellate court decision but from a book published upon the subject. The court's stopping this improper argument about the *Sacco-Vanzetti* case and about the history of the M'Naghten Rule was correct. These assignments of error are overruled.

Both defendants assign as error the able argument of the solicitor for the State that the jury in this case should find a verdict that carried a mandatory sentence of death. The General Assembly in 1961 enacted Chapter 890 of the Session Laws, codified as G.S. 15-176.1, which reads as follows: "In the trial of capital cases, the solicitor or other counsel appearing for the State may argue to the jury that a sentence of death should be imposed and that the jury should not recommend life imprisonment." In making this argument the solicitor was doing what the statute gave him a positive right to do. In his argument he made this statement:

> "Ladies and gentlemen, to do less than to ask you to return a verdict would be a sin, and if you do less than return that verdict, the only thing that I can say is don't ask the police department — don't ask the Solicitor or anybody else to protect you any more, but stop at the hardware store on your way home, get yourself a couple of locks and put them on your front door and your back door and get yourself a gun and protect yourself because the police department's hands are tied from now on unless you have the courage to do what —"

At that place an objection was lodged to this argument by counsel for defendant Williams, whereupon the court promptly made this reply: "Well, yes, there is no evidence in the record that the police department won't protect anybody. Strike that. Don't consider that part of his argument, members of the jury." The prompt action of the judge cured the error. We have carefully considered the challenged argument of the solicitor. The facts of the brutal murder disclosed by the evidence in this case fully justified the solicitor's argument for a verdict of guilty of first degree murder without a recommendation of imprisonment for life, and he was entitled to make such argument by authority of G.S. 15-176.1. The assignments of error to the arguments made by the solicitor are overruled.

The court in its charge said this to the jury:

> "When insanity, mental disease or disorder, even from long and continued use of alcohol or drugs, is interposed as a defense in a criminal action the burden rests with the defendant to prove such — not beyond a reasonable doubt, nor by the greater weight of the evidence — but only to the satisfaction of the jury."

To this charge the defendants did not except, nor is this extract from the judge's charge set out in the brief of either defendant. The rule is firmly established with us that 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; *S. v. Little,* 270 N.C. 234, 154 S.E. 2d 61; *S. v. Midyette,* 270 N.C. 229, 154 S.E. 2d 66; *S. v. Barber,* 270 N.C. 222, 154 S.E. 2d 104. In addition, defendants in their written prayers for instructions asked the court to give this charge:

> "If the State has satisfied you beyond a reasonable doubt, as the court has defined that term to you, that the defendants or either of them committed the act charged in the bill of indictment then it would become your duty to consider whether or not the defendants or either of them lacked sufficient mental capacity to form a criminal intent. On the plea of drunkenness as a defense, the burden is on the defendant to satisfy the jury that at the time of the commission of a crime he was intoxicated to such an extent that he did not know what he was doing, or trying to do, and was incapable of forming a criminal intent. However, if a defendant drinks liquor or other intoxicants for the purpose of giving him nerve and courage to commit a crime, then such voluntary drunkenness would not be an excuse for a crime committed while thus intoxicated. *State v. Hairston,* 222 N.C. 455 (1943)."

Defendants assign as error the court's charge in substance that the test of responsibility is the capacity to distinguish between right and wrong at the time and in respect of the matter under investigation. Counsel for defendant Williams contends that we should abandon the M'Naghten Rule and adopt that of the Model Penal Code. We do not agree. This assignment of error is overruled.

In *S. v. Creech, supra,* the Court said, speaking by Stacy, C.J.:

> "The test of responsibility is the capacity to distinguish between right and wrong at the time and in respect of the matter under investigation. *S. v. Potts,* 100 N.C. 457, 6 S.E. 656; *S. v. Brandon,* 53 N.C. 463. He who knows the right and still the wrong pursues is amenable to the criminal law. *S. v. Jenkins,* 208 N.C. 740, 182 S.E. 324. On the other hand, if 'the accused should be in such a state of mental disease as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing wrong,' the law does not

hold him accountable for his acts, for guilt arises from volition, and not from a diseased mind. *S. v. Haywood*, 61 N.C. 376.

"We are aware of the criticism of this standard by some psychiatrists and others. Still, the critics have offered nothing better. It has the merit of being well established, practical and so plain 'that he may run that readeth it.' Hab. 2:2. Moreover, it should be remembered that the criminal law applies equally to all sorts and conditions of people. It ought to be sufficiently clear to be understood by the ordinary citizen."

In *Leland v. Oregon*, 343 U.S. 790, 96 L. Ed. 1302, reh. den. 344 U.S. 848, 97 L. Ed. 659, the Court, speaking by Mr. Justice Clark, said:

". . . Knowledge of right and wrong is the exclusive test of criminal responsibility in a majority of American jurisdictions. The science of psychiatry has made tremendous strides since that test was laid down in *M'Naghten's* Case, but the progress of science has not reached a point where its learning would compel us to require the states to eliminate the right and wrong test from their criminal law. . . ."

True it is, that the atrocity of the defendants' conduct in killing Alton Artamous Maynard, an unarmed man, without provocation, was a circumstance from which opposite conclusions were sought to be drawn: the one that it exhibited minds fatally bent on mischief; and the other that it revealed diseased intellects on the part of each defendant caused by each defendant's drinking problems. The jury attributed it to the former.

Manifestly, a *seriatim* discussion of each assignment of error is not necessary or desirable, for to do that we would have to write a book instead of an opinion. We have discussed the basic principles which appellants urge in support of their assignments of error. We have carefully examined each exception and each assignment of error by each defendant. We find nothing in any one of them which in our opinion would justify another trial as to either defendant.

No error.

L. A. REYNOLDS COMPANY v. STATE HIGHWAY COMMISSION.

(Filed 24 July, 1967.)

1. **Appeal and Error § 57—**

An exception to a finding of fact which is not material to the decision will not be sustained.

2. **Highways § 8.1— Limitation on filing of claim on highway contract does not begin to run until Commission tenders unconditional payment.**

The evidence disclosed that the Highway Commission sent its contractor a warrant for the balance of the contract price less an amount withheld as liquidated damages, with a letter characterizing the payment as "final payment of the contract," that the contractor returned the warrant with request that it be reissued without words jeopardizing the contractor's right to assert that no liquidated damages should have been withheld. *Held:* Final payment was received by the contractor within the purview of G.S. 136-29(a) upon the date the contractor received the letter returning the warrant with notation permitting its negotiation without jeopardizing the contractor's claim, and the filing of claim by the contractor within sixty days thereafter was within the time limited.

3. **Trial § 56—**

Where the court is authorized to find the facts without a jury, the weight and credibility of the evidence is for the court, and the court properly denies motion for involuntary nonsuit when conflicting inferences may be drawn from the evidence.

4. **Contracts § 30—**

Contract provisions for liquidated damages for failure to complete the work under the contract within the time specified may not be asserted when the party claiming the damages is responsible for the delay.

5. **Highways § 8.1— Where delays in completing contracts are due to mutual defaults, court will not ordinarily apportion damages.**

In this action to recover the amount deducted by the Highway Commission from the contract price as liquidated damages, computed on a per diem basis, for delays in completing the work, there was evidence of substantial delays resulting from revisions and alterations of the plans by the Commission and delay resulting from the Commission's failure to remove a certain power line which interfered with the performance of the work. *Held:* The evidence is sufficient to support a finding by the trial court that the contractor's failure to complete the contract within the time specified was caused in large and substantial part by the Commission, so that an assessment of liquidated damages by the Commission was not lawful, and the contractor is entitled to recover the amount withheld, with interest.

6. **Appeal and Error § 57—**

Where the judgment is supported by correct conclusions of law supported by evidence, the correctness of another conclusion of law need not be determined upon appeal.

7. Interest § 1; State § 6—

The State is not liable for interest unless payment of interest is authorized by statute or lawful contract.

8. Same; Highways § 8.1—

Where the contract for highway construction provides that the Commission should pay interest at the rate of 5 per cent on the amount still due on the contract 90 days after the project is completed and accepted, the contractor is authorized to collect interest on such amount beginning 90 days after the Commission accepts the work.

THIS is a civil action arising out of a highway construction contract. Docketed and argued as Case No. 523, Fall Term 1966. Docketed as Case No. 524, Spring Term 1967.

Appeal by defendant from an order entered by *Copeland, S.J.*, at 7 March 1966, Civil Non-Jury Session of WAKE, denying a motion by defendant to dismiss plaintiff's complaint on the ground that plaintiff did not comply with the provisions of G.S. 136-29 with respect to filing a written and verified claim with the Director of the State Highway Commission for $16,400, the amount it deems itself entitled to under the said contract, within sixty (60) days from the time of receiving its final estimate.

Appeal by plaintiff and defendant from a judgment entered by Bone, E.J., at 16 May 1966, Civil Non-Jury Session of Wake, adjudging and decreeing that plaintiff have and recover from defendant the sum of $16,400, with interest thereon from the date thereof, and the costs.

Hatfield, Allman and Hall by Weston P. Hatfield, Albright, Parker and Sink by R. Mayne Albright for plaintiff appellee and appellant.

Thomas Wade Bruton, Attorney General, Harrison Lewis, Deputy Attorney General, and Eugene A. Smith, Trial Attorney, for defendant appellant and appellee.

PARKER, C.J. On 27 February 1962, plaintiff and defendant entered into a written contract, whereby plaintiff agreed to build the roadway and structures for 4.37 miles of roadway on relocated U. S. 52 in Forsyth County, according to specifications for Project No. 8.17374, for the sum of $1,580,628.17. Completion date for the project was, as set out in the contract, 1 March 1963, and liquidated damages at the rate of $400 per calendar day were to be assessed for any additional time required beyond the said completion date. Plaintiff completed the work on 24 May 1963, eighty-four days after the contract completion date.

The actual paving of the roadway was to be done under the terms of another contract on the same project, and the completion date as established by that contract was 1 October 1963. Plaintiff was a subcontractor on the second portion of the project. The road was finally completed and opened for public use on 18 October 1963, although a portion of the road was actually opened in September, 1963.

On 26 July 1963, plaintiff wrote defendant stating that the work had been delayed in completion because of acts of defendant in failing to have rights of way properly cleared so that plaintiff's crews could work on the job in accordance with the plan under which they submitted their bid, and acts of commission by defendant in inaccurately designing certain features of the project with the result that the designs had to be changed while the job was in process and plaintiff was delayed by defendant while such design changes were being made. Plaintiff stated that the acts of defendant had delayed plaintiff a total of 228 days on the project.

On 25 September 1963, defendant, responding to plaintiff's letter, agreed to an allowance of twenty-four additional days, among other things stating that some of the delays referred to in plaintiff's letter overlapped with other delays. This letter was signed by defendant's resident engineer on the project.

Subsequently, the resident engineer's recommendation of twenty-four days was extended by the defendant an additional nineteen days, for a total of forty-three days, and the plaintiff was assessed liquidated damages of 41 days at $400 per day, or a total of $16,400.

On 13 January 1964, defendant mailed to plaintiff a letter of "final estimate" and a warrant drawn on the State Treasurer for the balance remaining to be paid on the said project, less the sum of $16,400, a total of $24,361.43, together with an accompanying letter characterizing such payment as ". . . final payment of this contract." Plaintiff received this letter and warrant on 14 January 1964.

On 22 January 1964, plaintiff wrote the defendant a letter enclosing its warrant on the State Treasurer for $24,361.43, stating: ". . . (W)e feel that, taking the language of your letter of January 13 referring to this warrant as 'final payment of this contract', when read in conjunction with the notation on the warrant itself, might foreclose us from any further attempt to get this matter concluded on a more favorable basis for us. Accordingly, we would be very grateful if you would modify the wording on the warrant by using some such language as 'final estimate No. 19, less liquidated damages as claimed by Highway Commission.' We also would appreciate your writing us in language to the effect that the State is on notice of our claim and that negotiation of this warrant will not constitute any release by us of claims which we may have against

the State by reason of this imposition of liquidated damages." This letter also set forth contentions of plaintiff with respect to the merits of its case.

On 24 January 1964, defendant, by John H. Davis, State Construction Engineer, mailed a letter to plaintiff and in it returned the warrant for $24,361.43. This letter stated: "The acknowledgment of receipt and the negotiation of this warrant will not constitute any release by you with respect to any action you may desire to take as provided under the statute." This letter and warrant were received by plaintiff 25 January 1964.

On 20 March 1964, and by verified petition received in defendant's offices on 23 March 1964, the plaintiff filed a written and verified claim for $16,400 with the defendant, such petition setting forth in detail the facts upon which it based its claim for $16,400. This claim was rejected by defendant, and this action was instituted in the Wake County Superior Court by the issuance of summons on 18 August 1964, which summons was duly served on defendant.

On 15 September 1964, defendant filed in the office of the clerk of superior court of Wake County a motion and an answer. In its motion it moved that plaintiff's complaint "be dismissed upon the ground that the court does not have jurisdiction of the subject matter of the action", and in support of its motion defendant alleged, in summary, except when quoted:

(a) That this proceeding is an appeal under G.S. 136-29 from a decision of the Director of the State Highway Commission;

(b) That subsection (a) of G.S. 136-29 provides, in part, as follows:

"Upon the completion of any contract for the construction of any State highway awarded by the State Highway Commission to any contractor, if the contractor fails to receive such settlement as he claims to be entitled to under his contract, he may, within sixty (60) days from the time of receiving his final estimate, submit to the Director of the State Highway Commission a written and verified claim for such amount as he deems himself entitled to under the said contract setting forth the facts upon which said claim is based.";

(c) That subsection (d) of G.S. 136-29 is as follows:

"The submission of the claim to the Director of the State Highway Commission within the time and as set out in subsection (a) of this section and the filing of an action in the superior court within the time as set out in subsection (b) of this section shall be a condition precedent to bringing such

an action under this section and shall not be a statute of limitations.";

(d) That a "final estimate" of the work was mailed to plaintiff on 13 January 1964 and was received by it on 14 January 1964; and

(e) That plaintiff did not submit to the Director of the State Highway Commission a written and verified claim for the amount to which it deemed itself entitled, prior to 23 March 1964, on which date defendant received from plaintiff a petition setting forth plaintiff's claim, and therefore plaintiff has not complied with the condition precedent of submitting its written and verified claim within the 60-day period provided for in the statute.

In its answer, defendant denied the material allegations of the complaint, and alleged that the plaintiff's complaint should be dismissed and that plaintiff should recover nothing in this action.

Plaintiff filed a reply to defendant's motion to dismiss and answer, alleging in substance that the 60-day period did not, in contemplation of law, begin to run until 25 January 1964, when it received the final estimate and warrant the second time in a letter from defendant.

APPEAL BY DEFENDANT FROM ORDER OF JUDGE COPELAND.

Defendant's motion to dismiss plaintiff's complaint came on to be heard by Copeland, J., at the 7 March 1966, Civil Non-Jury Session of Wake. Based upon documents entered into the record by stipulation of counsel and argument by counsel for each side, Judge Copeland made findings of fact substantially as set forth above. Based upon his findings of fact, he made the following conclusions of law, which we summarize, except when quoted, the numbering of the paragraphs being ours:

(1) "The plaintiff has complied with the requirements of G.S. 136-29 by filing its claim with the defendant within sixty days from the time of receipt of final estimate, the court being of the opinion that the phrase '. . . sixty days from the time of receiving his final estimate . . .' refers to the receipt of such an estimate as would permit the claimant to negotiate any warrant accompanying the estimate without prejudice to the right of such claimant to assert its claim for additional funds against the defendant. The language used by the defendant in its letter of January 13, to the effect that the accompanying warrant was 'final payment of this contract' put plaintiff to the choice of either negotiating the warrant to the

possible prejudice of its claim against defendant, or of returning the warrant to the defendant with the request that defendant assure plaintiff that the warrant could be negotiated without prejudice, and therefore the receipt by plaintiff of defendant's letter and warrant on January 14, 1964, was not such 'receipt' as, in the opinion of the court, is contemplated by the statute."

(2) The date on which plaintiff "received" defendant's final estimate and warrant, within the meaning of G.S. 136-29 (a), was January 25, 1964, and plaintiff within sixty days thereafter filed its verified claim with defendant.

(3) As plaintiff's letter of 22 January 1964 outlined the reasons why it felt defendant was in error in failing to allow its claim, it was in the nature of a petition for reconsideration and thus tolled the running of the sixty days pending action on the letter by defendant.

Based upon his findings of fact and conclusions of law, Judge Copeland entered an order denying defendant's motion to dismiss plaintiff's complaint.

Defendant assigns as error only one of Judge Copeland's findings of fact, and that is as follows: "On January 3, 1964, the parties conferred with respect to such claim, at which conference the defendant was fully advised of plaintiff's position concerning the claim involved in this lawsuit." This assignment of error is overruled, for the simple reason that it is not material to our decision.

The crucial words of G.S. 136-29, subsection (a), in deciding the appeal from Judge Copeland are as follows: "from the date of receiving his final estimate." Briefs of counsel and an exhaustive research on our part have not disclosed a case on all fours, and no decision in other jurisdictions construing substantially similar words in such a statute as ours has been discovered.

When plaintiff on 14 January 1964 received a letter of "final estimate", containing a warrant drawn on the State Treasurer for $24,361.43, the balance remaining to be paid on Project No. 8.17374 less the sum of $16,400 withheld as liquidated damages, together with an accompanying letter characterizing such payment as "final payment on the contract", plaintiff could not negotiate the warrant without seriously jeopardizing, or entirely barring, his claim that the withholding of alleged liquidated damages was unlawful. On 22 January 1964, plaintiff wrote defendant a letter enclosing the said warrant on the State Treasurer, stating in substance its desire that defendant be put on notice of its claim and that negotiation of the said warrant would not constitute any release by it of any claims that it may have against defendant for imposition of liquidated damages. On 24 January 1964, defendant, by John H. Davis, State Construction Engineer, mailed a letter to plaintiff returning the said

warrant. This letter stated: "The acknowledgment of receipt and the negotiation of this warrant will not constitute any release by you with respect to any action you may desire to take as provided under the statute." Plaintiff received this letter on 25 January 1964.

Considering the facts in this particular case, it seems to us clear that defendant, by its letter written on 24 January 1964, voluntarily waived its rights to contend that plaintiff received its final estimate on 14 January 1964 when it received defendant's letter of 13 January 1964. If defendant had delayed forwarding its permission to plaintiff that it could negotiate the warrant without prejudice to its rights for as long as sixty days, and then had forwarded the warrant to the defendant with the assurance that it could negotiate the same without giving up its rights under G.S. 136-29, it is probable defendant could have effectively barred the plaintiff from ever asserting its claim that the deduction of liquidated damages was improper. Facts constituting such a waiver appear in plaintiff's reply to defendant's answer. It seems to us, and we so hold, that the receipt of the letter from defendant by plaintiff on 25 January 1964 (the letter was mailed the day previous) constituted "his final estimate" within the meaning and intent of G.S. 136-29(a). Within sixty days after plaintiff received "his final estimate" on 25 January 1964, plaintiff submitted to the Director of the State Highway Commission a verified and certified claim for $16,400 on the ground that the imposition of such liquidated damages was improper as provided in G.S. 136-29(a).

The crucial facts found by Judge Copeland are set forth substantially in the pleadings, and such crucial findings of fact are not challenged by defendant, except in one particular instance as set forth above, which is immaterial. It is not necessary for us to decide whether Judge Copeland's conclusion of law No. (3) (the numbering of the paragraphs are ours) is correct or not. His crucial findings of fact support his other conclusions of law, and they in turn support his order denying defendant's motion to dismiss the complaint. All of defendant's assignments of error in the appeal from Judge Copeland are overruled. The order of Judge Copeland is

Affirmed.

APPEAL BY DEFENDANT FROM JUDGMENT OF JUDGE BONE.

G.S. 136-29(b) reads: "As to such portion of the claim as is denied by the Director of the State Highway Commission, the contractor may, within six (6) months from receipt of said decision, institute a civil action for such sum as he claims to be entitled to under said contract by the filing of a verified complaint and issuance of summons in the Superior Court of Wake County . . ." This

action was instituted in the Superior Court of Wake County on 18 August 1964.

This action came on to be heard upon its merits by Bone, E.J., at 16 May 1966, Civil Non-Jury Session of Wake County Superior Court. He heard it without a jury as he was authorized to do by G.S. 136-29(c). Plaintiff and defendant offered evidence. Judge Bone found facts substantially as set forth above, and in addition found that Judge Copeland had entered an order denying defendant's motion to dismiss the complaint.

Judge Bone found further facts in substance as follows: Plaintiff was substantially delayed by acts of defendant, and such acts were not denied by defendant, although with respect to certain acts defendant contended that the delays were of shorter duration than claimed by plaintiff. Among the delays sustained by plaintiff resulting from acts of defendant were these: (1) Defendant delayed its layout and measurement of the area required for the placing of sectional plate pipe at Station 542+30 of the project, and plaintiff was thereby prevented from performing critical work and following its program of work as originally planned for several days in May, 1962; (2) In April, 1962, plaintiff was prevented from working on a bridge installation, or at least on a portion thereof, by reason of defendant's failure to have removed from the working area a power line stretching across the road near the southernmost pier of the proposed bridge, which power line was about sixteen feet in height above the road, so that plaintiff could bring its cranes and other heavy equipment to work in the area of the bridge, which omission to act on defendant's part prevented plaintiff for a considerable number of days from working on its critical path in the said project in accordance with its original plan for completion of the job, most of which delay by defendant was unreasonable and substantially hindered plaintiff in the completion of the work required to be done by the contract; but the court was unable to determine from the evidence precisely how much this was reflected in the total time taken for plaintiff to complete the work; (3) A portion of plaintiff's work was to be performed on the northeast end of the reconstructed U. S. Highway 52, and power poles carrying a 12,470 volt electric system were in the right of way in which plaintiff was to perform its work; plaintiff notified defendant of the existence of these poles and requested defendant immediately to remove the poles so that it could work in the area and at the same time comply with its contract in permitting traffic to pass while work was in progress; U. S. Highway 52 at this point was the most heavily traveled north-south highway leading out of Winston-Salem; defendant failed to act, and plaintiff was compelled to work on the highway within twenty inches of the edge

of the road's surface, thus involving a hazard to its crew and personnel; and the court finds that plaintiff, by this omission of the defendant to act, was delayed in being able to enter upon said portion of the premises in accordance with its original plan for the work for several weeks in the spring and summer of 1962, and this conduct on the defendant's part substantially hindered plaintiff in the completion of the work; but the court was unable to determine from the evidence precisely how much this was reflected in the total time it took for plaintiff to complete the work; (4) In connection with the construction of the project, a lake had to be drained at Station 522+50, in preparation for building an inlet structure and placing a line of 54-inch pipe under the project main line; the original design for such lake drainage was inadequate in that the pipe as shown on defendant's plans and specifications was placed at too high an elevation to provide drainage of the lake; and this prevented plaintiff from working in this area while the plans were revised for several days by reason of this fault on the part of defendant; but the court was unable to determine from the evidence precisely how much time it was delayed; (5) In May, 1962, plaintiff discovered the existence of a 16-inch water line not shown on defendant's map, with reference to which plaintiff had bid on the project, which water line conflicted with the proposed grade of the roadway approaching the bridge; the water line served, among other things, an industrial plant near Winston-Salem; and plaintiff was delayed while plans were revised to take into account the existence of the water line; plaintiff's evidence tended to show that defendant should have known of the existence of the water line at the time the plans for the project were prepared, since it had an encroachment agreement in its division offices in Winston-Salem showing the existence of the water line and the location thereof; by reason of the fault of defendant in not showing this water line on its map, plaintiff was substantially hindered and delayed for several weeks in the performance of its work; but the court was unable from the evidence to determine precisely how much time it was delayed; and (6) By reason of improper design, the bridge located at Station 399 on said project had to be widened and otherwise altered from the original plans and specifications shown on the map under which plaintiff bid the job, and such alterations delayed plaintiff; but the court was unable to determine precisely from the evidence what specific period of time this delay covered.

The delays above set forth overlapped in some instances in point of time, but altogether these delays were substantial and prevented plaintiff from performing its work in accordance with the custom and usage of the construction industry in such cases and in accord-

ance with its plan of operation based upon defendant's plans and specifications under which the job was bid by plaintiff.

The court further found as a fact that the nature of such delays and the interrelationship thereof were such as to render it impossible to make any reasonable apportionment of the same as between plaintiff and defendant; that the unreasonable acts, negligence and omissions on the part of defendant caused a large and substantial portion of the delay of plaintiff in completing the contract.

Based upon his findings of fact, Judge Bone made the following conclusions of law; (1) In accordance with Judge Copeland's order, the submission of the claim involved herein to the State Highway Administrator was within the time set out in G.S. 136-29(a), and therefore defendant's plea in bar was properly denied; (2) The assessment of liquidated damages against plaintiff in this case, under all the facts, was not lawful and defendant was not entitled to withhold any sum of money from plaintiff on account of its claim for liquidated damages; (3) In a civil action brought by a contractor under G.S. 136-29, where the plaintiff contractor has shown a balance due him on the contract price for work done, and that defendant has withheld same from plaintiff upon a claim that it is entitled to liquidated damages in the amount so withheld for delay on the part of plaintiff in completion of the work and failure to complete same within the contract period, and plaintiff has shown further that a large part, if not all of such delay was due to the fault of defendant, the burden of proof is on the defendant to show that the delay on the part of plaintiff has caused some actual damage to defendant, and failing so to show, defendant is not entitled to withhold any sum of money as liquidated damages; (4) Since the delays of defendant are of such substantial nature running throughout the project, there was no proper basis upon which plaintiff is chargeable for any delay for which liquidated damages might be due, it being impossible to apportion the delay in this case between plaintiff and defendant. A mere extension of time does not of itself alleviate the problem of such delays, since a number of other factors is involved, including the problems faced by plaintiff in moving his men and equipment around and off his planned program of operation. It is impossible to set a date from which liquidated damages would begin to run after such delays had been encountered, particularly where, as here, the delays occasioned by the acts of the defendant were previous to the completion date set by the contract, and, therefore, the court concludes as a matter of law that the delays were of such a substantial nature as to make apportionment between the parties impossible and thus to nullify the liquidated damages clause contained in the contract, or, at least, to render its attempted enforcement unfair

and inequitable; and (5) Plaintiff is entitled to recover of defendant the sum of $16,400 as the balance due upon the contract price for the work done, with interest thereon from the date of this judgment, but is not entitled to recover interest for any time prior to the date thereof.

Based upon his findings of fact and his conclusions of law, Judge Bone ordered and decreed that plaintiff have and recover of defendant the sum of $16,400, together with interest thereon from the date thereof, and the costs.

Defendant assigns as error the denial by Judge Bone of its motion made at the close of all the evidence for judgment of compulsory nonsuit.

Considering plaintiff's evidence in the light most favorable to it, it is clear that the court correctly denied defendant's motion.

Judge Bone, as he was authorized to do by G.S. 136-29, subsection (c), was sitting without a jury, and consequently the weight and credibility of the conflicting evidence for plaintiff and defendant were for Judge Bone. It is well settled that when different inferences may be drawn from the evidence, the ultimate issue was for Judge Bone. 4 Strong's N. C. Index, Trial, § 56. Judge Bone's findings of fact are supported by competent evidence, notwithstanding that there is evidence *contra,* and are as binding upon the court as a verdict of a jury.

Obviously, as an elementary general proposition, a contractor is not liable under a clause for liquidated damages based on a time limit if his failure to complete the contract within the specified time was wholly due to the act or omission of the other party in delaying the work, whether by omitting to provide the faculties or conditions contemplated in the contract to be provided by him, or by those for whom he is responsible, or by interfering with the work after the contractor has begun, or otherwise. *Dunavant v. R. R.,* 122 N.C. 999, 29 S.E. 837; *United States v. United Engineering & Contracting Co.,* 234 U.S. 236, 58 L. ed. 1294; Anno. 152 A.L.R., p. 1350; 22 Am. Jur., 2d, Damages, § 233; 25 C.J.S., Damages, p. 1096. The concept of justice back of the decisions appears to be that the other party should not be allowed to recover damages for what he himself has caused.

In *United States v. United Engineering & Contracting Co., supra,* the Court said: "We think the better rule is that when the contractor has agreed to do a piece of work within a given time, and the parties have stipulated a fixed sum as liquidated damages, not wholly disproportionate to the loss for each day's delay, in order to enforce such payment the other party must not prevent the performance of the contract within the stipulated time; and that where such is the

case, and thereafter the work is completed, though delayed by the fault of the contractor, the rule of the original contract cannot be insisted upon, and liquidated damages measured thereby are waived."

Plaintiff's Exhibit No. 1, entitled in part "State of North Carolina, State Highway Commission, Raleigh — Proposal, Contract and Contract Bond", on page 4, in paragraph 8.7 "Liquidated Damages", contains this language: ". . . but no liquidated damages will be chargeable for any delay in the final completion of the work by the Commission due to any unreasonable action, negligence, omission, or delay of the Commission."

It is manifest from Judge Bone's findings of fact, which are supported by competent evidence, that unreasonable acts on the part of defendant of commission and omission wholly caused a large and substantial part of the delay on the part of plaintiff to finish the job within the time limit. He found that it was delayed by defendant several days in May, 1962; a considerable number of days in April, 1962; for several weeks in the spring and summer of 1962; for several weeks in May, 1962, in connection with the water line discovered by it; "but the court is unable to determine from the evidence precisely how much of this period was reflected in the total time it took for plaintiff to complete the work required by the contract."

Although there is authority to the contrary, the majority rule is that where a contract contains a provision for liquidated damages, and delays in its completion are occasioned by mutual defaults, the courts will not attempt to apportion the damages, and the obligation for liquidated damages is annulled in the absence of a contract provision for apportionment (and no provision in the contract here providing for apportionment of damages has been called to our attention, and we have found none), and according to some authorities, notwithstanding the contract itself provides in express terms for apportionment of the delay. 25 C.J.S., Damages, § 115, p. 1097; 22 Am. Jur., 2d, Damages, § 233; Anno. 152 A.L.R., p. 1359. It seems to us, and we so hold, that in the instant case where Judge Bone found as a fact that acts of commission and omission on the part of defendant wholly caused a large and substantial delay on the part of plaintiff to finish the job within the time limit, and none of the delay was caused by plaintiff, and that it is not possible from the evidence to determine precisely the length of time plaintiff was delayed, and plaintiff went ahead and fully completed the job on 24 May 1963, which was eighty-four days after the contract completion date, but defendant extended the contract completion date for a total of forty-three days, and defendant assessed liquidated damages for forty-one days, the obligation under the contract for liquidated damages was annulled.

Applying the relevant law to the facts found by Judge Bone, his conclusion of law that the assessment of liquidated damages against plaintiff under all the circumstances as found by him was not lawful and defendant was not entitled to withhold any sum of money from plaintiff on account of its claim for liquidated damages, and his conclusion of law (4) set forth above, are correct. Judge Bone's findings of fact and his above conclusions of law (2) and (4) support his judgment that plaintiff recover from defendant the sum of $16,400. Therefore, it is not necessary for us to pass upon the correctness or not of the challenged portion of Judge Bone's conclusion of law (3), reading as follows: "(T)he burden of proof is on the defendant to show that delay on the part of plaintiff has caused some actual damage to defendant, or the public, and failing so to show, defendant is not entitled to withhold any sum of money as liquidated damages."

Defendant assigns as error the provision in the judgment that plaintiff recover interest on the judgment for $16,400 from the date of the judgment.

We are concerned here, not with a case of defendant taking private property under the power of eminent domain, *Sale v. Highway Commission,* 242 N.C. 612, 89 S.E. 2d 290, but a civil action arising out of a highway contract. In the instant case we are confronted with the established principle that interest may not be awarded against the State unless the State has manifested its willingness to pay interest by an Act of the General Assembly, or by a lawful contract to do so. *Yancey v. Highway Commission*, 222 N.C. 106, 22 S.E. 2d 256.

The contract between plaintiff and defendant contains this provision as set forth in "Standard Specifications for Roads and Structures," which is part of the contract here, and marked Plaintiff's Exhibit No. 1:

> "Should final payment on this project not be made within ninety (90) calendar days after the project is completed and accepted by the Commission interest at the rate of five per cent (5%) per annum will be paid the contractor on the final payment for the period beginning ninety (90) calendar days after the project is completed and accepted and extending to the date final payment is made. . . ."

Plaintiff contends the defendant is bound by the above quoted provision of its contract to pay interest at 5% per annum beginning ninety days after 24 May 1963, or 22 August 1963. We agree with plaintiff's contention. Plaintiff completed the work on 24 May 1963, and it is reasonable to infer from the record that the High-

way Commission accepted it on that date. It is our opinion, and we so hold, the State has bound itself by the part of the contract above quoted to pay interest at 5% per annum for the period beginning 90 days after the project has been completed and accepted and to the date final payment is made.

A 1965 Amendment to G.S. 136-29, effective 1 July 1965, substituted "State Highway Administrator" for "Director of the State Highway Commission," in subsections (a), (b), and (d), and added "with the approval of the State Highway Commission" near the end of subsection (a). We have not taken into consideration these verbal changes in the statute for the reason that plaintiff instituted its action on 18 August 1964, and the pleadings are cast as the statute was at that time.

We have carefully considered all defendant's assignments of error on its appeal from Judge Bone, and all are overruled with the following exception: Judge Bone's judgment will be modified by deleting the words "with interest thereon from the date of this judgment, but is not entitled to recover interest for any time prior to the date hereof," and substituting in lieu thereof "with interest at the rate of 5% per annum from 22 August 1963 until paid."

Upon defendant's appeal from Judge Bone, the judgment is

Modified and affirmed.

APPEAL BY PLAINTIFF FROM JUDGMENT OF JUDGE BONE.

Plaintiff assigns as error Judge Bone's not incorporating in the judgment that it was entitled to interest at 5% per annum from 22 August 1963. This assignment of error is good, for the reasons above stated.

On plaintiff's appeal the judgment of Judge Bone is modified and affirmed as set out above.

Modified and affirmed.

VANCE COUNTY, PLAINTIFF, v. THOMAS S. ROYSTER AND WIFE, CAROLINE H. ROYSTER, DEFENDANTS.

(Filed 24 July, 1967.)

1. Constitutional Law § 21—

Private property may not be appropriated by the State, even upon the payment of just compensation, except by the exercise of the power of eminent domain in accordance with lawful procedure.

2. Eminent Domain § 3—

Private property may be taken by the exercise of the power of eminent domain only when the taking is for a public use; what is a public use is a judicial question, but if the use be public the courts will not interfere with the legislative or administrative determination that the taking of particular property is necessary for the successful operation of the proposed project, or prevent the taking on the ground that another site would be preferable.

3. Same—

Acquisition of land for, and the construction and operation of, an airport for use by the public is a purpose for which a city or a county, or both, may acquire land by condemnation, and the fact that at the time of the taking there are no commitments from commercial air lines and the immediate prospect is for use only by a small number of private planes, is irrelevant, there being no suggestion that the airport would not be available and eventually used as a public facility.

4. Eminent Domain § 1—

Private property may not be taken by eminent domain even for a public purpose when such purpose, under the circumstances of the particular case, as a matter of law cannot be accomplished.

5. Taxation § 6—

The operation and maintenance of a county-municipal airport is not a necessary expense of the city or county.

6. Same—

The constitutional provision prohibiting a county or city from contracting a debt or levying a tax for a purpose other than a necessary purpose without a vote of the people is not an impediment to economic progress but merely relegates to the people and not to their elected representatives the power to determine whether a particular project should be undertaken.

7. Same—

Even though an agreement between a city and a county and the Federal Government be construed to obligate the city and county to spend only non-tax revenue for the maintenance and operation of an airport, the county and city are without authority to incur such debt without the approval of the voters, since the constitutional prohibition against the incurrence of a debt for other than a necessary expense without a vote applies regardless of whether the future obligation constitutes a charge on funds derived from taxation or otherwise.

APPEALS by plaintiff and defendants from *Johnson, J.*, at the 7 November 1966 Civil Session of VANCE.

This is a proceeding instituted by Vance County to take by the power of eminent domain the fee simple estate in 3.3 acres of land owned by the defendants. The petition alleges that the county proposes to use the property as a portion of a public commercial airport to be constructed by the county, in cooperation with the City of

Henderson, the Henderson Township Airport Authority, and the Federal Aviation Agency. The defendants in their answer allege that the proposed taking of their land is unlawful both because the taking is for a private, not a public use and because the agreement which the plaintiff has made with the United States Government to operate and maintain the proposed airport is in violation of Article 7, § 6, of the Constitution of North Carolina, the agreement not having been submitted to a vote of the people.

The clerk adjudged that the plaintiff has the power to condemn the land for the proposed use and appointed commissioners to appraise the land and fix the defendants' damages. The commissioners filed their report, which the clerk affirmed. The defendants appealed to the superior court.

Evidence relating to issues other than damages for the taking was heard by the judge without a jury. Upon these issues, the court made findings of fact and concluded that the taking by the county was for a public use and within its authority. Thereupon, the issue of damages was tried before a jury, which found the defendants' damages to be $5,000. Judgment was entered accordingly. Both parties appealed, but the county moved in the Supreme Court for permission to withdraw its appeal, leaving for determination only the appeal by the defendants from the judgment sustaining the power of the county to take the land.

The findings of fact made by the superior court include the following:

> "(5) That the use for which the property of the respondents is to be taken is as a portion of a site for the construction, operation and maintenance of a public commercial airport in Vance County, North Carolina.
>
> "(6) That the proposed airport in Vance County is to be constructed in conformity with specifications of the Federal Aviation Agency of the United States of America.
>
> "(7) That the 3.3 acre tract of land described in the petition is necessary and required for the construction, operation and maintenance of an airport in Vance County that will conform to the specifications of the Federal Aviation Agency.
>
> * * *
>
> "(11) That on or about June 2, 1966, the petitioner made an application for federal funds for the construction of the proposed airport through the Federal Aviation Agency of the United States of America and on or about June 27th, 1966, entered into

a grant agreement with the Federal Aviation Agency for and on behalf of the United States of America.

"(12) That there are seven private aircraft operated and maintained in Vance County.

"(13) That Vance County had a total population according to the official census records for 1960 of 32,002.

"(14) That all sums appropriated by Vance County and the City of Henderson, to date, for the airport project are from non-tax funds.

"(15) That there has been no referendum or vote of the people of Vance County in regard to the construction, operation or maintenance of an airport."

The defendants do not except to any of these findings of fact. They assign as error the refusal of the court to grant their motion to dismiss the proceedings at the close of the petitioner's evidence and their like motion at the close of all of the evidence. They also assign as error certain rulings of the court sustaining objection to evidence offered by them.

Evidence offered by the county tended to show:

The county commissioners and the city council approved a plan for matching funds with the federal government for the building of an airport facility in Vance County. The site selected was a tract of land then owned by the federal government which it proposed to lease for the construction and operation thereon of the proposed airport. In order to comply with the requirements of the Federal Aviation Agency, it is necessary that the 3.3 acres belonging to the defendants be acquired in order to remove the trees thereon so as to permit the safe approach and departure of airplanes from the airport. The county commissioners allocated in the budget a total of $49,000 from non-tax funds (ABC Store revenues) for the development of the airport.

The county board also authorized the execution of a "grant agreement" with the Federal Aviation Agency so as to obtain federal funds for the development of the airport. This agreement was executed on behalf of the county.

The Henderson Township Airport Authority (actually, the authority, the city and the county jointly) entered into a lease with the federal government (Secretary of the Army) whereby the site of the proposed airport, adjoining the land now proposed to be taken from the defendants, is located. The term of the lease is 25 years and the annual rental is $1,250.

No question relating to the establishment, operation or maintenance of the proposed airport was ever submitted to a vote of the people.

The Henderson Township Airport Authority has no indication from any commercial airline that it will use the proposed airport. There is no public airport in the county. There are seven privately owned airplanes in the county. No study has been made to determine the extent to which the proposed airport would actually be used. The chairman of the Airport Authority anticipates that the construction and operation of the proposed airport would substantially increase the use of the recreational facilities at Kerr Lake and thus benefit the economy of the county.

The defendants offered in evidence the "project application" by the city and county to the federal agency, the "grant agreement" between the United States and the city and county, and the lease from the Secretary of the Army to the city, the county and the Airport Authority.

By the "grant agreement" the Federal Aviation Agency, on behalf of the United States Government, agreed to pay 50% of the "allowable cost" of the proposed airport project, not to exceed a specified amount. The city and county thereby agreed to "carry out and complete the project without undue delay," and to "operate and maintain the Airport as Provided in the Project Application." Other undertakings by the city and county were also included in the agreement but these are not material to the determination of the present appeal. The "grant agreement" then provides:

> "11. In view of the provision appearing in Paragraph 6, Possible Disabilities, Part II — Representations of the Project Application, it is understood and agreed that the obligations under Part III — Sponsor's [the city and county] Assurances of the Project Application can and will be met by the Sponsor through the use of funds derived from sources other than taxation, both parties having determined that such necessary funds will be available as needed for these purposes."

Paragraph 6, Part II, of the "project application," so mentioned in the "grant agreement," reads:

> "6. *Possible Disabilities.* — There are no facts or circumstances * * * which in reasonable probability might make it impossible for the Sponsor to carry out and complete the Project or carry out the provisions of Parts III and IV of the Project Application, either by limiting its legal or financial ability or otherwise, except as follows:

"Under the restrictions of the Constitution and Laws of North Carolina, the Sponsor cannot pledge present or future tax revenues to assure its compliance with the assurances of Part III Sponsor's Assurances of the Project Application. Each possible disability is negated by Sponsor's having non-tax funds available to operate and maintain the airport as indicated by the Certificates executed by Sponsor's Auditor and Attorney."

Part III of the "project application," so mentioned in the "grant agreement," contains the following covenants by the "Sponsor" (the city and county), which covenants are to remain in full force and effect throughout the life of the project:

"2. The Sponsor will operate the Airport as such for the use and benefit of the public. * * *

"6. The Sponsor will operate and maintain in a safe and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the Airport * * *

"9. Whenever so requested by the FAA, the Sponsor will furnish without cost to the Federal Government, for construction, operation and maintenance of facilities for air traffic control activities, or weather reporting activities and communication activities related to air traffic control, such areas of land or water, or estate therein, or rights in buildings of the Sponsor as the FAA may consider necessary or desirable for construction at Federal expense of space or facilities for such purposes. * * *"

Attached to and made part of the "project application" is a certificate of the county auditor certifying that $30,500 of non-tax funds had then been committed by the county commissioners for this project, and further stating:

"Further, I certify that an estimate on funds that will be available annually for commitment to meet the sponsor's obligations and to comply with the assurances contained in the Project Application is the estimated amount of $2,000.00 for maintenance and operation of the airport and lease payments.

"The sources and amounts of nontax revenues available to the County of Vance and a portion of which will be made available to the Henderson Township Airport Authority for the

above airport project and for future maintenance and operation of the airport are as follows:

"ABC Store	$100,000.00
Court Fees	37,000.00
Non-Tax Surplus	20,000.00
	$157,000.00"

The lease from the Secretary of the Army to the city, the county, and the Airport Authority, as joint lessees, imposes upon the lessees, jointly, the obligation to pay the rent in the amount of $1,250 per year for the property to be used as the airport proper. It contains no provision limiting the liability of the county for such rent to non-tax revenues. It further obligates the lessees, jointly, to reimburse the United States for expenditures by it, upon the termination of the lease, in restoring the property "to a condition satisfactory to the District Engineer." This obligation is likewise not limited to non-tax revenues. The term of the lease is 25 years. It provides that the "lessee" may relinquish it at any time by giving 30 days' notice in writing to the Secretary of the Army, but it does not state that notice by the county alone will have that effect.

Sterling G. Gilliam for petitioner appellant.
Broughton & Broughton for respondent appellees.

LAKE, J. The motion of the petitioner for permission to withdraw its appeal is allowed.

Upon the appeal of the respondents, the ultimate question for decision is not whether it would be beneficial to the economy of Vance County and the City of Henderson for an airport to be constructed at the proposed site. The question is whether the respondents' property can be taken from them, without their consent, for the purpose of constructing an airport as proposed by the county. It is not a light thing to take property from the owners against their will, even though they be paid therefor the full value of it in money. Such taking can be accomplished only through the exercise of the sovereign power of the State through lawful procedures for a public use which the taker is authorized by the sovereign to make of the property.

Private property can be taken by exercise of the power of eminent domain only where the taking is for a public use. *Highway Commission v. Batts,* 265 N.C. 346, 144 S.E. 2d 126; *Charlotte v. Heath,* 226 N.C. 750, 40 S.E. 2d 600, 169 A.L.R. 569. In *Highway Commission v. Thornton, post* 227, it was decided that, whether a

proposed use of property is a "public use," such as will justify the taking of property without the consent of the owner, is a judicial question and is to be determined by considering whether the public will use the property, not by considering the benefits to the economy from a proposed private use of it.

If the taking is for a "public use," the economic feasibility of the proposed use is for the legislative or administrative body to determine. With that determination the courts may not interfere, except upon a clear showing of abuse of discretion such as to make the taking of the property an arbitrary and capricious interference with the right of the owner thereto. *Yarborough v. Park Commission,* 196 N.C. 284, 145 S.E. 563; *Jeffress v. Greenville,* 154 N.C. 490, 70 S.E. 919; 29A C.J.S., Eminent Domain, § 89(2). Thus, in the absence of a showing of bad faith, which is not suggested in the present case, the courts will not interfere with the legislative or administrative determination that the taking of the particular property is necessary for the successful operation of the proposed project or prevent the taking on the ground that another site would be better, cheaper or otherwise preferable. 29A C.J.S., Eminent Domain, § 90.

Nearly forty years ago, when flight across the ocean was still a marvel and commercial air travel and transportation were in their infancy, the Legislature of this State authorized cities and counties jointly to acquire, construct and operate airports and to exercise the power of eminent domain to acquire land for that purpose. G.S. 63-4, 63-5. The procedure followed in the present case is that prescribed by the statute. It is clearly established by the decisions of this Court that the acquisition of land for, and the construction and operation of, an airport for use by the public is a purpose for which a city or a county or both may appropriate and expend public funds and for which it or they may acquire land by the exercise of the power of eminent domain. *Airport Authority v. Johnson,* 226 N.C. 1, 36 S.E. 2d 803; *Turner v. Reidsville,* 224 N.C. 42, 29 S.E. 2d 211.

In a taking of land for the construction of an airport, as in the case of a taking for the construction of a road, if the taking is, in reality, for the purpose of making the property available for use by the public, it is immaterial that, in the immediate future, only a small segment of the public will be likely to make actual use of it. See: *Charlotte v. Heath, supra; Cozard v. Hardwood Co.,* 139 N.C. 283, 51 S.E. 932. In *Turner v. Reidsville, supra,* the argument, similar to one of the contentions of the respondents here, was made that land could not be acquired by eminent domain for construction of an airport because "no public airline now makes Reidsville a stopping place for air traffic, nor are there definite assurances for the

future, or apparent demand for facilities for public or private aircraft service," and so, it was argued, an airport for Reidsville was neither needed in the public interest nor prospectively advantageous to the citizens or industries, and its construction and maintenance would be a waste of public funds. This Court did not find that argument persuasive then and we do not find it so now, since the wisdom of the proposed construction and operation is not for us to determine or consider. The small number of privately owned airplanes, presently kept in Vance County at private landing strips, and the absence of commitments from commercial airlines to use the proposed airport do not determine the nature of the use to be made of the proposed facility. There is nothing in the record to suggest that it will not be available for use by any airplane, whether owned by a resident of Vance County or otherwise, desiring to land upon it, nor is there anything in the record to support a finding that if it is constructed it will not be used eventually by others than those who now own airplanes regularly kept in Vance County. Thus, the present record does not present a situation comparable to that found in *Highway Commission v. Batts, supra.*

We, therefore, conclude that the city and county propose to construct and operate the airport for public use. The proposed taking of the land of the respondents so as to provide for airplanes an approach to the runway of the airport free from trees and structures of considerable height is reasonably incidental to the construction of such an airport. Consequently, the proposed taking of this property is for a public use and is within the authority of the petitioner, unless the proposed construction and operation is otherwise beyond the authority of the petitioner.

For the petitioner to take the land of the respondents, without their consent, for a use incidental to a proposed airport, which airport the petitioner may not lawfully construct and operate, would be a vain and utterly useless deprivation of the respondents' rights in their property. Such an arbitrary, capricious taking of their land would be a violation of Article I, § 17, of the Constitution of this State. The land of a person may not be taken, without his consent, when the purpose, which would otherwise authorize the taking, cannot be accomplished as a matter of law.

It is clear upon the record before us that the proposed taking of the land of the respondents is to provide a safe approach to an airport which is to be constructed pursuant to the lease of the land for the airport proper, the "grant agreement" and the "project application," and not otherwise. If the petitioner does not have authority under the law to construct and operate the contemplated airport

pursuant to the provisions of these documents, the taking of the land of the respondents so as to provide a safe approach to such airport is beyond the authority of the petitioner. We, therefore, turn to the examination of the petitioner's undertaking in these documents and to the consideration of the authority of the petitioner to enter into such undertaking.

The lease expressly provides that the obligations therein undertaken are the joint obligations of the county, the city, and the Airport Authority. Thus, in the lease the county binds itself to pay rent throughout the 25 year term of the lease. The provision that the lease may be terminated earlier by the three joint lessees does not provide the county alone with a means of escape from this obligation if its joint obligors do not concur in its desire to terminate the lease. The full credit of the county is pledged for the payment of the agreed rent.

The "grant agreement" contains an undertaking by the county and by the city to maintain and operate the airport during the continuation of the lease. There is evidence in the record that the initial operation and the expense for maintenance will be relatively modest, but the obligation is not limited to operations and maintenance presently adequate to satisfy the Federal Aviation Agency. While the amount of the undertaking is not determinative, it is appropriate to recall at this point the following observation of Higgins, J., speaking for this Court in *Yokley v. Clark,* 262 N.C. 218, 136 S.E. 2d 564:

> "Costs of operating an airport include maintenance of runways, hangars, repair facilities, observation and directional tower, communications, lights, wind and weather measuring and testing devices, in addition to personnel necessary to man them."

The "grant agreement" also provides that the county, city and airport authority will complete the construction of the airport. The amount to be contributed by the federal agency to the construction cost is limited to a specified maximum. The county's liability is not so limited.

Article VII, § 6, of the Constitution of North Carolina provides:

> *"No debt or loan except by a majority of voters.* — No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless approved by a majority of those who shall vote thereon in any election held for such purpose."

This provision of our State Constitution, like the provision of Article V, § 4, imposing a limitation upon the power of the State, counties and municipalities to contract debts without a vote of the people, does not deprive the county of any power to contract a debt. It merely declares who shall have the power of decision. The Constitution gives to the people that power by requiring their duly elected representatives to submit the question to them for their approval before the indebtedness is assumed. When the Constitution puts into, or leaves in, the hands of the people a checkrein upon the discretion of their duly elected officials, it is not a true Liberalism which would give to the constitutional provision an interpretation such as to loosen the hold of the people upon the checkrein. The Constitution proceeds upon the theory that if it is, indeed, wise to contract an indebtedness for an unnecessary county or city expense, the people of the county or city will recognize this when the facts are presented to them and will approve the assumption of the obligation and, if they do not approve it, it ought not to be undertaken at their expense even though the county or city commissioners, and the courts as well, deem it wise to do so. It is appropriate to refresh our recollection of these comments by Seawell, J., speaking for the Court in *Purser v. Ledbetter*, 227 N.C. 1, 40 S.E. 2d 702:

> "We are not inadvertent to the uses of a written Constitution and the arguments that have been addressed to the propriety of a liberal construction so that it may aid, rather than retard, the march of progress. Concededly, from its nature and purpose, a constitution is intended to be a forward-looking document, expressing the basic principles on which government is founded; and where its terms will permit, is to be credited with a certain flexibility which will adapt it to the continuous growth and progress of the State [citations omitted]. But when the Constitution provides how orderly progress may be fostered and advanced, and the process involves political rights reserved or expressly secured to the people, the courts will be careful not to encroach on that prerogative, will be inclined to find in the provision itself the liberality and flexibility which the Constitution intends. * * *
>
> "This decision closes no gate to the people of Charlotte, or of any other municipality, if they have the will to open it. The Constitution makes them trustees of their own progress. It neither drives them or stays them, but leaves them with the responsibility for the wisdom of the venture."

It is not for the court to determine the wisdom of a decision to contract a debt for a county or a city, but it is the duty of the

court to determine whether the proposed indebtedness is for a "necessary expense" within the meaning of the above provision of the Constitution. *Sing v. Charlotte,* 213 N.C. 60, 195 S.E. 271; *Palmer v. Haywood County,* 212 N.C. 284, 193 S.E. 668, 113 A.L.R. 1195; *Starmount Co. v. Hamilton Lakes,* 205 N.C. 514, 171 S.E. 909; *Storm v. Wrightsville Beach,* 189 N.C. 679, 128 S.E. 17. Pursuant to this authority and duty, this Court has determined that the construction of a public airport is not a "necessary expense" in that sense. *Airport Authority v. Johnson, supra; Sing v. Charlotte, supra.* Thus, a county or city may not contract a debt or pledge its faith for the construction or operation of such an airport without first submitting the question to a vote of the people of such county or city.

In the present case, the "grant agreement," unlike the lease, contains by reference to the "project application" the express recognition that, since the agreement has not been approved by a vote of the people, the revenues of the county or city derived from taxation cannot be used lawfully for paying the expenses of maintaining and operating the airport. Assuming, without deciding, that this recognition of the foregoing provision of the Constitution is sufficient to limit the liability of the county and city, and the right of the Federal Aviation Agency, to non-tax funds for the payment of these expenses, the "grant agreement" is not thereby insulated against the power of the constitutional provision.

The Constitution not only forbids the levying and expenditure of a tax for a purpose other than a "necessary expense," it also forbids the contracting of any debt for such purpose without first submitting the matter to a vote of the people.

This Court has held that bonds of a city, issued for the purpose of acquiring revenue producing property and which expressly provide that only the revenues produced by such property shall be used for or subject to demand for payment of such bonds, are not a "debt" of the city within the meaning of the above quoted provision of the Constitution. *Keeter v. Lake Lure,* 264 N.C. 252, 141 S.E. 2d 634; *Britt v. Wilmington,* 236 N.C. 446, 73 S.E. 2d 289; *Williamson v. High Point,* 213 N.C. 96, 195 S.E. 90; *Brockenbrough v. Commissioners,* 134 N.C. 1, 46 S.E. 28. These decisions do not, however, extend to the "grant agreement" in the present case. The "grant agreement," giving to the restrictive provision therein the broadest possible effect, leaves subject to a demand for the construction and for the operation and maintenance of the proposed airport every non-tax revenue of the county, including the revenues from the operation of the Alcoholic Beverage Control Stores, court costs and all other revenues paid into the county's general fund. As this Court

said in *Yokley v. Clark, supra,* with reference to an undertaking by a county and a city to maintain and operate an airport:

> "[T]he Constitution forbids contracting the debt or pledging the credit of the Town and County without a vote. The making of the pledge for future fulfillment is unauthorized. The method by which payment was intended, whether by taxation or otherwise, is immaterial, if for an unnecessary purpose * * *
>
> "Opportunities to spend matching funds from the Federal Government and from other sources without voter approval are attractive to many county and city governing authorities. But, if the proposed appropriation is for an unnecessary public purpose, (as in this case) the town and county officials are without authority either to use tax money or to incur a debt in furtherance of the project."

Neither the lease nor the "grant agreement" having been approved by a vote of the people of the county, the county commissioners were not authorized to enter into either of these contractual obligations on behalf of the county. Consequently, the construction, operation and maintenance of the proposed airport by the county and city are not presently authorized and the taking of the land of the respondents for a use incidental to the operation of it is not authorized. The motion of the respondents, at the close of all the evidence, to dismiss these condemnation proceedings should have been granted.

Reversed.

DANIEL E. BRANNOCK AND WIFE, JEAN W. BRANNOCK, PLAINTIFFS, v. A. B. FLETCHER AND WIFE, LEXIE FLETCHER, DEFENDANTS.

(Filed 24 July, 1967.)

1. Vendor and Purchaser § 1—

As between the parties, the vendor may be considered a mortgagee and the purchaser a mortgagor, and ordinarily the purchaser is not entitled to possession until he has fully paid the purchase price, although by express or implied agreement he may be given the right to possession prior thereto.

2. Same—

The purchaser in possession is not liable for rent prior to default.

3. Same—

A purchaser in possession under agreement of the parties cannot be deprived of possession as long as he is not in default in the payment of the purchase price.

4. Same—

Where prospective purchasers are given possession prior to the execution of the contract to purchase which recites the payment of a stated sum and stipulates monthly payments to be made each month thereafter, there is a necessary implication that the purchasers are entitled to possession of the property so long as they make the payments in accordance with the contract.

5. Same—

Agreement by the vendors that the purchasers might make up payments in default at the end of the contract period does not preclude vendors from invoking the acceleration provision of the contract when the agreement to defer the payments is not supported by a new and independent consideration.

6. Same—

Vendors may not invoke the acceleration agreement in the contract without first giving the purchasers adequate notice and reasonable opportunity to bring their payments up to date.

7. Vendor and Purchaser § 10—

The distinction between rescission, forfeiture, and the termination of an executory contract of purchase and sale because of the failure of the purchaser to perform his obligations, is important; rescission entitles each party to be placed *in statu quo ante*, requiring that payments made by the purchaser be refunded and that the vendors recover the amount of reasonable rents, while in the event of forfeiture or termination of the purchasers' contractual rights because of failure to make payments as stipulated, the purchasers would not be entitled to recover payments theretofore made.

8. Same—

Plaintiff purchasers' evidence tended to show that they were in possession of the property under an executory contract of purchase and sale, that defendant vendors wrongfully demanded that plaintiffs surrender the property at a time when plaintiffs were not in default, and that plaintiffs voluntarily surrendered the property. ***Held:*** Nonsuit was improperly entered in plaintiffs' action to recover payments made under the contract, since the evidence is sufficient to support a finding that the parties rescinded the contract, in which event plaintiffs would be entitled to recover the payments made.

APPEAL by plaintiffs from *Martin, S.J.*, 30 January 1967 Session of FORSYTH.

Action by vendee, instituted 15 July 1966, to recover payments made under a contract to convey realty.

In June or July 1961, by oral contract of purchase and sale, plaintiffs agreed to buy from defendants a certain house and lot. Plaintiffs entered into possession of the property, they say, on 1 July 1961; defendants say, 1 June 1961. On 13 November 1961, the parties executed a written contract for the purchase and sale of the

property at the price of $11,400.00. The agreement recited payment of $400.00 and a balance due of $11,000.00 to be paid at the rate of "$112.00 per month, each month hereafter." The contract provided:

> "(S)aid payment of $112.00 to be applied, first on the payment of interest at the rate of 6% per annum, and the balance to be applied on balance due under this contract, until the full sum of $11,400.00 and interest has been paid. Failure to make payments when due makes whole amount due and payable."

Except for a description of the property sold, the foregoing provisions constitute the entire written contract.

Plaintiffs allege that they completely performed their obligations under the contract; that on or about 1 June 1963 — when they had paid a total of $2,600.71 — defendant A. B. Fletcher informed them that unless they were able to obtain a loan on the property the next day, they would be required to vacate the house; that, being unable to obtain a loan, they moved out as ordered. They seek to recover the sum of $2,600.71, with interest, from defendants.

Answering the complaint, defendants admitted the execution of the written contract, but denied that plaintiffs performed their obligations under it. They allege that plaintiffs did not make the required payments; that they were constantly in default; that their total payments under the contract were $2,091.71; that they lived in the house, which had a reasonable rental value of $100.00 a month, for 25 months; that they voluntarily vacated the premises on 1 July 1963 at a time when they were $708.29 in arrears with their payments; that during their occupancy of the house they damaged it in the sum of $1,000.00; that for their 25-months' occupancy, plaintiffs owed them $2,500.00; and that, after crediting plaintiffs with the $2,091.71 paid, they still owe a balance of $408.29 for rent. Defendants seek to recover from plaintiffs this sum with interest, plus $1,000.00 in damages.

Upon the trial, plaintiffs' evidence tended to show: Plaintiffs moved into the house on 1 July 1961. At that time, they attempted to obtain a loan from Piedmont Federal Savings and Loan Association (Piedmont), which refused to deal with plaintiffs. Defendant A. B. Fletcher then obtained a loan "in his name." He told plaintiffs that they could probably get a loan on the property in their name in about a year and that he would keep it in his name until they could get one. On 13 November 1961, plaintiffs began making monthly payments of $112.86 to Piedmont, which applied $59.07 to the payment of Mr. Fletcher's loan on the property and deposited the balance of $53.79 in his savings account. Plaintiffs received two books

from Piedmont, "a savings book" and "a loan book." The payment page of the latter was entitled "A. B. Fletcher and Lexie A. Fletcher Payments made by Danny Braddock (Brannock) Duplicate." Eventually, plaintiffs stopped paying anything into Mr. Fletcher's account at Piedmont and started paying him personally on his "second mortgage." Sometimes they were late in making those payments. Mr. Fletcher told plaintiffs that they should always make the payments to Piedmont even if they could not pay him. They missed paying him two or three months because of sickness. The latter part of May or the first of June 1963, Mrs. Fletcher told plaintiffs that he wanted them "to get the loan over to their names." Piedmont still refused to make plaintiffs a loan, and Mr. Fletcher told them that he wanted his house, and he wanted it the next day. Mrs. Fletcher extended the time until Saturday, and plaintiffs moved on that day.

At the time plaintiffs moved out of the house, Mrs. Brannock testified:

> "(W)e had actually paid twelve hundred dollars on the loan to Piedmont. . . . I had it written in the book of the payments. . . . I do not know to the very penny the total amount we have paid on the house — to Piedmont Federal and Mr. Fletcher — all together. . . . Looking at the complaint refreshes my recollection as to how much we paid on the contract, and it is $2,600.71."

Mr. Brannock testified:

> "During the time we were making these payments, we were not late to Piedmont. We were late to Mr. Fletcher on the second note because of sickness, and we would have to make it up at the end. . . . He did not, that I remember, ever demand that I catch up the payments in arrears."

According to the records of Piedmont, the Fletcher-Brannock loan required monthly payments of $59.07 and a total of $1,299.54 was paid. For the most part, the records do not show who made the payments, but they do reveal that three drafts were drawn on Mrs. Brannock for the months of April, May, and June 1963, and all were returned unpaid. When payments for these months were finally made, Mr. Fletcher's name was entered beside the May and June payments; Mrs. Brannock made the one for May. The sum of $1,299.54 represented payment at $59.07 for 22 months.

At the close of plaintiffs' evidence, defendants moved for judgment of nonsuit. The motion was allowed, and plaintiffs appealed.

Harold R. Wilson; Alvin A. Thomas for plaintiff appellants.
Walter C. Holton for defendant appellees.

SHARP, J. Plaintiffs assign as error the dismissal of the action upon defendants' motion for nonsuit. We, therefore, consider the evidence in the light most favorable to them. *Mills v. Lynch*, 259 N.C. 359, 130 S.E. 2d 541.

Plaintiffs, as vendees in an executory contract for the purchase and sale of a residence from defendants, were in possession of the property when the contract was signed on 13 November 1961. The total purchase price to be paid was $11,400.00. Defendants acknowledged the receipt of $400.00, and plaintiffs agreed to pay the balance in installments of $112.00 "each month hereafter." The first payment, therefore, was due December 13, 1961. At the time plaintiffs moved out, shortly after 1 June 1963, a total of eighteen payments, or $2,016.00 should have been made. This sum (if paid), plus the $400.00 down payment, would have made a total of $2,416.00 paid on the purchase price.

Both plaintiffs testified that they did not know the exact amount which they had paid on the contract, but after refreshing her recollection from the complaint, however, Mrs. Brannock testified that plaintiffs had paid a total of $2,600.71. This sum would be $184.71 in excess of the amount due under the contract at the time defendants demanded possession of the property on or about 1 June 1963 and at the time plaintiffs complied with defendants' demands by voluntarily vacating the premises. Yet, both Mr. and Mrs. Brannock testified that they were two or three months in arrears with that portion of the $112.00 monthly payment which they were to make direct to Mr. Fletcher. They said that he had agreed that they could "make it up at the end." Notwithstanding, Mrs. Brannock also made the flat statement that plaintiffs had paid $2,600.71 on the house when Mr. Fletcher demanded possession, and that they "were not behind" with their payments at that time.

This state of the evidence, plus the minimal written contract, which patently does not embrace all the terms of the previous oral agreement between the parties and which does not stipulate the consequences of a default by either, necessitates a marshaling of legal principles which the briefs have not attempted. Since plaintiffs brought this action to recover the payments they had made, their theory necessarily is that defendants had rescinded the contract. Although the evidence discloses that their last payment was made more than three years before they brought this action, no question of the statute of limitation arises for the reason that the provisions

of G.S. 1-52 were not pleaded. G.S. 1-15; *Iredell County v. Crawford,* 262 N.C. 720, 138 S.E. 2d 539.

In a contract for the sale of land, the vendee may be given the right to possession prior to the conveyance of title either by the terms of the contract or by necessary implication. 55 Am. Jur., Vendor and Purchaser § 385 (1946). In the absence of any express or implied agreement to the contrary, however, the vendee has no right to the possession until he has fully paid the purchase price. *Allen v. Taylor,* 96 N.C. 37, 1 S.E. 462; Annot., Right of vendor and purchaser respectively to possession pending performance, but before default, of executory contract for sale of real estate, 28 A.L.R. 1069 (1924); 8A Thompson, Real Property § 4449 (1963 repl.).

> "It is well settled, that the purchaser of land, when let into possession under a contract of purchase, is simply an occupant of it at the will of the vendor, and he so continues until the purchase money shall be paid. The vendor may at any time put an end to such occupancy by demanding possession, after reasonable notice to quit; and if it be not surrendered, then he may at once bring and maintain an action to recover the possession." *Allen v. Taylor, supra* at 39, 1 S.E. at 463.

Accord, Jones v. Boyd, 80 N.C. 258; *Dowd v. Gilchrist,* 46 N.C. 353; *Love v. Edmondston,* 23 N.C. 152; 55 Am. Jur., Vendor and Purchaser § 387 (1946). A vendee is not, however, such a tenant as may be evicted by summary ejectment under G.S. 42-26 (N. C. Pub. L. 1868-'69, ch. 156); *McCombs v. Wallace,* 66 N.C. 481; nor, in the absence of an express provision in the contract, is a vendee in possession liable for rent prior to default. The interest on the unpaid purchase price is in lieu thereof — *Mitchell v. Wood,* 70 N.C. 297; *Pearsall v. Mayers,* 64 N.C. 549 — for the sales price is presumed sufficient consideration for the intermediate occupation. 55 Am. Jur., Vendor and Purchaser § 363 (1946). *Cf. Jones v. Jones,* 117 N.C. 254, 23 S.E. 214. The payment by the vendee of the greater part of the purchase money makes no difference in the vendor's right to the possession of the property; "but if the vendee should afterwards file a bill in equity for specific performance, he will not only be allowed a credit for his payments, but also be entitled to an account of the profits of the land made by the vendor after he shall have recovered possession." *Butner v. Chaffin,* 61 N.C. 497, 498.

It has been held repeatedly that "the relation between vendor and vendee in an executory agreement for the sale and purchase of land is substantially that subsisting between mortgagee and mortgagor, and governed by the same general rules." *Jones v. Boyd, supra*

at 261; *accord, Crawford v. Allen* and *Realty Co. v. Crawford,* 189 N.C. 434, 127 S.E. 521; *Eubanks v. Becton,* 158 N.C. 230, 73 S.E. 1009; *Killebrew v. Hines,* 104 N.C. 182, 10 S.E. 159; *Allen v. Taylor, supra; Hook v. Fentress,* 62 N.C. 229; 55 Am. Jur., Vendor and Purchaser § 354 (1946). As between the parties, the vendor may be considered a mortgagee and the vendee a mortgagor. *Bank v. Loughran,* 122 N.C. 668, 30 S.E. 17; *Jones v. Boyd, supra; Ellis v. Hussey,* 66 N.C. 501.

At common law, a mortgagee, in his character as the legal owner, was entitled to the immediate possession of the mortgaged premises even before breach of condition unless this right had been waived or it had been otherwise stipulated in the mortgage. Under the modern equitable doctrines, however, the mortgagor is entitled to remain in the possession of the property at least until breach of condition. Formerly, the rule was frequently stated as follows: "It is familiar learning that, *at least,* after default of the mortgagor in paying the debt secured by the mortgage, the mortgagee is entitled to the possession and is accountable to the mortgagor for rents and profits." (Italics ours.) *Weathersbee v. Goodwin,* 175 N.C. 234, 235, 95 S.E. 491, 492; *accord, Bank v. Jones,* 211 N.C. 317, 190 S.E. 479; *Montague v. Thorpe,* 196 N.C. 163, 144 S.E. 691. More recently the rule is stated with the phrase italicized above omitted. *Gregg v. Williamson,* 246 N.C. 356, 98 S.E. 2d 481; *Mills v. Building & Loan Assn.,* 216 N.C. 664, 6 S.E. 2d 549. Although a mortgagee in possession is accountable for the rents and profits which he receives from the premises, he may be made to account only in his action to foreclose or in the mortgagor's suit to redeem or in connection with voluntary payment. *Anderson v. Moore,* 233 N.C. 299, 63 S.E. 2d 641; 2 Jones, Mortgages § 1426 (8th Ed., 1928); II Glenn, Mortgages § 216 (1943).

Like a mortgagor, a vendee who, by agreement with his vendor, is in possession of the property under an executory contract of purchase and sale cannot be deprived thereof as long as he is not in default in the performance of his contract. 92 C.J.S., Vendor and Purchaser §§ 461, 464 (1955); 55 Am. Jur., Vendor and Purchaser §§ 438, 439, 444 (1946); Annot., When a vendor may recover possession from his vendee, 107 Am. St. Rep. 722 (1906); Annot., 94 A.L.R. 1239, 1263 (1935). It is implicit in the facts of this case that, notwithstanding the lack of an express provision to that effect in the written contract, plaintiffs were to have possession of the property. They were buying a house to live in; they were in possession of it at the time the contract was executed. At $112.00 a month, more than 8 years would have elapsed before they had paid for the property. It is not reasonable to suppose that they would have contracted to

buy the house unless they had acquired, at the same time, the right to its immediate and continued possession. The necessary implication, therefore, is that plaintiffs were entitled to the possession of the property so long as they complied with the contract by making the payments as they came due. It is equally apparent from plaintiffs' evidence that the parties contemplated that, as soon as plaintiffs' debt had been reduced to an amount which they could finance, they would obtain a loan on the property and pay the purchase price in full. Until they could get a loan, however, defendants were obligated to carry the loan at Piedmont "in their names." No such provisions, however, were incorporated in the written contract. Therefore, plaintiffs were not legally obligated to procure a loan. *Neal v. Marrone*, 239 N.C. 73, 79 S.E. 2d 239. They were, however, obligated to make each monthly payment as it became due, and the failure to pay any installment in full made the entire unpaid balance due and payable.

Unless supported by some new and independent consideration, an agreement by defendants that they might miss several payments and "make it up at the end," would not abrogate the acceleration provision of the contract if defendants later decided to enforce it. *Products Corp. v. Sanders*, 264 N.C. 234, 141 S.E. 2d 329; *Craig v. Price*, 210 N.C. 739, 188 S.E. 321. Under the circumstances disclosed by plaintiffs' evidence, however, defendant could not declare the entire balance due without first giving plaintiffs adequate notice and a reasonable opportunity to bring their payments up to date. Annot., L.R.A. 1918B, 541, 547; 55 Am. Jur., Vendor and Purchaser § 625 (1946). Even though plaintiffs gave testimony tending to show (as their brief concedes) that they might be "behind in two or three of these payments," taking this evidence in the light most favorable to them, they were not behind in their payments when ordered to move. If, however, plaintiffs were behind in their payments (as defendants allege), and continue in default after reasonable notice, defendants would have been entitled to take possession of the premises without resorting to an action of ejectment — provided possession could be obtained peaceably. In such event, plaintiffs would not be entitled to recover back what they had paid.

> "It is settled law that where a party agrees to purchase real estate and pays a part of the consideration therefor and then refuses or becomes unable to comply with the terms of his contract, he is not entitled to recover the amount theretofore paid pursuant to its terms. *Rochlin v. Construction Co.*, 234 N.C. 443, 67 S.E. 2d 464; *Improvement Co. v. Guthrie*, 116 N.C. 381, 21 S.E. 952; 31 A.L.R. 2d 118, Anno. — Vendee's Recovery of Purchase Money; 55 Am. Jur., Vendor and Purchaser, section

535, page 927; 92 C.J.S. Vendor and Purchaser, section 554 (a), page 566." *Scott v. Foppe*, 247 N.C. 67, 70, 100 S.E. 2d 238, 240.

Accord, Annot., L.R.A. 1918B, 541; Annot., Vendee's right to recover amount paid under executory contract for sale of land, 59 A.L.R. 189, 194 (1929); Annot., 102 A.L.R. 852, 854 (1936); Annot., 134 A.L.R. 1064 (1941).

If, as plaintiffs contend, they were not in arrears with their payments, they were entitled to keep possession of the premises, and to refuse to move when Mr. Fletcher orderd them to vacate "tomorrow." Instead, they importuned Mrs. Fletcher "to give them until Saturday to move." Having surrendered possession, they were still entitled — even if they were in arrears — to tender to defendants the unpaid balance of the purchase price within a reasonable time and to have specific performance of their contract to convey. In the absence of special circumstances or a stipulation to the contrary, time is not of the essence in a contract of sale and purchase of land. *Douglass v. Brooks*, 242 N.C. 178, 87 S.E. 2d 258. But until a vendee "has made full payment he is not in condition to demand a conveyance of the land." *Jones v. Boyd, supra* at 261.

Upon the breach of a contract of purchase and sale, several courses are open to the injured party. Upon a breach by the vendor, the vendee, *inter alia*, may (1) stand upon the contract and sue at law for damages for its breach, or he may go into equity seeking its specific performance; or (2), treating the vendor's breach as an abandonment, may himself abandon the contract — thereby rescinding it — and recover what he has paid. Other available remedies are enumerated in 92 C.J.S., Vendor & Purchaser § 543 (1955). Upon a breach by the vendee, the vendor also has a choice of remedies. (In North Carolina, of course, the vendor has no lien absent a mortgage or deed of trust.)

"(He) may bring an action for damages for the breach, or may sue in equity for specific performance, or bring an action for the purchase price remaining unpaid, or proceed to enforce his vendor's lien for unpaid purchase money, or, if he has parted with possession of the land, he may sue to recover its possession, or retake possession if the premises are vacant; he may retake possession and recover damages for the breach, or he may bring a suit for foreclosure of the vendee's interest or to quiet title, or he may rescind the contract *in toto* with the usual rights and duties attendant on such action, or he may accept the noncompliance as a forfeiture of the contract, or he may bring an action to rescind the contract or declare it at an end. Further, he may remain inactive and retain for his own use the moneys paid by

> the purchaser, and he may retain or recover a deposit made by the purchaser on the purchase price." 92 C.J.S., Vendor & Purchaser § 375 (1955).

See *Credle v. Ayers,* 126 N.C. 11, 35 S.E. 128; *Allen v. Taylor, supra; Mitchell v. Wood, supra.* For an interesting discussion of the remedies available to both vendee and vendor see *Glock v. Howard & Wilson Colony Co.,* 123 Cal. 1, 69 Am. St. Rep. 17, 43 L.R.A. 199, wherein it is said: "If his generosity prompts him so to do, he (vendor) may agree with the vendee for a mutual abandonment and rescission, in which last case, and in which last case alone, the vendee in default would be entitled to a repayment of his money." *Id.* at 25.

If the purchaser makes default in the stipulated payments, the vendor may refuse to perform further on his part, or he may take proceedings to foreclose the vendee's rights under the contract, "without incurring liability at law to refund to the purchaser any part of the purchase money theretofore paid *where the vendor does no act indicating rescission of the contract.*" (Italics ours.) 55 Am. Jur., Vendor and Purchaser §§ 535, 536 (1946). The mere fact that the vendor resumes possession of the property does not entitle the purchaser to recover payments made on the contract where it is not rescinded. 92 C.J.S., Vendor & Purchaser § 554 (1965).

> "Rescission is something more than a mere declaration of forfeiture by which a seller seeks to eliminate the rights of a delinquent purchaser and retain advance payments. . . . (A) rescission implies the entire abrogation of the contract and a restoration of the benefits from the other party." *Pedley v. Freeman,* 132 Iowa 356, 109 N.W. 890, 119 Am. St. Rep. 557. *Accord,* Annot., 94 A.L.R. 1239, 1240 (1935).

The distinction between rescission, forfeiture, and the termination of a vendee's contractual rights because of his failing to perform his obligations is an important one. Annot., L.R.A. 1918B, 547-549; Annot., 59 A.L.R. 189, 215 (1929); see 31 A.L.R. 2d 10; 8A Thompson, Real Property §§ 4465, 4466 (1963 repl.). It depends ordinarily not only upon the acts of the parties but *the intent* with which they are done.

> "Rescission is not merely a termination of contractual obligations. It is abrogation or undoing of it from the beginning. It seeks to create a situation the same as if no contract ever had existed. It differs from a breach of contract by abandonment or repudiation by one party, so recognized by the other. *For rescission there must be mutuality, express or implied.* The mutuality essential to rescission may be found to exist if, after breach of contract or abandonment by one party, the other by

word or act declares the contract rescinded." (Italics ours.) *Dooley v. Stillson,* 46 R.I. 332, 335, 128 Atl. 217, 218, 52 A.L.R. 1505, 1507 (1928).

Rescission may be by mutual agreement or one party may rescind because of a substantial breach by the other. 69 Am. St. Rep. 31 (1899); Annot., L.R.A. 1918B, 540, 541; Annot., 59 A.L.R. 189, 190, 215-220 (1929); Annot., 102 A.L.R. 852, 861-863 (1936); Annot., 134 A.L.R. 1064, 1075-1077 (1941); 55 Am. Jur., Vendor & Purchaser §§ 579, 581 (1946). In either case, a rescission of the contract entitles each party to be placed *in statu quo ante fuit.* A vendee in default is entitled to recover payments made even though the contract provided that on default in a payment he should forfeit them. At the same time, however, the vendor is entitled to recoup for any damages of omission or commission arising from vendee's use and occupation of the real estate. These would include, *inter alia,* a reasonable rent for the property and compensation for any destruction or depreciation which vendee caused. *Glock v. Howard & Wilson Colony Co., supra; Hurley v. Anicker,* 51 Okla. 97, 151 Pac. 593, L.R.A. 1918 B, 538; *Dooley v. Stillson, supra;* 55 Am. Jur., Vendor & Purchaser §§ 538, 542, 611, 636 (1946).

The theory of plaintiffs' case appears to be this: Defendants' wrongful demand that plaintiffs surrender possession of the property at a time when they were not in default was conduct clearly inconsistent with the contract and evinced their purpose to rescind it; plaintiffs, who were not in default, acquiesced in defendants' purpose by voluntarily surrendering possession, thereby rescinding the contract.

> "(An) implied agreement to rescind may consist in an abandonment or repudiation of the contract by one of the parties assented to or acquiesced in by the other; but to constitute rescission by mutual consent, both of these elements must be present. Conduct on the part of both the vendor and the purchaser which is inconsistent with the continuance of the contract of sale constitutes rescission by abandonment." 91 C.J.S., Vendor & Purchaser § 124 (1955).

Abandonment, however, is to be inferred only from acts and conduct which are clearly inconsistent with the contract. *Bell v. Brown,* 227 N.C. 319, 42 S.E. 2d 92.

Taking the evidence most favorable to plaintiffs as true, considering it in the light most favorable to plaintiffs, and giving them the benefit of every inference which may reasonably be deduced from it — as we are required to do, *Edwards v. Johnson,* 269 N.C. 30, 152

S.E. 2d 122 —, the jury could find the facts to be in accordance with this hypothesis. If they did so find, it would follow as a matter of law that a rescission had occurred. The court erred, therefore, in withdrawing the case from the jury and dismissing it as of nonsuit.

Reversed.

ROBERT B. ASHLEY, EMPLOYEE, v. RENT-A-CAR COMPANY, INC., EMPLOYER AND COSMOPOLITAN INSURANCE COMPANY, CARRIER.

(Filed 24 July, 1967.)

1. Master and Servant § 67—

Disability as used in the Workmen's Compensation Act refers not to physical infirmity but to a diminished capacity to earn money, and while the employee's return to work after the injury and the fact that the same wages are paid him after the injury as before create a presumption of termination of disability, such presumption is a presumption of fact and rebuttable. G.S. 97-2(9).

2. Master and Servant § 73—

Medical and hospital expenses and the cost of nursing services are not a part of, and are not included in, compensation recoverable under the Workmen's Compensation Act.

3. Same—

The provision of G.S. 97-25 that the employer should be liable for medical and nursing services for such time as such services will tend to lessen the period of disability, *held* not to preclude such payments when the disability is permanent, provided such services will tend to lessen the degree of disability.

4. Same—

Claimant was severely burned in a compensable accident. The employer continued to pay full wages after the accident and claimant gradually resumed his managerial duties as his total disability lessened. There was expert testimony that although claimant's disability was permanent, further operations would lessen the degree of disability by enabling claimant to grasp objects with his left hand, and to raise and lower his head, etc. *Held:* The employer and his insurance carrier may be held liable for such operations. G.S. 97-25.

5. Same—

Evidence tending to show that after compensable injury, claimant was totally incapacitated even after his release from the hospital, that he received nursing care at his home subsequent to his release from the hospital, and that his condition improved during the period of such nursing care, *held* to support award of compensation for such care as tending to lessen the degree of claimant's disability.

APPEAL by defendants from *McKinnon, J.*, October 1966 Civil Session of DURHAM.

Claim under Workmen's Compensation Act for unpaid medical expenses and for payment for proposed future surgical procedures.

On 7 January 1963 plaintiff was severely burned in an accident compensable under the Workmen's Compensation Act, and the resulting injuries caused him to be hospitalized from that date until 12 June 1963, and further caused him to be confined at home under care of a private nurse for the greater part of the time until May 1965. During his hospitalization plaintiff required extensive surgery, and after his discharge in June 1963 he required further surgery to remove cataracts and to amputate a finger on his right hand. Plaintiff has been paid his full salary regularly since the accident, and after his return from the hospital he resumed his managerial and supervisory duties with defendant employer progressively as his health improved. This work was conducted by plaintiff from his home.

Defendants paid all medical expenses incurred during the time plaintiff was hospitalized, and since 12 June 1963 they have paid $10,657.28 in additional medical expenses. Approximately $2,500 in medical expenses incurred by plaintiff after 12 June 1963 have not been paid by defendants.

Plaintiff filed request for hearing before the Industrial Commission to obtain payment of these unpaid medical expenses and, further, to fix defendants' liability for future medical expenses anticipated by plaintiff. Defendants filed motion before the Commission alleging that through error they had overpaid for medical expenses the sum of $10,657.28, and moved that this amount be allowed as a set-off against any compensation the Commission should find defendants owed the plaintiff.

Plaintiff testified and offered the testimony of Dr. Lewis McKee, Dr. Arthur B. Bradsher, Dr. Leonard Goldner and Mr. Eugene Allen. Defendants offered no evidence. The hearing Commissioner entered findings of fact and conclusions of law as follows:

FINDINGS OF FACT.

"1. That claimant, Robert B. Ashley, is 57 years old and on the date of the accident giving rise to this claim was employed by the defendant employer herein as manager of the Durham office; that his duties were entirely supervisory in nature and involved no manual labor.

"2. That on January 7, 1963, claimant was injured in a fire while at work and was immediately hospitalized with second

and third degree burns over approximately 65 percent of his body surface; that his eyes showed evidence of flash burns and at that time his eyelids were swollen shut; that he was unconscious and semi-conscious for approximately three months following his injury and was in the hospital continuously from the date of his injury to June 12, 1963; that he has been hospitalized on four occasions since his original hospitalization.

"3. That upon his release from the hospital on June 12, 1963, claimant was unable to even write his name; that private duty nurses were required from that date to May 1, 1965 as a result of his injury; that during this period of time by reason of his multiple burns and resultant scarring claimant had to have assistance in eating, brushing his teeth, combing his hair, dressing himself, and care for his general condition; that said nursing care was reasonably necessary and tended to lessen his period of disability.

"4. That at the time of his release from the hospital on June 13, 1963, claimant began to resume part of his former supervisory duties with the employer; that he has not maintained regular office hours, but since that date has made decisions and suggestions to the other employees covering the operation of the business, mostly by telephone from his home; that he has negotiated for purchase of new automobiles and obtained insurance coverage on them for his employer from his home; that he has done no physical labor since his injury, has not been able to do so, and will probably never be able to again engage in manual labor.

"5. That following his accident claimant developed posterior capsulor cataracts on each eye as a result of his injury; that he had no cataracts and no trouble with his eyes prior to his burns; that by October 22, 1963, his vision had deteriorated by reason of said cataracts to 20/100 in the right eye and 20/70 in the left eye; that Dr. George S. Meyer performed surgery and removed the cataracts and restored his vision to its former state of efficiency, the first of such cataract operations being performed in May of 1964; that said cataract operations were occasioned by his injury. That said operations tended to lessen his period of disability.

"6. That Dr. Arthur Bradsher now estimates claimant as having 100 percent permanent loss of his right hand and 90 per-

cent permanent loss of use of his left arm as a result of his injury.

"7. That there are very few square inches of normal skin left on claimant's body unaffected by either scarring or skin grafts; that he is unable now to look up or hold his head back due to restriction of neck and head motion by scar tissue on his anterior neck; that claimant has developed an area of scarring in the left axilla area where the arm joins the anterior chest which severely restricts movement of this arm outward and away from the body; that claimant's left hand is left in such fashion at this time that he is unable to grasp objects with it; that operative procedures by orthopedists and plastic surgeons to claimant's neck, left axilla and left hand would improve his general condition; that plastic repair of the neck contracture would permit him to raise his head and give him greater range of motion with movements of his head; that repair of the left axilla contracture would permit claimant to have greater range of motion of his left arm and hand and give him greater use of this member of his body; that operative procedures to claimant's left hand and the fingers thereon would decrease the permanent disability therein and permit him to use the hand to greater efficiency; that with such operative procedures to claimant's hand he could again grasp objects. That he is not able to do this at this time.

"8. That the operative procedures recommended by Dr. McKee and plaintiff's other physicians will tend to lessen claimant's period of disability and must be provided by the defendants.

"9. That claimant has not yet reached maximum improvement; that claimant's permanent partial disability and/or disfigurement resulting from his injury is not yet ready to be rated and will not be ready for final rating until the operative procedures recommended have been carried out."

CONCLUSIONS OF LAW.

"1. That the operative procedures now recommended by claimant's physicians will tend to lessen his period of disability and therefore must be provided by defendants. G.S. 97-25, G.S. 97-31.

"2. That the nursing care rendered claimant from the date of his injury to May 1, 1965, was reasonably necessary by rea-

son of his injury and resultant conditions and the cost of same must be provided by defendants. G.S. 97-25.

"3. That claimant's cataracts described in Finding of Fact #5 resulted naturally and unavoidably from claimant's injury and the operations for correction of same must be provided by defendants. G.S. 97-2(6), G.S. 97-25. Defendants contend the operative procedures now recommended by claimant's physicians will not "tend to lessen the period of disability," although they admit such procedures will probably reduce to some extent the amount of permanent partial disability. This position cannot be sustained. G.S. 97-31 states compensation shall be paid during the healing period and "shall be deemed to continue for the periods specified." The hand operative procedures therefore will lessen the "period" of disability if they reduce the percentage of permanent loss and the neck and axilla surgery will enable him to better perform his work. The case of *Millwood v. Cotton Mills,* 215 N.C. 519 is factually distinguishable. In that case claimant was incurably totally and permanently disabled and the "treatment" sought was not calculated to reduce her permanent disability."

Based upon the foregoing findings and conclusions, the Hearing Commissioner entered the following award:

"1. Defendants shall pay all medical, hospital, nursing, and other treatment expenses incurred by claimant on account of his injury, including but not limited to the bills incurred in connection with the claimant's cataract operations and his nursing care to May 1, 1965, when bills for same have been submitted to and approved by the Industrial Commission.

"2. Defendants shall provide the additional operative procedures and other treatment recommended by his physicians to improve the present condition of his neck, left axilla and left hand. After said procedures have been performed and claimant has attained maximum improvement, this case shall be reset for hearing in Durham upon the request of any of the parties, in the event the amount of compensation due for permanent partial disability and/or disfigurement cannot be agreed upon.

"3. Defendants shall pay all costs incurred, including an expert witness fee in the sum of $75.00 to Dr. Arthur Bradsher, Windsor; which shall include his mileage; $25.00 each to Dr. George S. Meyer, Dr. J. Leonard Goldner, and Dr. Lewis M. McKee, Durham, North Carolina.

"4. Approval of counsel fee for claimant's counsel is deferred pending final award herein."

Defendants excepted to the findings of fact, conclusions of law, and award entered by the Hearing Commissioner and appealed to the Full Commission. The Full Commission overruled defendants' exceptions and adopted the findings of fact, conclusions of law and award of the hearing Commissioner. From judgment entered by the Full Commission, defendants appealed to the Superior Court. The trial judge entered judgment overruling each of defendants' exceptions and affirming the opinion and award of the Industrial Commission. Defendants appealed.

Hofler, Mount & White and Richard M. Hutson for plaintiff.
Spears, Spears & Barnes for defendants.

BRANCH, J. Defendants contend there is not sufficient competent evidence to support the findings of fact and to justify the conclusions of law that the operative procedures now recommended by claimant's physicians or that the nursing and medical care received by claimant after 12 June 1963 tend to lessen claimant's period of disability so as to impose liability for the payment thereof on defendants.

G.S. 97-25 provides, *inter alia:* "Medical, surgical, hospital, nursing services, medicines, sick travel, and other treatment including medical and surgical supplies as may reasonably be required, for a period not exceeding ten weeks from date of injury to effect a cure or give relief *and for such additional time as in the judgment of the Commission will tend to lessen the period of disability,* . . . shall be provided by the employer. . . ." (Emphasis ours.)

G.S. 97-2(9) provides: "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 any other employment."

Defendants first argue there is no disability under the workmen's compensation statute since plaintiff is receiving the same wages he received before his injury. In support of this contention, they cite and rely on *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865, where claimant suffered an injury in the course of his employment which resulted in a permanent partial disability in the use of his back. He lost no compensable time from work, but was unable to do the same physical work because of his injury. His employer assigned

him to other duties at the same wage. All medical bills, except those of Duke Hospital and for dental services, had been paid by employer or the insurance carrier. Upon hearing plaintiff's claim, the Industrial Commission, *inter alia,* ordered that the defendants pay to the proper parties "the reasonable medical, surgical and hospital costs of treatments rendered the claimant at Duke Hospital and for payment of dental bills incurred as a result of his injury by accident, after bills have been submitted to and approved by the Commission." It found that plaintiff had lost no wages and therefore denied compensation, but retained jurisdiction in the event his injuries should diminish his wages within 300 weeks from the date of the accident. Plaintiff appealed. Affirming the conclusions and award of the Industrial Commission, this Court stated:

> "The statute provides no compensation for physical pain or discomfort. It is limited to the loss of ability to earn. 'The loss of his capacity to earn . . . is the basis upon which his compensation must be based.' . . . '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 any other employment.' . . . In short, under our Act, wages earned, or the capacity to earn wages, is the test of earning capacity, or, to state it differently, the diminution of the power or capacity to earn is the measure of compensability. . . . However urgently he 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. It stands as an unassailable answer to any suggestion that he has suffered any loss of wages within the meaning of the Act."

Branham v. Panel Company, supra, is readily distinguishable from the instant case, in that *Branham* dealt with *compensation* for disability, dependent as to amount upon whether the injury produced a permanent total, a permanent partial, a total temporary, or a partial temporary incapacity to earn wages. The Court was applying the rule in *Branham* to determine the actual difference between wages earned prior to the injury and wages earned after the injury. It is conceded that in some cases growing out of G.S. 97-30 it becomes necessary to apply this rule in order to determine the amount of *compensation due.* However, this would not be applicable to medical, surgical, hospital, and nursing services under G.S. 97-25, as medical and hospital expenses are not a part of and are not included in determining recoverable compensation. *Whitted v. Palmer-Bee Co.,*

228 N.C. 447, 46 S.E. 2d 109; *Morris v. Chevrolet Co.*, 217 N.C. 428, 8 S.E. 2d 484; *Hedgepeth v. Casualty Co.*, 209 N.C. 45, 182 S.E. 704; *Hoover v. Indemnity Co.*, 202 N.C. 655, 163 S.E. 758. We note that in *Branham* the Court approved the allowance of all medical bills without any reference to whether they were incurred within the 10-week period from the date of injury, or whether they tended to "lessen the period of disability." Further, in *Branham* the Commission found that the employee *was* partially disabled and awarded compensation for 300 weeks, less such time as he was paid full wages. It also found that he had been paid full wages *in lieu* of compensation. Therefore, under those facts the Court held that he could not receive compensation in addition to full wages and medical expenses. The determination of disability was not before the Court, and its comment concerning the definition of "disability" was mere *dictum*.

In *Hill v. DuBose*, 234 N.C. 446, 67 S.E. 2d 371, the Court considered a compensation case in which the award for partial permanent disability was based upon a finding as to the amount the claimant had earned since the date on which the total permanent disability had ceased, rather than upon his capacity or ability to earn. Holding this to be error, the Court, speaking through Chief Justice Devin, said:

> ". . . 'The disability of an employee because of an injury is to be measured by his capacity or incapacity to earn the wages he was receiving at the time of the injury. *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865; *Anderson v. Motor Co.*, *ante*, p. 372 (233 N.C. 372, 64 S.E. 2d 265). Loss of earning capacity is the criterion.' *Compensation must be based upon loss of wage-earning power rather than the amount actually received.* It was intended by the statute to provide compensation only for loss of earning capacity. Hence, the finding that claimant had earned $7 per week for the period from 25 November, 1949, to 18 July, 1950, was not the proper basis for determining the award under the statute." (Emphasis ours) Accord: *Evans v. Times Co.*, 246 N.C. 669, 100 S.E. 2d 75.

Here, the Court made *capacity* to earn the same wages, and not the particular employer's policy or willingness to pay wages for an undetermined time, the test of disability.

In the instant case it would indeed be harsh to deprive claimant of medical expenses otherwise due him on the theory that his capacity to earn wages was not diminished because his employer saw fit, from motives of generosity or otherwise, to continue to pay the

same wages after his injury. It would strain credulity to hold that an employee who was in a semi-conscious condition for ten weeks after an injury, or confined to the hospital in a cast, was not disabled. *A fortiorari* the act of his employer in paying his wages in full from the date of the injury should not be determinative of the employee's disability and thereby relieve the employer or insurance carrier from liability for hospital and medical care designed to improve his capacity to earn wages. It would be unconscionable to hold that a man who had been so severely burned and disfigured that he is unable to hold a pencil, pick up a water glass, or lift his arm high enough to comb his hair, has not suffered any diminished capacity to earn wages simply because his employer, for an indeterminate period of time, continues to pay claimant the same wages he received before the injury. The rule adopted by the majority of the decisions since *Branham v. Panel Co., supra,* is: Under the Workmen's Compensation Act disability refers not to physical infirmity but to a diminished capacity to earn money. *Anderson v. Motor Co.,* 233 N.C. 372, 64 S.E. 2d 265; *Dail v. Kellex Corp.,* 233 N.C. 446, 64 S.E. 2d 438; *Hill v. DuBose, supra; Watts v. Brewer,* 243 N.C. 422, 90 S.E. 2d 764; *Barnhardt v. Cab Co.,* 266 N.C. 419, 146 S.E. 2d 479.

The *Branham* case was last cited in *Burton v. Blum & Son,* 270 N.C. 695. However, the *Burton* case is distinguishable from the instant case in that the claimant sought to recover on the basis of continuing "total disability" from the date of the accident to the date of intestate's death, a period of approximately thirty months. The evidence showed actual employment and payment of wages during the period which completely refuted continuing total disability. In the instant case we have a claim for medical expenses which is not based on continuing total disability.

This Court said in *Pratt v. Upholstery Co.,* 252 N.C. 716, 115 S.E. 2d 27:

> "It is true that there is a presumption that disability ends when the employee returns to work. *Tucker v. Lowdermilk,* 233 N.C. 185, 63 S.E. 2d 109. But this is a presumption of fact and not of law. This Court has held that a rebuttable presumption may not under certain circumstances be weighed against the evidence."

Receipt of the same wages after injury should create no stronger presumption than the presumption which arises on an employee's returning to work. In both instances a rebuttable presumption of fact arises. *In re Will of Wall,* 223 N.C. 591, 27 S.E. 2d 728. See Annotations: 149 A.L.R. 413 and 118 A.L.R. 731.

Certainly the amount of wages received by the employee after his injury should be strong evidence of his capacity or incapacity to earn wages, but under the conditions here disclosed receipt of wages in the amount received before the injury cannot be conclusive proof that no "disability" exists. How long will employer continue to employ claimant if his condition remains unchanged? What would become of claimant if employer should not continue his business? Must claimant continue to be employed by the same employer against his will in order to receive payment of compensation or medical expenses?

In support of their position, defendants further contend that there is not sufficient evidence to support the finding that treatment will tend to lessen the period of disability. In this connection defendants rely on the case of *Millwood v. Cotton Mills*, 215 N.C. 519, 2 S.E. 2d 560, where an employee developed dementia praecox after hospitalization resulting from an accident in the course of her employment. The evidence revealed her condition to be incurable, requiring her to be confined to an institution for the remainder of her life. The Court held there was not sufficient evidence to sustain an award of additional medical attention, since there was "no evidence that treatment would tend to lessen the period of her disability."

The facts in the instant case differ in that here, not only may claimant's condition be improved and disability lessened, but there is competent medical evidence that treatment will tend to lessen the *period* of disability. Dr. Arthur B. Bradsher, a medical expert in the field of neurosurgery, *inter alia*, testified: "Operative procedures performed upon his right hand tended to lessen his period of disability. . . . I would hazard an estimate that further operative procedures on Mr. Ashley's left arm would tend to lessen his period of disability on this arm, but improvement would be limited. . . . He has improved in the fifteen months that I have seen him, partially because of medical treatment and operative procedures."

Dr. Lewis McKee, plaintiff's family physician, testified: "In my opinion, if Mr. Ashley has corrective Orthopedic and plastic surgery, it will lessen his disability. . . . Mr. Ashley is permanently disabled at the present time. Corrective surgery would lessen the period of his disability."

It would appear from the medical testimony that the treatment proposed for claimant and the treatment rendered was such that it would tend to increase claimant's capacity to work.

G.S. 97-30 in part provides: "Except as otherwise provided in § 97-31, where the incapacity for work resulting from the

> injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to 60 per centum of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than thirty-seven dollars and fifty cents ($37.50) a week, and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of injury. . . ."

Under this statute compensation for permanent partial disability is measured by the degree of disability, except in case of loss of a member as specified in G.S. 97-31. Ordinarily, where permanent disability is reduced to a lesser degree, the employer or insurance carrier is benefitted, since the amount of compensation to be paid is lessened. We do not believe the Legislature which enacted the Workmen's Compensation Act intended that there must be complete recovery within a stated time in order than an employee might continue to receive medical benefits under the statute beyond the ten-week period.

> "The Compensation Act requires that it be liberally construed to effectuate the objects for which it was passed — to provide compensation for workers injured in industrial accidents. . . . It is the duty of the court to determine whether, in any reasonable view of the evidence, it is sufficient to support the critical findings necessary to permit an award of compensation. The court does not weigh the evidence. That is the function of the Commission. If there is any evidence of substance which directly, or by reasonable inference, tends to support the findings, the courts are bound by them, 'even though there is evidence that would have supported a finding to the contrary.' *Searcy v. Branson,* 253 N.C. 64, 116 S.E. 2d 175." *Keller v. Wiring Co.,* 259 N.C. 222, 130 S.E. 2d 342.

We hold that the evidence before the Commission was sufficient to support its findings and conclusions and to sustain the award.

The judgment of the court below is

Affirmed.

ROSA WORLEY HARRELSON AND C. O. HARRELSON, D/B/A MRS. R. L. HARRELSON & COMPANY, v. CITY OF FAYETTEVILLE.

(Filed 24 July, 1967.)

1. Appeal and Error § 5—

The Supreme Court, in the exercise of its supervisory jurisdiction, may determine an appeal on its merits when decision affects the public interest, notwithstanding the appeal might be dismissed on procedural grounds.

2. Municipal Corporations § 24—

Ordinances of municipal corporations may be enacted in the exercise of the police power and thus be penal in nature, or in the exercise of proprietary powers and be in the nature of a franchise or contract.

3. Municipal Corporations § 31.1; Aviation § 1—

A municipality has authority to grant a franchise authorizing the carriage of passengers to and from the municipal airport and authorizing such carrier to enter upon the boundaries of the airport property in the performance of such service, since such authority is necessarily implied from the express statutory powers granted municipalities in regard to airports. G.S. 160-1, G.S. 63-2, G.S. 63-49(a), G.S. 63-50, G.S. 63-53.

4. Same—

A municipal corporation has the power to stipulate that a franchise for the carriage of passengers to and from an airport, with authority to enter within the boundaries of the airport property in the performance of the service, should be exclusive, notwithstanding the Utilities Commission had theretofore granted a franchise to a common carrier to operate to the boundaries of the airport, there being a provision in the ordinance that if such exclusive operation should require approval or authority of any other governmental agency it should be the duty of the franchise holder to obtain such approval or authority, G.S. 62-260(a).

APPEAL by defendant from *Clark, Special Judge*, February 27, 1967 Civil Session of CUMBERLAND.

Civil action to declare void a resolution adopted December 29, 1966, and a *proposed* franchise ordinance referred to in said resolution, and to enjoin defendant from advertising for bids for such *proposed* franchise ordinance and from granting such franchise.

A temporary restraining order was in effect until the final hearing at February 27, 1967 Civil Session, at which time the parties, waiving jury trial, agreed that the presiding judge should find the facts and enter his conclusions of law and judgment thereon.

The record contains no evidence except admissions in the pleadings and certain stipulated facts. Defendant does not except to any of the findings of fact set forth in the judgment.

The judgment, after preliminary recitals, provides:

". . . and the Court having found the following facts:

"1) Plaintiffs are residents of Cumberland County, North Carolina, doing business as a partnership under the trade name of 'Mrs. R. L. Harrelson & Company.'

"2) Defendant is a duly created North Carolina municipal corporation owning and, through its duly constituted Fayetteville Airport Commission, operating a municipal airport, named Grannis Field, located about five miles south of defendant's city limits.

"3) On 30 November 1965 the North Carolina Utilities Commission issued to plaintiffs Passenger Common Carrier Certificate No. B-207, printed certificate portion of which is attached to plaintiffs' Complaint. The passenger common carrier authority set out in this Certificate was:

" 'Docket No. B-207. PASSENGER COMMON CARRIER AUTHORITY. From the intersection of U. S. Highway 301 and Southern Avenue at the intersection of Powell Street, city of Fayetteville, over U. S. Highway 301 at the intersection of the Airport Road, with closed doors; from the intersection of U. S. Highway 301 and the Airport Road to the Airport with open doors, unrestricted. Reference: Docket No. B-23.'

"4) Since about November, 1965, plaintiffs have been conducting an airport passenger and luggage limousine service between Grannis Field and other points in Cumberland County, in and outside defendant's city limits.

"5) Plaintiffs have never held any license, franchise, certificate or other explicit authority from defendant for such business, but have been conducting same with the knowledge of defendant.

"6) Plaintiffs have several thousands of dollars invested in buses and other equipment used for the conducting of said business.

"7) On December 29, 1966, defendant, through its governing City Council, duly adopted a Resolution pursuant to which defendant, following public sealed bids, proposes to advertise for award a franchise for the furnishing of airport passenger and luggage limousine service to and from Grannis Field. A true copy of this Resolution, proposed form of franchise embodied in an Ordinance, form for Advertisement for Bids, Bid Form, and Notice of Meetings of the City Council at which passage of the Franchise Ordinance were to be heard for adoption and award are attached to plaintiffs' Complaint and form a part of the record of this case.

"8) Such Franchise Ordinance provides, and the effect of such Ordinance would be, that no person to whom such a franchise had not been awarded could go upon Grannis Field for the purpose of engaging in such airport limousine business. It further provides for regulation by defendant of fares; routes; the number, times and places of pickup and delivery at Grannis Field, on property of the

United States at Fort Bragg, North Carolina, and at other possible points; safety, insurance, and equipment standards; formula for amount of rental to be paid to defendant City by the franchisee; and for other operating controls by defendant over franchisee.

"9) Plaintiffs have a property right in their said business and in said North Carolina Utilities Commission Certificate. If, for any reason, plaintiffs could not continue said business in its present status and extent, plaintiffs would be substantially damaged, the extent of which is not ascertainable.

"10) That an actual controversy exists between plaintiffs and defendant and this Court has jurisdiction of the parties and jurisdiction of the subject matter under Article 26, Chapter 1 (1-253, *et seq.*) of the General Statutes of North Carolina.

"And the Court, after considering the pleadings of record in this matter, the stipulations of parties and counsel, the arguments of counsel, and, after having found the foregoing facts, the Court is of the opinion that the Ordinance in question is void and of no legal effect for that it exceeds the authority of the City of Fayetteville, either express or implied;

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Ordinance in question exceeds the authority of the defendant City of Fayetteville, either express or implied, and that said Ordinance be, and the same is hereby declared to be void and of no legal effect. The costs of this action are taxed against the defendant."

Defendant excepted "to the rendering and signing of the foregoing judgment" and appealed.

Quillin, Russ, Worth & McLeod for plaintiff appellees.
Harry B. Stein and Tally, Tally & Lewis for defendant appellant.

BOBBITT, J. The *proposed* franchise ordinance was adjudged void solely on the ground "it exceeds the authority of the City of Fayetteville, either express or implied." This is the ground on which it was attacked by plaintiffs. It was not challenged as unconstitutional in any respect.

The City Council has not adopted any franchise ordinance. In the resolution adopted December 29, 1966, it set forth its finding "that there is a real need for, and that the public interests and convenience require, an Airport limousine service between the Fayetteville Municipal Airport (Grannis Field) and the City of Fayetteville and any and all other terminal points to which the using public requests the service." The resolution provides for advertisement for sealed bids for a proposed franchise for the furnishing of such air-

port passenger and luggage limousine service. It approves a form of advertisement providing: (1) That "(t)he terms and conditions of such franchise limousine service shall be as fully set out in a draft of a franchise ordinance copy of which may be obtained at said City Manager's office"; and (2) that "(t)he City reserves the right to 1) award the franchise upon the several bases of amount of rental bid, quality and extent of equipment and service proposed and financial and other responsibility, and 2) reject any or all bids." The resolution also prescribed the form for submission of bids, providing in part: "The undersigned bids, as to franchise rental, the greater of: 1) $........................ per rent year, or 2) ....% of gross receipts or income of such business."

The provisions of the proposed franchise ordinance are summarized in the court's findings of fact.

Consideration of plaintiffs' status is appropriate. The certificate issued to them by the North Carolina Utilities Commission purports to confer common carrier authority along a specified route *to* the Airport. It does not purport to confer authority for operation within the boundaries of defendant's airport property. Understandably, plaintiffs prefer to *continue* to operate *within* the boundaries of defendant's airport property without restriction, regulation or payment of rental.

Plaintiffs do not allege they intend to bid for the proposed franchise. Rather, they assert they apprehend if they should bid, successfully or unsuccessfully, they might thereby become estopped to challenge the validity of the proposed franchise ordinance. Except as stated below, they do not attack specific provisions of the proposed franchise ordinance, but assert generally that defendant lacks authority to enact *such* an ordinance. They do assert "that said Resolution and Ordinance also provides for the defendant to prohibit any person, firm or corporation from going upon Grannis Field for the pickup or delivery of passengers and baggage unless such person, firm or corporation shall have obtained a 'franchise' from the defendant municipal corporation."

Defendant having raised no question with reference thereto, we pass, without decision, the doubtful question as to whether plaintiffs' status entitles them to maintain this action. Since the public is affected, particularly the patrons of the airlines and airport facilities, we deem it appropriate to consider these questions: (1) Whether defendant has legislative authority to grant a franchise or enter into a contract on terms similar to those set forth in the proposed franchise ordinance, and (2) whether an *exclusive* franchise or contract for the proposed airport limousine service may be granted or made.

Statutory provisions pertinent to the authority of defendant to

enact a franchise ordinance *such* as that proposed include those set out below.

G.S. Chapter 160 is entitled "Municipal Corporations." In Article 1, entitled "General Powers," it is provided: "Every incorporated city or town is a body politic and corporate, and shall have the powers prescribed by statute, and those necessarily implied by law, and no other." G.S. 160-1. In considering this statute, this Court has held: "It is an established rule that a municipal corporation is authorized by implication to do an act if the doing of such act is necessarily or fairly implied in or incident to the powers expressly granted, or is essential to the accomplishment of the declared objects and purposes of the corporation." *Green v. Kitchin,* 229 N.C. 450, 453-454, 50 S.E. 2d 545, 547, and cases cited; 37 Am. Jur., Municipal Corporations § 112; 62 C.J.S., Municipal Corporations § 117a.

G.S. Chapter 63 is entitled "Aeronautics." Article 1 thereof, entitled "Municipal Airports," consisting of G.S. 63-1 through G.S. 63-9, is a codification of the statute enacted as Chapter 87, Public Laws of 1929. G.S. 63-2 provides: "The governing body of any city or town in this State is hereby authorized to acquire, establish, construct, own, *control,* lease, equip, improve, *maintain, operate,* and *regulate* airports or landing fields for the use of airplanes and other aircraft, either *within* or *without* the limits of such cities and towns and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such city or town." (Our italics.)

Article 6 of Chapter 63, entitled "Public Airports and Related Facilities," consisting of G.S. 63-48 through G.S. 63-58, is a codification of the statute enacted as Chapter 490 of the Session Laws of 1945 and amendments thereto. One purpose of the 1945 Act, as declared in the caption thereof, was "to make uniform the law with reference to public airports."

G.S. 63-49(a), in pertinent part, provides: "Every municipality is hereby authorized, through its governing body, to acquire property, real or personal, for the purpose of establishing, constructing, and enlarging airports and other air navigation facilities and to acquire, establish, construct, enlarge, improve, *maintain,* equip, *operate,* and *regulate* such airports and other air navigation facilities and structures and *other property incidental to their operation,* either *within* or *without* the territorial limits of such municipality and within or without this State; to make, prior to any such acquisition, investigations, surveys, and plans; to construct, install, and maintain airport facilities for the servicing of aircraft and *for the comfort and accommodation of air travelers;* and to purchase and

sell equipment and supplies as an incident to the operation of its airport properties." (Our italics.)

G.S. 63-50 provides, in pertinent part, that "the acquisition, establishment, construction, enlargement, improvement, *maintenance,* equipment and *operation* of airports and other air navigation facilities, and the exercise of any other powers herein granted to municipalities, are hereby declared to be public, governmental and municipal functions . . ." (Our italics.)

G.S. 63-53 provides that, *"(i)n addition* to the general powers in this article conferred, and *without limitation thereof,"* a municipality is specifically authorized, as provided in subsection (3), *inter alia,* "to confer the privileges of concessions of supplying upon its airports goods, commodities, things, *services* and *facilities;* provided that in each case in so doing the public is not deprived of its rightful, equal, and uniform use thereof." (Our italics.) Subsection (6) authorizes a municipality "(t)o exercise all powers necessarily incidental to the exercise of the general and special powers herein created."

G.S. Chapter 62 is entitled "Public Utilities." Article 12 thereof, entitled "Motor Carriers," consists of G.S. 62-259 through G.S. 62-279. G.S. 62-260(a) in pertinent part provides: "Nothing in this chapter shall be construed to include persons and vehicles engaged in one or more of the following services by motor vehicle if not engaged at the time in the transportation of other passengers or other property by motor vehicle for compensation: . . . (4) Transportation of passengers to and from airports and passenger airline terminals when such transportation is incidental to transportation by aircraft."

"The ordinances of a city are of a dual nature. They may be in effect local laws, or they may constitute contracts. The grant of a franchise to a street car company, and its acceptance of the same, constitute a contract." *State of Washington v. Seattle & R. V. Ry. Co.,* 1 F. 2d 605. Accord: *City of Brunswick v. Myers,* 357 Mo. 461, 209 S.W. 2d 134; *Kansas City Power & Light Co. v. Town of Carrollton,* 346 Mo. 802, 142 S.W. 2d 849; *Yellow Cab Co. v. City of Chicago,* 396 Ill. 388, 71 N.E. 2d 652.

McQuillin, in his classification of ordinances, refers to "ordinances granting franchises, special privileges, etc., which may be termed franchise or contract ordinances." 5 McQuillin, Municipal Corporations § 15.10 (3d ed.).

The provisions of the proposed franchise ordinance are contractual, not penal. They purport to provide for and regulate limousine service on Fayetteville's airport property and between a designated

area on its airport property and Fayetteville and also between a designated area on its airport property and Fort Bragg.

Our decisions establish: The construction, maintenance and operation of a municipal airport is not a necessary expense within the meaning of Article VII, Section 7, of the Constitution of North Carolina. *Sing v. Charlotte,* 213 N.C. 60, 195 S.E. 271. It is for *a public purpose, Turner v. Reidsville,* 224 N.C. 42, 29 S.E. 2d 211; *Reidsville v. Slade,* 224 N.C. 48, 29 S.E. 2d 215; *Airport Authority v. Johnson,* 226 N.C. 1, 36 S.E. 2d 803; *Rhodes v. Asheville,* 230 N.C. 134, 52 S.E. 2d 371, reh. den., 230 N.C. 759, 53 S.E. 2d 313. This Court held in *Rhodes v. Asheville, supra,* that the construction, maintenance and operation by a municipality of an airport is *a proprietary function,* as distinguished from a governmental function; hence, the municipality may be held liable in tort for the negligent operation thereof. Accord: 8 Am. Jur. 2d, Aviation § 58; Annotation, 66 A.L.R. 2d 634, 636.

Decision in each of the following cases is based in part on the ground that the municipality, in making a contract or granting a franchise for limousine service at a municipal airport, was acting in a proprietary capacity. *Miami Beach Airline Service v. Crandon,* 159 Fla. 504, 32 So. 2d 153, 172 A.L.R. 1425; *North American Co. v. Bird,* 61 So. 2d 198 (Fla.); *Ex Parte Houston,* 93 Okla. Crim. 26, 224 P. 2d 281; *Stone v. Police Jury of Parish of Calcasieu,* 226 La. 943, 77 So. 2d 544; *Oakland v. Burns,* 46 Cal. 2d 401, 296 P. 2d 333.

This statement from the opinion of Terrell, J., in *Miami Beach Airline Service v. Crandon, supra,* is pertinent: "When given authority to do so a governmental entity is expected to perform a proprietary function under like rules and regulations as those pursued by private individuals. No one would contend that a private or a public service corporation would be barred from entering into an exclusive contract like that involved here if the necessities of its business required. When county commissioners are clothed with a proprietary function wherein they are responsible to the public for prompt and efficient service, it necessarily follows that they must be clothed with power to enable them to meet such requirements and we think the act in question does this."

In Ex Parte Houston, supra, after reviewing relevant Oklahoma statutes, the court, in opinion by Powell, J., said: "Here the City of Oklahoma City was acting in a proprietary capacity as distinguished from a governmental capacity. This fact is the key to the solution of this case. (Citations). And from the facts heretofore recited, we find that it owned and was operating the municipal airport terminal under authority of the Uniform Airport Act, supra, and under such

authority obligated itself contractually with the various airlines using the airport terminal facilities, to perform certain usual, necessary and incidental services therewith connected. An airport terminal exists for the purpose of handling passengers arriving and departing by air line, and the Will Rogers Municipal Airport being approximately eight miles southwest of downtown Oklahoma City, the transportation of passengers to and from the airport to Oklahoma City and looking after their comfort, safety and convenience is the primary responsibility of Oklahoma City as owner and operator of said terminal. To us it appears reasonable that the power to acquire and operate a proprietary function implies all necessary power to operate it efficiently."

In our opinion, and we so decide, our statutory provisions, quoted above, authorize defendant to award a contract granting to the franchisee the right to provide limousine service upon terms and conditions such as those set forth in the proposed franchise ordinance.

The court found as a fact that "(s)uch Franchise Ordinance provides, and the effect of such Ordinance would be, that no person to whom such a franchise had not been awarded could go upon Grannis Field for the purpose of engaging in such airport limousine business." Assuming defendant's authority to grant a franchise as indicated, whether it should grant an exclusive franchise or nonexclusive franchises is a matter for determination by its City Council in the exercise of its discretion and judgment.

In Rhyne, Municipal Law § 22-16, it is stated: "The courts have unanimously upheld the power of a municipal corporation or operator of a publicly owned airport to grant an exclusive right to one company to furnish taxicab, limousine or airline bus service at its airport on the ground that this is the only way a city can carry out its duty to see that adequate, safe, orderly and reliable ground transportation is provided to airline passengers at all times." This statement is fully supported by each of the following cases: *Miami Beach Airline Service v. Crandon, supra; North American Co. v. Bird, supra; Ex Parte Houston, supra; Stone v. Police Jury of Parish of Calcasieu, supra; Oakland v. Burns, supra; Rocky Mountain Motor Co. v. Airport Transit Co.,* 124 Colo. 147, 235 P. 2d 580; *Associated Cab Co. v. Atlanta,* 204 Ga. 591, 50 S.E. 2d 601; *Hertz Drive-Ur-Self System v. Tucson Airport Auth.,* 81 Ariz. 80, 299 P. 2d 1071.

In 8 Am. Jur. 2d, Aviation § 56, this statement, based on decisions cited above and others, appears: "It has been consistently held that a governmental body or authority, as owner and operator of a public airport, can lawfully and properly grant an exclusive taxicab or limousine or car-rental concession at the airport." Also,

see Annotation, "Validity, construction, and operation of airport operator's grant of exclusive or discriminatory privilege or concession," 40 A.L.R. 2d 1060.

The proposed franchise ordinance contains the following provision: "If any route, condition of service or other aspect of Franchisee's operation or business shall require approval or authority of or from any person, agency, or governmental or other authority than the City, it shall be Franchisee's responsibility, alone, to obtain same, and provide proof of such authority to City before commencing operations under this franchise."

As indicated, no specific provision of the proposed franchise ordinance, except that granting exclusive rights to the franchisee, was challenged by plaintiffs. Decision on this appeal is that a franchise ordinance of the nature of that proposed does not exceed the authority of the City of Fayetteville. For this reason, the judgment of the court below is reversed; and, upon certification of this opinion, the court will enter judgment dismissing the action and taxing plaintiffs with the costs.

Reversed.

BESSIE ABBOTT TERRELL v. JOSEPH THEODORE TERRELL.

(Filed 24 July, 1967.)

1. **Reference § 10—**

The Superior Court upon review of exceptions to the referee's findings of fact must review the evidence, determine the credibility of the witnesses and form its own judgment as to the facts and the law, and therefore where the evidence in regard to a particular finding is conflicting and sufficient to support contrary findings, the court may set aside the referee's finding and substitute a contrary finding of its own supported by the evidence.

2. **Partnership § 3; Husband and Wife § 14— Evidence held to support finding that realty was held by parties as tenants by the entirety and not as tenants in partnership.**

The wife testified that she and her husband operated a partnership business, and her evidence was to the effect that the real estate held by herself and husband was purchased with partnership funds solely for the operation of the partnership business. The wife introduced a written partnership agreement stipulating that husband and wife were partners in the business and each owned one-half of the assets. The husband testified to the effect that there was no partnership agreement prior to the execution of the written instrument and that he signed the written in-

strument because she tricked him by stating that if he did so she would come back and live with him. The documentary evidence tended to show that the land was conveyed to the husband and wife prior to the execution of the partnership agreement. *Held:* On appeal upon exception to the referee's finding of facts the court had authority to set aside the referee's finding that the real estate was held by the husband and wife as partner ship property and had authority to substitute a finding that the real estate was held by the husband and wife as tenants by the entirety.

3. Evidence § 27; Husband and Wife § 14—

The rule that a written instrument may not be contradicted or varied by parol applies to the nature and quality of an estate conveyed by deed and in the absence of anything to prevent the application of this rule, a deed to husband and wife, nothing else appearing, vests title in them as tenants in the entirety, and a different estate may not be established by parol.

4. Husband and Wife § 15; Partnership § 9—

In the wife's action for dissolution of a partnership existing between herself and husband and for an accounting of the partnership assets, the wife is not entitled to one-half of the rental value of real estate used in the operation of the partnership when such real estate is held by the parties as tenants by the entirety, since the husband alone is entitled to the rents and profits to the exclusion of the wife.

APPEAL by plaintiff from *Cowper, J.*, September 1966 Assigned Non-Jury Session of WAKE.

Civil action for the appointment of a receiver of the partnership business and for an accounting between the parties.

Plaintiff and defendant are husband and wife. Plaintiff in her complaint alleges in substance as follows: She and defendant have been partners trading and doing business under the firm name and style of Terrell's Grocery on N. C. Highway #54 in the town of Cary, Wake County. Attached to the complaint is an agreement between her and her husband entered into on 18 March 1965, and made a part of the complaint, which states in substance that she and her husband agree to and with each other as follows: (1) They own as partners that business in the town of Cary known as Terrell's Grocery; and (2) they each own in said business one-half of the assets of said business and are each entitled to one-half of the income therefrom, and that each shall have equal rights as partners in the management and operation of the partnership business. The defendant has usurped complete control and possession of the entire business of the partnership and refuses to account to plaintiff for any share of the profits, and defendant is appropriating all earnings to his own use and benefit. Defendant is wasting and dissipating the assets of the partnership to the detriment of plaintiff, and has repeatedly threatened to destroy said business in its entirety rather

than account to this plaintiff for her just share of the earnings and profits. Plaintiff is entitled to a dissolution of the partnership, and plaintiff knows of her own knowledge that the partnership business is highly profitable and that for many years it has earned a large net income which should have been available to the owning parties in equal shares in excess of $500 per month. Plaintiff has no income or means of livelihood except the interest in said partnership business and the income therefrom.

Defendant filed no answer to the complaint and on 19 July 1965 Bailey, Judge Presiding, entered a judgment by default and inquiry adjudicating, among other things, as follows: (1) That plaintiff is entitled to a partnership accounting, and that she have and recover judgment against the defendant for such sum as she may be entitled to receive upon a full accounting between the partners owning and operating Terrell's Grocery; (2) that all the issues, both of fact and of law, incident to the taking of a full accounting for the profits of said partnership and all the assets of said partnership be referred to the Honorable Basil L. Sherrill, who will hear the evidence of both plaintiff and defendant and report his findings of fact and conclusions of law to this court in the manner prescribed by law not later than 1 September 1965.

On 27 April 1965, Carr, Judge Presiding, entered an order appointing Gilbert L. Winfree receiver of Terrell's Grocery operated and owned by plaintiff and defendant as partners. On 28 May 1965, Carr, Judge Presiding, entered an order appointing Gilbert L. Winfree permanent receiver; and restraining all persons, firms, and corporations from interfering in any manner with the property or assets of said Terrell's Grocery, or with the receiver in the exercise of his duties.

Basil L. Sherrill, referee, filed his report as referee on 27 July 1966 in the office of the clerk of the Superior Court of Wake County. In his report he recites that both parties were present and introduced evidence, and that documentary evidence was also introduced. The referee made the following findings of fact:

> "1. That a partnership between the parties hereto is in existence has been found as a fact by the Honorable Leo Carr, Judge of the Superior Court, and that question is not before the Referee.
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> "2. By stipulation and agreement the period for which an accounting is to be had begins with the date of December 1, 1963.
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> "3. That title to the land and buildings comprising the business of Terrell's Grocery, in Cary, North Carolina, on Highway

N. C. #54, is in the name of Joseph Theodore Terrell and Bessie Abbott Terrell.

"4. That the land and buildings used in connection with the partnership was purchased in or about 1954 or 1955 with funds derived from sale of other partnership property and from the proceeds of profits derived from the partnership.

"5 That the evidence regarding earnings of the partnership were inadequate, and that no evidence of earnings for the year 1965 have been placed in evidence before the Referee. That income tax returns for the years 1962, 1963, and 1964 for Joseph T. Terrell show net income of $3,427.09, $2,399.63, and $2,386.30, respectively, and this income is reported as derived entirely from operation of Terrell's Grocery. No partnership tax returns were ever filed.

"Sales tax returns in each year are consistent with income tax returns, and show gross sales for 1962, 1963, and 1964 of $124,620.38, $134,403.12, $130,048.77, respectively.

"That an examination of bank statements and cancelled checks offered into evidence show nothing concerning income, due to the fact that the total of all checks paid for stock of goods is about one-half of the gross sales shown on the sales tax returns. Total of deposits in the bank do not equal one-half of reported sales in months selected for examination. The ledger book record of receipts is consistent with sales tax receipts, notwithstanding the absence of deposits in the bank.

"6. That no records were kept of the amount of groceries or gasoline used for personal consumption, and that no salaries were taken by anyone during the operation of the partnership.

"7. That since July 2, 1965, the date on which the Court approved a sale of the business by a receiver, only the land and building used in the partnership must be accounted for in a partnership accounting.

"8. Most of the evidence at the March 4, 1966 Referee's Hearings concerned payments to the plaintiff by the defendant, either directly or indirectly for her benefit. There is no evidence that any of such payments were intended in any manner to be any part of a partnership accounting. Further, there is no indication of whether or not any part of said payments were intended as a part of the husband's duty to support his wife.

"9. There is no evidence before the Referee showing cash income other than that shown on the tax returns, and the Referee finds that the income from the partnership for the period of December 1, 1963, to July 2, 1965 was $4,332.00, and plaintiff

is entitled to one-half of this sum. There is evidence tending to show that each of the parties subsisted on the Terrell's Grocery Store.

"10. If the Referee should have any authority to make a finding as to the validity of the partnership agreement after the finding by Judge Carr that a partnership does exist, the Referee finds as a matter of fact that not sufficient evidence of fraud has been shown to void the partnership agreement which has been introduced in this action.

"11. The fair market value of the real property at 101 West Durham Road in Cary, North Carolina is $25,000.00 and the fair rental value thereof is $250.00 per month.

"12. The Referee finds that the fair rental value of the property at 101 West Durham Road in Cary, North Carolina for the period July 2, 1965 until the date of this report, July 22, 1965 *(sic)* is $3,166.66, and that plaintiff is entitled to one-half of this sum."

Based upon the foregoing facts the referee submitted to the court his conclusions of law as follows:

"1. That the land and buildings used in conjunction with Terrell's Grocery is held as tenants in partnership, and not as tenants by the entirety. That based on the facts found, the tenancy in partnership is still in existence insofar as the land and buildings are concerned, even after July 2, 1965, the date on which the business was sold by the court appointed receiver."

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

"1. That the plaintiff have and recover $3,749.33 of the defendant, and that the defendant be taxed with the costs of this action."

On 18 August 1966 defendant filed exception to the referee's findings of fact Nos. 4 and No. 8, *(sic)* and to his conclusion of law to the effect that the land and buildings used in connection with Terrell's Grocery were held as tenants in partnership and not as tenants by the entirety on the ground "that there is no evidence in the record as to any tenancy in partnership in the lands and buildings; all of the evidence in the record being directed to the partnership in the business operations of Terrell's Grocery and Market."

On 22 August 1966 defendant filed an amendment to his excep-

tions to the referee's findings of fact that "the real property was held as tenancy in partnership, for that no contract establishing the partnership was executed in accordance with G.S. 52-6 as required by law."

On 30 September 1966 Cowper, Judge Presiding, at the September 1966 Assigned Non-Jury Session of Wake, entered a judgment in which after reciting that plaintiff and defendant appeared before him, both being represented by their attorneys of record, and the court having considered the various and several exceptions of the defendant to the findings of fact and conclusions of law contained in the report of the referee, entered judgment as follows:

"1. That the Referee's findings of facts Nos. 4, 7, and 12 are in error for that there is not sufficient evidence in the record to indicate that any of the real property was purchased or intended to be purchased as partnership property, and plaintiff has failed to prove by the greater weight of evidence that any of the property was purchased or intended to be purchased as partnership property and the record indicates that the real property was purchased by the plaintiff and defendant as tenants by the entirety. Therefore, Referee's findings of facts Nos. 4, 7, and 12, are hereby found to be in error as to those findings or portions thereof reading as follows:

" '4. That the lands and buildings used in connection with the partnership was purchased in or about 1954 or 1955 with funds derived from sale of other partnership property and from the proceeds of profits derived from the partnership.'

" '7. That since July 2, 1965, the date on which the court approved the sale of the business by a Receiver, only the land and buildings used in the partnership must be accounted for in a partnership accounting.'

"That portion of Referee's findings of fact No. 12, reading: '. . . that the plaintiff is entitled to one-half of this sum.' (the fair rental value of the property at 101 West Durham Road).

"2. That the Referee's findings of law that the land and buildings used in connection with Terrell's Grocery are held by plaintiff and defendant as tenants in partnership and not as tenants by the entirety and that such tenancy in partnership remains in existence is in error for that there is insufficient evidence before the Referee and before the court upon which it could be found that the real estate was held by plaintiff and defendant as tenants in partnership for that there is insufficient

evidence to support a finding of tenancy in partnership and plaintiff has failed to prove by the greater weight of evidence that any of the real property was held by plaintiff and defendant as tenants in partnership, the greater weight of evidence instead showing that all of the real estate was held by plaintiff and defendant as tenants by the entirety.

"3. That no part of the partnership agreement heretofore adjudged to exist in this action in any way affected or changed the ownership of the real property owned by plaintiff and defendant as tenants by the entirety as aforesaid, but affected only the business operated as Terrell's Grocery.

"4. That except as heretofore found by the court, and as necessarily modified by such findings of the court the Referee's findings of facts Nos. 1, 2, 3, 5, 6, 8, 9, 10 and 11, are correct and based upon competent evidence and the law applicable thereto.

"NOW, THEREFORE, it is ORDERED, ADJUDGED AND DECREED by the court:

"1. That the court hereby finds that the lands and buildings used in connection with Terrell's Grocery are held by plaintiff and defendant as tenants by the entirety.

"2. That the Referee's findings of facts Nos. 1, 2, 3, 5, 6, 8, 9, 10, and 11, be and the same are hereby approved and confirmed, save as necessarily modified by the adjudication that the real property is owned by plaintiff and defendant as tenants by the entirety.

"3. That the plaintiff have and recover of defendant the sum of $2,166.00.

"4. That the costs of this action be taxed against plaintiff and defendant in equal shares."

From this judgment, plaintiff appeals.

Allen Langston for plaintiff appellant.
Albright, Parker & Sink by Henry H. Sink for defendant appellee.

PARKER, C.J. Plaintiff assigns as error that part of Judge Cowper's judgment that the referee's findings of fact Nos. 4, 7, and that part of 12 quoted below are found to be in error:

"That portion of Referee's findings of fact No. 12, reading: '. . . that the plaintiff is entitled to one-half of this sum.' (the fair rental value of the property at 101 West Durham Road)."

Plaintiff contends in her brief as follows:

"Mrs. Terrell filed with the Court, without objection by the defendant, her affidavit stating that she knows of her own knowledge that each and every parcel of real estate now owned by the partners was purchased with partnership funds; that all mortgages placed on the land have been paid back out of partnership earnings. That a part of the land which they have owned at one time or another has been sold in the course of partnership business operations and that without exception all of the money received from the sale of any such land has been treated as partnership money and used as capital funds belonging to the partnership in the normal operation of its business (R. pp. 11 and 12); that she knows that the sole purpose of acquiring any of the land and sole purpose of retaining titles thereto has been to secure for the partnership a permanent place from which to carry on its operations.

"In her oral testimony before the Referee, Mrs. Terrell again testified that the land was bought as a part of the partnership business and for the benefit of the business. (R. pp. 27 and 28). That when land was sold the money was put back into the business, that the buildings were used for business purposes and that all money paid out or received on or from the land was treated as money of Terrell's Grocery. (R. pp. 28, 30).

"In his oral testimony the defendant confined himself entirely to matters having absolutely nothing to do with the ownership of the land. He at no point raised the slightest contention that they owned this land in any right other than as tenants in partnership. (R. p. 32).

"In short, all the evidence before the Referee shows, therefore, that the real estate owned by the Terrells was bought by them as partners and for the use of their partnership. There is absolutely no evidence that it was bought for any other purpose. Furthermore, the evidence shows clearly that it was paid for with partnership money, and that the real estate has been used solely for the benefit of the partnership."

The written agreement entered into by plaintiff and defendant on 18 March 1965 is attached to the complaint and made a part thereof. This agreement recites that the parties hereto now and for

several years prior to signing this agreement have owned as partners that business in the town of Cary which is known as Terrell's Grocery, and the parties hereto desire to enter into this written statement ratifying and confirming their respective ownership in said business. In this agreement the parties agreed with each other as follows: (1) That they own as partners that business in the town of Cary known as Terrell's Grocery; and (2) that they each own one-half of the assets of said business and are each entitled to one-half of the income therefrom, and that each shall have equal rights as partners in the management and operation of the partnership business.

In the hearing before the referee, J. T. Terrell, the defendant, testified as follows:

> "DIRECT EXAMINATION by Mr. Sink:
> I entered into a partnership agreement on the 18th day of March, 1965. There was no partnership prior to that time. There is no date for the beginning of the partnership because she is not a partner. I signed the agreement on the promise she was going to come back and live with me. That's why I say she tricked me. I signed the agreement because she says we are going back to live together and she did not want to go back until she was satisfied I was going to sign that paper.
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> "CROSS-EXAMINATION by Mr. Langston:
> Mrs. Terrell and I were living together up until maybe two years ago until about the 10th of December, 1963. She hasn't been no partner all these years. She worked there for some of these years. She worked in the store some. After she quit her job she worked there regularly and cooked and kept house. I didn't pay her anything for it and I ain't been paid neither. Both of us worked for free.
>
> "I signed it so I don't see where there is any difference. It was my mistake. I have done and done it and there is nothing I can help about it. The 18th day of March, 1965, would be my date as to date at which a partnership began because the way she got it would tricking me and I had an honest opinion about it that we was going back and living together."

In *Davis v. Davis,* 184 N.C. 108, 113 S.E. 613, the proper procedure when a judge reviews a referee's report is as follows:

> "When exceptions are taken to a referee's findings of fact and law, it is the duty of the judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. He is not permitted to do this in a perfunctory way,

> but he must deliberate and decide as in other cases — use his own faculties in ascertaining the truth, and form his own judgment as to fact and law. This is required not only as a check upon the referee and a safeguard against any possible error on his part, but because he cannot review the referee's findings in any other way."

The report of the referee is under the control of the court, and the power of review is a broad one and the court may "set aside, modify, or confirm it in whole or in part." G.S. 1-194.

It is manifest from the record that Judge Cowper believed the testimony of Joseph Theodore Terrell, the defendant, that there was no partnership agreement between plaintiff and himself and although it is stated in the agreement attached to the complaint and made a part thereof that the parties for several years prior to the signing of this agreement on 18 March 1965 were partners, plaintiff "tricked" him into signing this agreement upon her promise that she was going to come back and live with him, which in fact she did not do. In addition, the referee's unchallenged finding of fact No. 5 "that no partnership tax returns were ever filed," fortifies defendant's testimony. It is equally manifest that Judge Cowper did not believe the testimony of plaintiff that there was any partnership before that date.

"It is fundamental, of course, that a referee's finding of facts must be predicated on, and reasonably warranted by, the evidence before him and not be contradictory thereof; he cannot infer and find a material fact directly contrary to the evidence before him on a reference." 45 Am. Jur., References, § 35.

Judge Cowper in the exercise of his duty to consider the evidence given, in the performance of the duty imposed upon him by virtue of the provisions of G.S. 1-194, held that the referee's findings of fact Nos. 4, 7, and part of 12 are in error so that there is not sufficient evidence in the record to indicate that any of the real property purchased or intended to be purchased is partnership property, and plaintiff has failed to prove that any of the property was intended to be purchased as partnership property, and the record indicates that the real property was purchased by plaintiff and defendant as tenants by the entirety. His finding has support in the evidence and is binding upon us upon review, and he was correct in setting aside the referee's findings of fact Nos. 4, 7, and 12 to the extent as indicated. Plaintiff's assignments of error in that respect are overruled.

Plaintiff assigns as error the referee's conclusion of law and Judge Cowper's adjudication that the lands and buildings in connection with Terrell's Grocery are held by plaintiff and defendant as tenants

by the entirety. The judge may set aside the referee's findings of fact and conclusions of law in whole or in part and may substitute his findings of fact and conclusions of law in whole or in part. *Ramsey v. Nebel,* 226 N.C. 590, 39 S.E. 2d 616. However, there must be some competent evidence to support the findings of fact by the judge. *Threadgill v. Faust,* 213 N.C. 226, 195 S.E. 798.

The referee in his report states, "Documentary evidence was also introduced." The unchallenged findings of fact by the referee show that title to the land and buildings comprising the business of Terrell's Grocery in Cary, North Carolina, on N. C. Highway #54 is in the name of Joseph Theodore Terrell and Bessie Abbott Terrell, and were purchased in or about 1954 or 1955. At the time of the conveyance the parties were husband and wife.

Judge Moore said for the Court in *Smith v. Smith,* 249 N.C. 669, 107 S.E. 2d 530:

> " 'A conveyance of land must be in writing and comply with certain formalities, and its principal function is to evidence the transfer of a particular interest in land. . . . an agreement which contradicts express provisions of the deed . . . which "would change the essential nature" of a deed absolute, may not be shown.' Stansbury, North Carolina Evidence, Sec. 255, pp. 512 and 514. The Parol Evidence Rule applies in litigation involving the construction of the nature and quality of estates conveyed by deed. *Heaton v. Kilpatrick,* 195 N.C. 708, 143 S.E. 644; *Flynt v. Conrad,* 61 N.C. 190. A conveyance cannot be contradicted by a parol agreement, nor, in the absence of proof of fraud, mistake, or undue influence, can a deed solemnly executed and proven be set aside by parol testimony. *Walters v. Walters,* 172 N.C. 328, 90 S.E. 304; *Mfg. Co. v. Mfg. Co.,* 161 N.C. 430, 77 S.E. 233."

"A deed to husband and wife, nothing else appearing, vests the title in them as tenants by the entirety with right of survivorship." 2 Strong's N. C. Index, Husband and Wife, § 14. Nothing else appears in Judge Cowper's judgment to prevent the application of this rule. Judge Cowper was correct in adjudicating that the land and buildings used in connection with Terrell's Grocery are held by plaintiff and defendant as by the entirety.

Plaintiff assigns as error the adjudication of Judge Cowper "that the plaintiff have and recover of defendant the sum of $2,166.00." This assignment of error is overruled. The referee adjudicated that the plaintiff have and recover $3,749.33 from defendant. The referee's figure of $3,749.33 is made up from his unchallenged finding of fact No. 9 that the income from the partnership from 1 December 1963

to 2 July 1965 was $4,322.00, and half of that is $2,166.00, plus the fair rental of the property at 101 West Durham Road, Cary, for the period 2 July 1965 until the date of his report is $3,166.66, and half of that is $1,583.33. The $2,166.00 plus $1,583.33 amounts to $3,749.33, the amount the referee submitted in his report to the court that plaintiff recover from defendant. This was error because title to the property at 101 West Durham Road, Cary, was held by the parties as an estate by the entireties, and during the coverture the husband is entitled exclusively to the rents and profits to the exclusion of the wife. *Smith v. Smith,* 255 N.C. 152, 120 S.E. 2d 575; *Porter v. Bank,* 251 N.C. 573, 111 S.E. 2d 904; *Williams v. Williams,* 231 N.C. 33, 56 S.E. 2d 20; *Atkinson v. Atkinson,* 225 N.C. 120, 33 S.E. 2d 666; *Bank v. Hall,* 201 N.C. 787, 161 S.E. 484.

All plaintiff's assignments of error have been carefully considered and all are overruled. The judgment of Judge Cowper below is

Affirmed.

ELEANOR B. O'NEIL, FRASER KNIGHT O'NEIL, AND THE CITIZENS BANK AND TRUST COMPANY OF SOUTHERN PINES, EXECUTOR AND TRUSTEE UNDER THE WILL OF JOHN C. BARRON, DECEASED, v. MICHELLE O'NEIL, MOLLY O'NEIL AND MICHAEL O'NEIL, MINORS; AND THE UNBORN ISSUE OF ELEANOR B. O'NEIL.

(Filed 24 July, 1967.)

1. Executors and Administrators § 31—

The dispositive provisions of a will may not be modified by a family settlement merely because the beneficiaries may be dissatisfied with its provisions, and the courts will not substitute their judgment in contravention of the wishes of testator, but a will may be modified by a family settlement only when there exists some exigency or emergency not contemplated by testator and modification of the will in accordance with the family settlement would tend to preserve the estate and promote and encourage family accord.

2. Same—

The mere fact that a beneficiary under a will has filed a caveat does not warrant the court in approving a family agreement modifying the dispositive provisions of the will unless there is evidence before the court disclosing a *bona fide* controversy as to the validity of the will.

3. Same—

Mere allegation that caveat had been filed attacking the validity of the will on the ground of mental incapacity of grantor and allegation that the primary beneficiary had testified in a different case in regard to the mental

incapacity of testator generally, without evidence before the court disclosing that there would be evidence adduced at the caveat proceeding raising a serious question as to the validity of the will, is insufficient to invoke the equity jurisdiction of the court, and judgment approving the settlement is vacated and the cause remanded for a determination of whether there exists a *bona fide* controversy as to the will's validity.

APPEAL by P. H. Wilson, guardian *ad litem* for Michelle O'Neil, Molly O'Neil and Michael O'Neil, minors, and guardian *ad litem* for the unborn issue of Eleanor B. O'Neil, defendants, from a judgment rendered by His Honor, *John D. McConnell, Resident Judge* of the Twentieth Judicial District, in chambers, on March 8, 1967. From MOORE.

Plaintiffs instituted this civil action to obtain court approval of a "family settlement agreement" dated January 24, 1967, which modifies dispositive provisions of a paper writing dated October 7, 1964, probated in common form as the last will and testament of John C. Barron, deceased, and to obtain instructions that the trustee named in said will administer and dispose of the assets of the estate of John C. Barron in accordance with the provisions of said will *as modified* by said "family settlement agreement."

The case was submitted on the pleadings and on stipulations. The following exhibits were attached to and made a part of the complaint: (1) Exhibit A, the said will of October 7, 1964; (2) Exhibit B, first annual accounting of the executor; (3) Exhibit C, second annual accounting of the executor; (4) Exhibit D, statement of assets as of December 31, 1966; (5) Exhibit E, paper writing dated January 13, 1956, purporting to be a last will and testament of John C. Barron; and (6) Exhibit F, the "family settlement agreement" dated January 24, 1967, entered into and executed by the plaintiffs herein. The answer of the guardian *ad litem* admits categorically all allegations of the complaint.

John C. Barron, a widower, died February 23, 1965, at the age of eighty-six years. He was survived by plaintiff Eleanor B. O'Neil, his daughter and only child. Eleanor B. O'Neil, a widow, is fifty-two years of age. She has four children: (1) Fraser Knight O'Neil, a plaintiff herein, over twenty-one years of age; (2) Michelle O'Neil, eleven; (3) Michael O'Neil, ten; and (4) Molly O'Neil, eight.

The fair market value of the assets of the estate as of December 31, 1966, "after conditional payments of $200,992.31 in federal estate and North Carolina inheritance taxes during the year 1966," was $700,501.31, consisting of cash and securities valued as $668,001.31 and of real estate valued at $32,500.00. Anticipated income for 1967 is $26,733.24. These facts sufficiently disclose the nature and size of the estate.

On February 26, 1965, plaintiff Bank, which is named as executor and trustee therein, filed the paper writing dated October 7, 1964, for probate in common form as the last will and testament of John C. Barron; and on said date the Bank qualified as executor and is now acting in that capacity. The Bank stands ready to qualify and to act as trustee. The paper writing dated October 7, 1964, will be referred to hereafter as the "Will."

The "Will" provides that the entire estate, after payment of debts and funeral expenses, shall go to the Bank, as trustee, to be administered and disposed of as follows: The entire income is to be paid to Eleanor B. O'Neil during her lifetime, and at her death "the principal and accumulated income then constituting the trust estate shall be apportioned in equal shares to such of the children of my said daughter as shall then be living and to the living issue *per stirpes* of such of the children of my said daughter as shall be dead with issue then living." If any share "shall vest in any person under twenty-one years of age at the time of the vesting thereof in accordance with the foregoing provisions," such share is to be held and administered "as a separate trust" by the trustee until the beneficiary of such share attains the age of twenty-one years.

On June 22, 1965, Eleanor B. O'Neil filed a caveat to said "Will," alleging the execution thereof was obtained by fraud and undue influence and that John C. Barron, at the time of the execution thereof, lacked testamentary capacity. Fraser Knight O'Neil, upon becoming twenty-one years of age, "aligned himself with the caveator."

Pending trial of the issues raised by said caveat, the said "family settlement agreement" was entered into and executed by the Bank, Eleanor B. O'Neil and Fraser Knight O'Neil, the plaintiffs herein. It provides for modifications of said dispositive provisions of the "Will" as set forth below. In consideration thereof, the said caveators agree in substance they will interpose no objection to the probate of the "Will" in solemn form.

The said "family settlement agreement" proposes that the "Will" be modified in the following manner: As originally provided, the entire income is to be paid to Eleanor B. O'Neil during her lifetime. Upon her death, the share of each surviving child is to be held and administered by the trustee as follows: Such child is to receive the income therefrom until termination of the trust; one-third of the principal thereof upon attaining the age of twenty-five years; one-third of the "then remaining principal" upon attaining the age of thirty years; and "the entire remainder of the principal" upon attaining the age of thirty-five years. Upon the death of such child prior to termination of the trust, the trust assets are to be distributed

as such child "shall appoint by a will referring specifically to the power herein given to him or her," or, in the event of failure to exercise such power, to such child's next of kin.

It would seem that the proposed modifications do not affect the status of a grandchild whose parent predeceased Eleanor B. O'Neil. As originally provided, the share of such grandchild vests upon the death of Eleanor B. O'Neil; but if then under twenty-one years of age, the share of such grandchild is held in trust until he or she attains the age of twenty-one years.

If, after trial of the issue *devisavit vel non,* it should be adjudged that the "Will" is not the last will and testament of John C. Barron, the interests of the children of Eleanor B. O'Neil would be drastically and adversely affected in the following respects:

1. If John C. Barron died intestate, Eleanor B. O'Neil, as sole heir and next of kin, would receive in fee the entire estate.

2. If a paper writing dated January 13, 1956, purporting to be the last will and testament of John C. Barron, were probated (which the parties stipulate would take place if the "Will" is not established), Eleanor B. O'Neil, under the terms thereof, would receive in fee the entire estate.

3. Assuming Eleanor B. O'Neil received the entire estate of John C. Barron: Upon the death, intestate, of Eleanor B. O'Neil, or upon her death leaving a will in which her children are named as beneficiaries, the share each child would receive would be reduced by the prior claims of federal estate and North Carolina inheritance taxes.

4. Assuming Eleanor B. O'Neil received the entire estate of John C. Barron: If Eleanor B. O'Neil should remarry, her husband, if not a beneficiary under her will, could dissent therefrom as authorized by G.S. 30-1 and receive a portion of her estate.

Paragraphs 27 and 28 of the complaint are as follows:

"27. Eleanor B. O'Neil is strongly of the opinion that her children should not be given the unrestricted use and enjoyment of substantial sums of money at the age of twenty-one years; in the event of her death, she is fearful that her children would not be capable of managing and preserving their shares of the estate of John C. Barron at such an early age; her convictions concerning this are such that, unless the term of the trusts for her children is extended as set out in the settlement agreement hereinafter referred to, she intends to actively pursue and prosecute the caveat proceeding, despite the fact that the ultimate success of the caveat might, and

probably would, drastically diminish the amount of money and property ultimately passing to her children from the estate of John C. Barron.

"28. Because there is a *bona fide* controversy regarding the validity of the paper writing dated October 7, 1964, and because the grandchildren of John C. Barron are among the principal objects of his bounty and the parties desire to carry out the wishes of John C. Barron to preserve as much of his estate as possible for their ultimate benefit and enjoyment, and because the parties desire to avoid the expense and delay in the settlement of the estate of John C. Barron which would be occasioned by a trial of the caveat proceeding, and because the parties are convinced that postponing the beneficial enjoyment of the shares given to the children of Eleanor B. O'Neil after her death until each child is more mature and is capable of exercising sounder judgment and discretion in the management and preservation of substantial sums of money is in the best interests of each child, the parties have entered into a settlement agreement, expressly subject to approval by the Supreme Court of North Carolina, settling all matters and things in controversy among them, a copy of which settlement agreement is attached hereto and marked Exhibit F."

The court made findings of fact in accordance with the admitted allegations and stipulations. In addition thereto, the court found as a fact that "(t)here is a *bona fide* controversy regarding the validity of the paper writing dated October 7, 1964, purporting to be the last will and testament of John C. Barron, and a trial of the caveat proceeding would result in substantial expense to the estate and delay in the settlement of the estate." Upon the facts found, the court entered judgment authorizing and instructing the Bank to administer and dispose of all the assets of the estate of John C. Barron as executor and trustee pursuant to the terms of said "Will" as modified by the terms and provisions of said "family settlement agreement."

The guardian *ad litem*, as set forth in his appeal entries, excepted "to the signing of the foregoing judgment on the grounds that the facts as correctly found and set forth in the judgment do not support or justify the conclusions of law set forth in the judgment," and appealed.

Boyette & Brogden and Hoyle & Hoyle for plaintiff appellees Eleanor B. O'Neil and Fraser Knight O'Neil.

Leath, Bynum, Blount & Hinson for plaintiff appellee The Citizens Bank and Trust Company of Southern Pines.

William D. Sabiston, Jr., for defendant appellant P. H. Wilson, Guardian Ad Litem.

BOBBITT, J. There are material limitations upon the right to alter the terms of a testamentary trust by a family settlement agreement. *Carter v. Kempton,* 233 N.C. 1, 62 S.E. 2d 713; *Redwine v. Clodfelter,* 226 N.C. 366, 38 S.E. 2d 203; *Trust Co. v. Buchan,* 256 N.C. 142, 123 S.E. 2d 489; *Stellings v. Autry,* 257 N.C. 303, 126 S.E. 2d 140.

Simply stated, plaintiffs propose a substantial modification of the dispositive provisions of the "Will."

A will is not an instrument "to be amended or revoked at the instance of devisees who are merely dissatisfied with its provisions." Denny, J. (later C.J.), in *Wagner v. Honbaier,* 248 N.C. 363, 369, 103 S.E. 2d 474, 478. "It is not the province of the courts to substitute their judgment or the wishes of the beneficiaries for the judgment and wishes of the testator." Barnhill, J. (later C.J.), in *Carter v. Kempton, supra.*

"Family agreements looking to the advantageous settlement of estates or to the adjustment of family differences, disputes or controversies, when approved by the court, are valid and binding. They are bottomed on a sound public policy which seeks to preserve estates and to promote and encourage family accord." *Fish v. Hanson,* 223 N.C. 143, 25 S.E. 2d 461, and cases cited. When fairly made they are favorites of the law. *Tise v. Hicks,* 191 N.C. 609, 132 S.E. 560. However, "(t)he rule that the law looks with favor upon family agreements does not prevail if the rights of infants are unfavorably affected." *Wagner v. Honbaier, supra; In re Reynolds,* 206 N.C. 276, 173 S.E. 789.

The provisions of a will or testamentary trust may be modified by a family settlement agreement only where there exists some exigency or emergency not contemplated by the testator. *Rice v. Trust Co.,* 232 N.C. 222, 59 S.E. 2d 803; *Redwine v. Clodfelter, supra.* Here, the alleged unforeseen exigency or emergency is the filing of the caveat with resulting expensive litigation and drastic and adverse effects upon defendants in the event the "Will" should not be established. Nothing in the record suggests controversies presently exist between Eleanor B. O'Neil and defendants or any present lack of family accord.

The question for decision is whether the record before us is sufficient to support the court's finding that "(t)here is a *bona fide* controversy regarding the validity of the paper writing dated October 7, 1964, purporting to be the last will and testament of John

C. Barron." If not, the judgment must be vacated and the cause remanded.

The mere fact that a caveat has been filed, standing alone, is not sufficient ground for modification of the dispositive provisions of the will. The outcome of the litigation must be in doubt to such extent that it is advisable for persons affected to accept the proposed modifications rather than run the risk of the more serious consequences that would result from an adverse verdict.

Nothing in the record indicates evidence was offered when the case was submitted to Judge McConnell. The judgment seems to be based solely upon admissions and stipulations. Hence, its binding effect, if any, upon defendants, is predicated upon the agreements and consent of their guardian *ad litem*.

"It is well settled in this jurisdiction, at least, that in the case of infant parties, the next friend, guardian *ad litem*, or guardian cannot consent to a judgment against the infant, without an investigation and approval by the court." *Butler v. Winston*, 223 N.C. 421, 27 S.E. 2d 124. As stated by Parker, J. (now C.J.), in *Trust Co. v. Buchan, supra:* "The superior court of North Carolina in its equity jurisdiction has inherent authority over the property of infants, since it stands *in loco parentis*, and has the same jurisdiction in this respect as that of the English High Courts of Chancery. *Coxe v. Charles Stores Co.*, 215 N.C. 380, 1 S.E. 2d 848."

Plaintiffs alleged Eleanor B. O'Neil was examined adversely before a commissioner, on motion of the Bank, in the caveat proceeding. They alleged she testified, when so examined, "that her father, John C. Barron, was confused in the last year of his life about many things; that at times he did not recognize old friends; that he was uncertain as to the nature and extent of his property; that he frequently, prior thereto, stated that he felt that substantial sums of money should not be inherited by children at the age of twenty-one, and that children should not receive the unrestricted use of substantial sums of money until they were more mature, and preferably in three separate distributions at ages twenty-five, thirty, and thirty-five." Plaintiffs alleged "that Eleanor B. O'Neil contends that her sworn testimony tends to show generally that during most of the last year of his life John C. Barron lacked the capacity to understand the nature of his act and the nature and extent of his property."

Plaintiffs alleged that "the position of the Bank is, and continues to be, that the paper writing dated October 7, 1964, was drafted by an experienced and competent attorney; that it was executed by John C. Barron at a time when he was completely lucid and at a time when he had a clear understanding of the nature of

his act and the nature and value of his property and the manner in which he desired to dispose of his property; that it was properly executed by John C. Barron; and that it is in all respects a valid testamentary disposition of all the property and estate of John C. Barron."

It does not appear that a transcript of said adverse examination of Eleanor B. O'Neil was submitted to Judge McConnell. Certainly, it is not in the record presented to this Court. Moreover, neither the Bank nor the guardian *ad litem* offered evidence as to whether the "Will" constitutes a valid testamentary disposition by John C. Barron of his property and estate.

The provisions of the "Will" indicate clearly it was drawn carefully by a competent and skillful draftsman. The signature of John C. Barron appears on the last (sixth) page and on the left-hand margin of each of the five preceding pages. Three witnesses attested its execution by John C. Barron. The record discloses no information as to the circumstances under which the "Will" was drafted. Nor does the record indicate what inquiries, if any, have been made to determine what testimony the draftsman and the witnesses would give relevant to what occurred prior to and at the time of the execution of the "Will."

In the present case there is no evidence, either by testimony or affidavit, that John C. Barron did not have mental capacity sufficient to make and execute a valid will on October 7, 1964. The nearest approach to evidence to this effect is the allegation in the complaint that Eleanor B. O'Neil *had* testified in *a different* case in the general manner set forth above. In this connection, compare *Redwine v. Clodfelter, supra,* and *Wagner v. Honbaier, supra.*

Plaintiffs alleged they entered into the agreement "expressly subject to approval by the Supreme Court of North Carolina." We are constrained to hold the record submitted does not contain evidence sufficient to support the crucial factual findings upon which the validity of the "family settlement agreement" depends.

We do not hold there is no *bona fide* controversy as to the validity of the "Will." We do hold, and all that we hold, is that there is no evidence in the present record sufficient to support the court's finding that such *bona fide* controversy exists. Accordingly, the judgment of the court below is vacated and the cause is remanded for further proceedings not inconsistent with this opinion.

If there exists in fact a genuine and *bona fide* controversy as to the validity of the "Will," the proposed modifications of its dispositive provisions seem reasonable and not adverse to the best interests of the defendants.

Error and remanded.

CITY OF RALEIGH, PETITIONER, v. SCOTT G. MERCER, RESPONDENT.

(Filed 24 July, 1967.)

1. Pleadings § 12—

A motion to dismiss a proceeding because the complaint does not state facts sufficient to constitute a cause of action is in effect a demurrer, presenting the question of the sufficiency of the pleading, admitting for the purpose the truth of the factual averments well stated, and all relevant inferences of fact reasonably deducible therefrom, but not conclusions of law.

2. Municipal Corporations §§ 19, 20—

Municipalities have been given authority to make public improvements and to levy assessments against abutting private property, G.S. 160-239, G.S. 160-241, and the municipal authorities have sole power to determine the necessity for the improvements and the authority to apportion the costs by any recognized and established rules, and the courts may interfere only when there has been palpable and gross abuse of discretion on the part of the municipal authorities.

3. Same—

Where a municipality has constructed a sewer outfall line across a portion of respondent's land and levied assessments against such land, the respondent may not attack the assessments on the ground that his property was already served by adequate sewer facilities, that it was not suitable for subdivision, and that therefore he would not be benefited by the construction of the sewer line, since the necessity for such improvement is solely for the determination of the municipal authorities and the respondent's grounds of objections do not amount to a charge of arbitrariness, abuse of discretion, or *mala fides* on the part of the authorities.

4. Same—

Where a respondent asserts that assessments against his land for public improvements is discriminatory and not uniform, just and equitable, respondent is entitled to offer evidence in respect thereto, and it is error for the court to sustain the municipality's motion that respondent's appeal from the assessments be dismissed on the ground that such averments do not entitle respondent to relief.

5. Eminent Domain § 1—

The exercise of the power of eminent domain is always subject to the limitation that there must be definite and adequate provision for reasonable compensation to the owner.

6. Same; Municipal Corporations §§ 19, 20—

Where a municipality condemns a portion of a tract of land for a sewer outfall line and later assesses the owner for the public improvement, and in the condemnation proceeding the court, upon the city's objection, excludes the owner's evidence that he would receive no benefit from the proposed sewer line but nevertheless would be charged with the assessment for the improvement, *held*, upon appeal from the assessment thereafter levied, the case must be remanded for the hearing of evidence in order to insure that respondent receives reasonable compensation for the taking of the easement for the sewer outfall line.

7. Pleadings § 12—

If a demurrer is overruled, the admission for the purpose of the demurrer of the truth of the facts well pleaded ends forthwith.

APPEAL by respondent from *Cowper, J.*, September 1966 Assigned Non-Jury Session of WAKE.

This is a civil proceeding brought by the city of Raleigh, pursuant to the provisions of G.S. 160-239 *et seq.*, for the purpose of levying a special assessment against respondent and others for a sewer main outfall line.

This proceeding originated in the City Council of the city of Raleigh with the adoption of resolution No. (1965)-16 "to ascertain and compute the total cost of certain local improvements in the city of Raleigh and to make assessments against the lots or parcels of land benefiting therefrom." The resolution in Section 1 states: "That the sewer line in the Birnamwood Road from Dixie Trail west 2200 feet toward Ridge Road; Ridge Road Outfall from Dixie Trail to Ridge Road, as directed in Resolution No. 1964-660, has been completed." The amount of the assessment against the property of respondent, Scott G. Mercer, was $2,071.02.

On 6 October 1965 a notice was published stating that the assessment rolls had been completed against lots and parcels of land, among others as follows: "No. 528. Sewer line in Birnamwood Road from Dixie Trail west 2200 feet toward Ridge Road; Ridge Road Outfall from Dixie Trail to Ridge Road." This notice stated that on 18 October 1965 there would be a meeting of the City Council in the city of Raleigh to be held in the Council Chamber of the Municipal Building for the purpose of hearing objections of all persons interested who appear and make proof in relation thereto. At said hearing respondent appeared in person and with counsel and made both written and verbal objections to said Assessment Roll No. 528, insofar as the same related to his premises.

The City Council of Raleigh thereupon referred Sewer Assessment Roll No. 528 to the Public Works and Planning Committee of the city of Raleigh, where it came on for hearing on 25 October 1965, at which time respondent appeared and renewed his protest, objection, and exceptions theretofore made before the City Council. Action was deferred on this Assessment Roll No. 528 until the subsequent meeting of the said committee, at which time the said committee recommended to the City Council that said assessment roll be confirmed.

At its 26 July 1966 meeting, without further notice or hearing, the City Council of Raleigh confirmed Sewer Assessment Roll No. 528, and notice of said action was mailed to respondent by the city

of Raleigh dated 28 July 1966. Respondent, within the time prescribed by law excepted and served notice of appeal on said city of Raleigh on 3 August 1966, and thereafter, also within the time prescribed by law on 8 August 1966 completed "a statement of facts" on appeal to be served on said city, and the same was docketed in the Superior Court of Wake County, North Carolina. G.S. 160-244; G.S. 160-245.

This is a summary of respondent's statement of facts, upon which he bases his appeal (G.S. 160-245):

(1) Respondent, Scott G. Mercer, owns a lot and residence at 1515 Dixie Trail in the city of Raleigh, which he purchased and uses as a home, and not for economic development; that said premises by the nature of the terrain are not suitable for subdivision; and that said residence has been served by adequate sewer facilities for many years, and a municipal city line is at present in the public street adjoining said premises.

(2) On or about 24 November 1964 in Special Proceeding No. 9545 the city of Raleigh commenced a condemnation proceeding against him for the purpose of condemning a sewer main outfall line along the entire western and southern boundaries of his property in order to drain sewage from the entire neighborhood to the west of his land; that he filed appropriate answer to said proceeding denying, among other things, the public necessity for said line and alleging on information and belief that the said city would undertake thereafter to burden his property additionally by imposing upon it assessments for said sewer installation.

(3) In due course the said proceeding came on for hearing before commissioners appointed by the court to determine just compensation to be paid to him for the sewer easement to be condemned; upon said hearing he undertook to offer evidence tending to show that he would be damaged in part by assessments which would be levied against him on account of the sewer line which was thereby sought to be condemned; upon the tender of such evidence in said proceeding, the city of Raleigh asserted and contended that his premises received no benefit whatever from the installation which was the subject matter of said proceeding, and contended therefore that evidence of any such assessments were inadmissible in the cause, thereby procuring the court to exclude evidence of the same from said proceeding.

(4) Notwithstanding his allegations as aforesaid, the city of Raleigh on 6 October 1965 published a notice of a proposal to assess his property under Assessment Roll No. 528 and gave notice that a hearing would be held for objections and allegations thereto on 18

October 1965; that on 18 October 1965 he and his counsel appeared before the City Council and filed verbal and written objections and protests to the proposed assessment, alleging and contending that the proposed sewer installation did not in fact benefit his said premises; that the city of Raleigh had so asserted and was estopped to contend otherwise, and that said assessment should therefore not be approved. His written protest marked Exhibit "A" is attached to this statement and made a part thereof.

(5) That the City Council referred said matter to its Public Works Committee which met on 25 October 1965; that he and his counsel appeared before said committee and reiterated his objections and protests theretofore set forth, including the assertion that his premises were not benefited by said sewer installation and could therefore not be constitutionally assessed, and further asserting and alleging that the city was estopped to contend otherwise.

(6) Thereafter he received by mail on 30 July 1966 a letter from Ervie T. Glover, Revenue Collector, dated 28 July 1966, requesting payment of alleged Sewer Assessment Roll No. 528, for the sum of $2,071.02 for 688.63 lineal feet of sewer line. He received a letter on 1 August 1966 from the city clerk and treasurer advising that said Sewer Assessment Roll No. 528 was confirmed on 26 July 1966, and that thereafter he promptly filed notice of appeal to the Superior Court of Wake County, which was duly served upon said city within the time provided by law.

(7) Special Sewer Assessment Roll No. 528 is illegal and unlawful and in violation of Article V, Section 3 of the State Constitution and in violation of the Federal Constitution for that: (a) His property is owned and used by him as a home place and not for economic development; that he is not engaged in the real estate business for profit, and his premises are not suitable and not desirable to be subdivided in any manner or used in any other fashion than as a residence; that said premises are already served by adequate sewer facilities, and a municipal sewer line is available; that the sewer line for which the sewer assessment is levied is for the purpose of draining raw untreated sewage from lands lying to the north and west of respondent's property and not for the purpose of serving his said properties in any manner, and that his properties are not to be benefited in any manner; (b) that the city of Raleigh in the proceeding it instituted for the purpose of condemning lands for said sewer line in Special Proceeding No. 9545 asserted and contended that his premises are not benefited by the sewer installation aforesaid, thereby inducing the court to exclude evidence of the assessments which he alleged would ensue; that in this proceeding

for Sewer Assessment No. 528 the city undertakes to assert and contend that the identical sewer installation across his premises does in fact benefit his property and said city of Raleigh should be barred and estopped from taking a diametrically opposite inconsistent position with respect to the same such matter thereby attempting to minimize the just compensation to be paid; (c) Special Sewer Assessment Roll No. 528 is violative of Article V, Section 3 of the State Constitution for that the same constitutes a special tax and assessment on respondent, is discriminatory against him as distinguished from all other property owners of the city of Raleigh, and is not uniform, just and equitable; (d) Special Sewer Assessment No. 528 is violative of Article V, Section 3 of the State Constitution for that as constructed and located the same is not for the public purpose of the citizens which can readily be served by deepening and improving existing sewer facilities lying to the west of his property, but rather by way of procuring improvements for the city of Raleigh by means of extracting funds by assessment of his land; (e) Special Sewer Assessment Roll No. 528 is violative of the Fourteenth Amendment to the Constitution of the United States for the same constitutes the taking of property without due process of law.

Wherefore, he prays that he is entitled to have Special Sewer Assessment No. 528 declared null and void and the city permanently restrained from declaring an assessment lien arising out of and in connection with Special Sewer Assessment Roll No. 528, and for the costs of this action.

On 11 August 1966 respondent filed a motion to require the city to make Assessment Roll No. 528 more definite and certain in these particulars: (1) Whether or not Assessment Roll No. 528 embraces in its entirety 688.63 feet for a total assessment of $2,071.02, and (2) whether or not his premises will be subjected to other and further assessments on account of the sewer main, manholes and other facilities installed upon his said premises, and upon the easement sought to be condemned in Special Proceeding No. 9545.

This proceeding came on for hearing at the September 1966 Assigned Non-Jury Civil Session of Wake, at which time the city moved to dismiss the appeal on the ground "that the allegations of the Statement of Facts on Appeal do not entitle the appellant to the relief sought." Judge Cowper presiding entered a judgment granting the city's motion, and ordered that the appeal by respondent be dismissed at his cost.

From this judgment, respondent appealed to the Supreme Court.

Emanuel and Emanuel by Robert L. Emanuel for respondent appellant.

Paul F. Smith and Donald L. Smith for petitioner appellee.

PARKER, C.J. The city of Raleigh's motion to dismiss the proceeding because the complaint does not state facts sufficient to constitute a cause of action is in effect a demurrer, *Johnson v. Graye,* 251 N.C. 448, 111 S.E. 2d 595, and a demurrer presents squarely for decision the sufficiency of the pleadings, because the motion in this case for the purpose admits the truth of factual averments well stated in the statement of the case on appeal, and all relevant inferences as may be reasonably deduced therefrom. But it does not admit conclusions of law. 3 Strong's N. C. Index, Pleadings, § 12.

It appears that respondent has taken the proper statutory procedure to perfect his appeal to the Superior Court. G.S. 160-245. At least petitioner makes no contention to the contrary.

Respondent's appeal here, *inter alia,* is based upon his assertion that his property will not benefit from the proposed assessment, and also that there is no necessity for the sewer line.

The city of Raleigh was fully empowered to establish the assessment district and to assess the burdens in proportion to the benefits. G.S. 160-239; G.S. 160-241, Local Modification City of Raleigh, Chapter 1056, Session Laws 1965; *Durham v. Proctor,* 191 N.C. 119, 131 S.E. 276.

In *Raleigh v. Peace,* 110 N.C. 32, 14 S.E. 521, the Court held as correctly summarized in the third headnote in our Reports:

> "The power to levy such assessments is derived solely from the Legislature, acting either directly or through its local instrumentalities, and the courts will not interfere with the exercise of the discretion vested in the Legislature as to the necessity for or the manner of making such assessments, unless there is a want of power or the method adopted for the assessment of the benefits is so clearly inequitable as to offend some constitutional principle."

In *Tarboro v. Staton,* 156 N.C. 504, 72 S.E. 577, the recognized principle is stated as follows in the second headnote in our Reports:

> "While these assessments are upheld on the theory of special benefits conferred, and which bear some reasonable relation to the burdens imposed, authority to make them is referred to the sovereign power of taxation, which is primarily and as a rule exclusively a legislative power; and where the Legislature, or a municipal government, exercising legislative power expressly

conferred for the purpose, has provided for a local improvement of this character, its action is conclusive as to the necessity for the improvement; and in establishing general rules by any of the recognized methods imposing special assessments for its construction and maintenance and in applying these rules or methods to the property of an individual owner, the courts are permitted to interfere only in rare and extreme cases, in which it is clearly manifest that the principle of equality has been entirely ignored and gross injustice done."

In *Felmet v. Canton,* 177 N.C. 52, 97 S.E. 728, it is said:

"The right of municipalities to make these assessments for public local purposes, when acting under legislative authority properly conferred, has been very broadly upheld in this State, extending to any of the recognized methods of procedure and apportionment and including both the front-foot rule as well as the creation of local assessment districts. Being, as it is, referred to the power of taxation, it is very largely a matter of legislative discretion, usually held to be conclusive as to the necessity for the improvement, and in respect to the method of apportionment as well as the amount it only becomes a judicial question in cases of palpable and gross abuse."

Ample provision was made for a hearing by respondent if he desired to protest, and such was accorded. Respondent does not contend that the assessment against him for the construction of a sewer main outfall line was excessive or unreasonable. The fact that respondent owns a lot and residence which he uses as a home and not for economical development, and that said premises by the nature of the terrain are not suitable for subdivision, and that said residence has been served by adequate sewer facilities for many years and a municipal sewer line is at present in the public street adjoining said premises, and the further fact as alleged by him that the construction of the sewer main outfall line is not for the public purpose of the citizens which can readily be served by deepening and improving existing sewer facilities lying west of his property in the city of Raleigh by means of extracting funds by assessment of lands of respondent, and that the sewer line for which the sewer assessment is levied is for the purpose of draining raw untreated sewage from lands lying to the north and west of respondent's property and not for the purpose of serving his said properties in any manner, and that his properties are not to be benefited in any manner, are not allegations of arbitrariness, abuse of discretion, or *mala fides* on the part of the City Council, and are not grounds for holding the assessment against him null and void.

The statement of the case on appeal alleges in substance the Special Sewer Assessment Roll No. 528 is violative of Article V, Section 3 of the State Constitution, "for that the same constitutes a special tax and assessment on respondent, is discriminatory against him [Mercer] as distinguished from all other property owners of the city of Raleigh, and is not uniform, just and equitable." In our opinion, and we so hold, respondent is entitled to offer evidence in respect thereto, if he can, for a determination as to whether or not the assessment against him was so inequitable and so unjust and so discriminatory as to offend the provisions of Article V, Section 3 of the State Constitution. It is only practical equality as is reasonably attainable under the circumstances, and not absolute mathematical accuracy that is to be expected in a matter of this kind. On the record, as now presented, we think the city of Raleigh was entitled to have the assessment against respondent's property approved unless it is prohibited by Article V, Section 3 of the State Constitution.

In the statement of the case on appeal he alleges in substance that Special Sewer Assessment Roll No. 528 is violative of the Fourteenth Amendment to the United States Constitution for the same constitutes the taking of property without due process of law. In the statement of the case on appeal it appears that the city of Raleigh on 24 November 1964 in Special Proceeding No. 9545 commenced a condemnation proceeding against respondent for the purpose of condemning a sanitary sewer main outfall line along the entire western and southern boundaries of said properties in order thereby to drain sewage from the entire neighborhood to the west of said Mercer's lands. Mercer filed appropriate answer to said proceeding, denying among other things the public necessity for said lines, and alleging on information and belief that the city would undertake thereafter to burden said property additionally, by imposing upon it assessments for said sewer installation and construction. According to the record before us, there is nothing to indicate that that suit has been terminated. It is elementary learning that the requirement that just compensation be paid is guaranteed both by the Federal Constitution (Fourteenth Amendment) and the State Constitution (Article I, Section 17), and the exercise of the power is always subject to the principle that there must be definite and adequate provisions made for reasonable compensation to the owner. 2 Strong's N. C. Index, Eminent Domain, § 1.

This is said in 27 Am. Jur. 2d, Eminent Domain, § 372:

> "The question whether benefits accruing to property which has been damaged, or to property remaining after part thereof

has been taken, for the construction of a public improvement, may be set off against the compensation for the damage or for the part taken, in a situation in which the property remaining or damaged is subject to a special assessment, may arise in a great variety of situations, since the assessment of such benefits may take place either in the condemnation proceeding or in a separate proceeding, and, in the former case, benefits and damages may be assessed either separately, or the balance may be struck and assessed, while in the latter case, the condemnation proceeding may precede the assessment proceeding, or vice versa. But there is one safe standard which applies irrespective of the situation in which the question arises — that is, benefits cannot be deducted if, in a particular situation, to allow such deduction would in effect compel the condemnee to pay twice for the same benefit."

We cannot determine from the record as to whether this condemnation suit instituted by the city has been terminated. In this state of the record, we think the safe thing to do is to reverse the judgment dismissing the case and to send the special proceeding back for a hearing of evidence in order to insure that respondent receives reasonable compensation for his land taken for the construction of the sewer main outfall line.

Respondent contends in his brief the city of Raleigh is "estopped from contending that the premises of respondent are benefited from the installation of sewer facilities which are the predicate of Sewer Assessment Roll No. 528." We think it is not wise and not safe for us to determine this point, for the simple reason we are dealing with a statement of case on appeal as set forth, pursuant to G.S. 160-245, which has not been replied to by the city.

As has been said above, plaintiff's motion to dismiss is in effect a demurrer. The rule is well established with us that upon a demurrer a pleading will be liberally construed with the view to substantial justice between the parties, giving the pleader the benefit of every reasonable intendment in his favor, G.S. 1-151, and a demurrer will not be sustained unless the pleading is wholly insufficient or fatally defective. 3 Strong's N. C. Index, Pleadings, § 12. If a demurrer is overruled, the admission of the facts properly pleaded ends forthwith. *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384.

The judgment below dismissing the case is

Reversed.

CHARLIE PAUL, JOSEPH E. WILLIAMS, MILTON STYRON, THE BOARD OF DEACONS OF THE DAVIS ORIGINAL FREE WILL BAPTIST CHURCH; LESLIE STYRON, CLERK; REGINALD STYRON, TREASURER; ALL OFFICERS OF THE DAVIS ORIGINAL FREE WILL BAPTIST CHURCH; AND ROY STYRON AND GUY WILLIS, TRUSTEES OF THE SAID CHURCH; AND HARRY WILLIS, STERLING DIXON, ELMER WILLIS, WORDIE MURPHY, VAN WILLIS AND OTHERS OF THE DAVIS ORIGINAL FREE WILL BAPTIST CHURCH UNITED IN INTEREST AND PRESENTLY RECOGNIZED BY THE EASTERN CONFERENCE OF ORIGINAL FREE WILL BAPTISTS OF NORTH CAROLINA AS THE ONE AND ONLY VALID DAVIS ORIGINAL FREE WILL BAPTIST CHURCH. ALSO KNOWN AS THE CHARLIE PAUL FACTION, v. CLINTON PINER, JULIUS WILLIS, LLOYD DAVIS, ALL DEFENDANTS PURPORTING TO BE MEMBERS OF THE BOARD OF DEACONS OF THE DAVIS ORIGINAL FREE WILL BAPTIST CHURCH; AND LLOYD DAVIS, GRADY DAVIS, CLYDE STYRON, JOHNNIE DAVIS AND BOBBY DUDLEY, INDIVIDUALLY AND AS THE PURPORTED BOARD OF TRUSTEES OF THE DAVIS ORIGINAL FREE WILL BAPTIST CHURCH; AND T. O. TERRY, PURPORTED PASTOR OF THE DAVIS ORIGINAL FREE WILL BAPTIST CHURCH; AND RALPH LOWRIMORE AND OTHERS UNITED IN INTEREST WITH THE ABOVE NAMED DEFENDANTS AND KNOWN AS THE CLINTON PINER FACTION.

(Filed 24 July, 1967.)

1. Appeal and Error § 59—

An appeal from a judgment of nonsuit presents the question whether the evidence, considered in the light most favorable to plaintiff, is sufficient to be submitted to the jury, giving plaintiffs the benefit of all reasonable inferences which may be properly drawn from the evidence in their favor.

2. Religious Societies § 3—

Civil courts have no jurisdiction of purely ecclesiastical questions and controversies, and will inquire into ecclesiastical questions only to the extent necessary to determine the property rights of the contending parties.

3. Religious Societies § 2—

Where the congregation of a church is divided into two factions, title and the right to use the church property belong to that faction, whether a minority or majority, which remains faithful to the doctrines, policy and fundamental customs and rules of the denomination which were accepted and followed by the congregation prior to disagreement.

4. Religious Societies § 3—

The evidence disclosed that one faction of a congregation adhered to the national association of the denomination, while another faction adhered to the conference and the state convention of the denomination which had withdrawn from the national association, but there was no evidence of any specific acts of defendant faction which were contrary to the characteristic usages, customs, doctrines and practices of the denomination accepted by both factions before dissension. *Held:* The evidence discloses a purely ecclesiastical dispute which is not justiciable by the courts, and nonsuit was properly entered.

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

APPEAL by plaintiffs from a judgment of compulsory nonsuit entered at the close of plaintiffs' evidence by *Bundy, J.*, at the Regular 22 August 1966 Civil Session of CARTERET.

John A. Wilkinson for plaintiff appellants.
Boyce, Lake & Burns by Eugene Boyce and Wheatly & Bennett by C. R. Wheatly, Jr., for defendant appellees.

PARKER, C.J. This controversy has been before the Court on two previous occasions — at the 1965 Spring Term reported as *Conference v. Piner,* 264 N.C. 67, 140 S.E. 2d 721, and at the 1966 Spring Term reported under the same name in 267 N.C. 74, 147 S.E. 2d 581. In the former case the Eastern Conference of Original Free Will Baptists of North Carolina and its officers were parties plaintiff in addition to the plaintiffs now before the Court. The complaint sought relief against one defendant which did not similarly affect all other defendants. The Court held that there was a misjoinder of parties and causes, and reversed the order of the court below overruling defendants' demurrer. In the second case plaintiffs omitted their prayer for separate relief against one of the individual defendants, and sought the same relief against all defendants. Defendants appealed from the order overruling their demurrer, and asserted that their demurrer should have been sustained below for that two different plaintiffs, the Eastern Conference and the other plaintiffs, had pleaded two separate causes of action seeking different relief against the same defendants. The Court held that the demurrer was properly overruled. The judgment of the lower court was affirmed and the opinion suggested that the complaint be reformed to comply with the requirements of G.S. 1-122. *Conference v. Piner,* 267 N.C. 74, *supra.*

Plaintiffs reinstituted the action, deleting the Eastern Conference as a party plaintiff, and filed an amended complaint. Except for this change the pleadings are similar to those filed in the case reported in 267 N.C., *supra.*

Involved in the controversy are the Original Free Will Baptists of North Carolina hereinafter referred to as the Denomination, the Eastern Conference of Original Free Will Baptists of North Carolina hereinafter referred to as the Eastern Conference, the Davis Original Free Will Baptist Church hereinafter referred to as Davis Church, the State Convention of Original Free Will Baptists hereinafter referred to as the State Convention, the National Association of Original Free Will Baptists hereinafter referred to as the National Association, the Coastal Association of Original Free Will Baptists hereinafter referred to as the Coastal Association, the plain-

tiffs known as the Charlie Paul Faction who are, or claim to be, members (some officials) of Davis Church, and defendants known as the Clinton Piner Faction who are, or claim to be, members (some officials) of the Davis Church.

Plaintiffs' amended complaint is set forth in twenty-two pages in the record, and has attached thereto and made a part thereof voluminous exhibits of ecclesiastical documents. This complaint is characterized by verbose allegations of conclusions of law and meager factual averments. Plaintiffs' allegations are very briefly summarized as follows: That plaintiffs are recognized as the true congregation of the Davis Church by the Eastern Conference; that the Denomination was organized in this State in 1727, and has maintained a denomination with the same faith, customs, habits, and practices; that the Eastern Conference was organized in 1895 and exists under the constitution and by-laws of the Denomination and that it now represents eighty Free Will Baptist Churches; that the Davis Church was organized in 1876 under the constitution, by-laws, and discipline of the Denomination; that it was a charter member of the Eastern Conference; that it has remained an active member and has adhered to the customs, practices, and usages of the Denomination and has complied with rules of the church set out in its "Statement of Faith and Discipline" and has participated in programs and activities of the Eastern Conference and the State Convention; that prior to 1912 there existed a book of discipline for the Denomination which is now known as the "Statement of Faith and Discipline"; that the 1955 revision of this Statement was adopted by the Conference in 1955 and that this Statement is the official rule for determining the relationship between plaintiffs and defendants. Plaintiffs incorporate in their complaint the church covenant portion of the Statement of Faith and Discipline, and another section entitled "Independence of Churches" which begins with the statement "Each local church is a distinct and independent organization, with full authority to manage its own internal affairs, elect its officers, receive, dismiss, discipline, and exclude members", and concludes with the following: "The annual conference being the highest tribunal shall have final judgment over the local churches." Plaintiffs further allege that there is a connectional form of church government between the Davis Church and the Eastern Conference; that the constitution contained in the Statement of Faith and Discipline provides that the delegation from each church shall carry to the Conference or Association a statistical and financial report on the church; that the Eastern Conference has an executive committee and an examining board which ordains and disciplines ministers; that the Davis Church uses

Sunday School literature published by the Denomination; that the Davis Church enjoyed a peaceful and useful relationship with the Eastern Conference into the year 1960; that in 1960 a division and unrest appeared in the Church, led by the defendants; that the pastor resigned in August, 1960, and was succeeded by the defendant Terry in April, 1961; that defendant Terry began a campaign to take the Church out of the Eastern Conference and to basically change its organization, affiliations, customs, and practices; that in September, 1961, the Church voted not to send a delegate to the State Convention; that in October, 1961, it voted to send no delegate to the Carteret County Sunday School Convention.

Plaintiffs further allege that a special session of the State Convention was held in May, 1962; that the defendants succeeded in persuading the Church members not to send a delegate; that the defendants did this in furtherance of a design to take control of the Davis Church and remove it from its rightful place in the State Convention and in the Eastern Conference; that the defendant Terry wanted to align the Church with the Coastal Association which was created for the purpose of destroying the Eastern Conference and the Denomination and substitute a new order for the faith, practices, and customs of the Church; that the defendant faction caused a meeting to be held for the purpose of taking Davis Church out of the State Convention and taking its property, facilities, and membership and affiliating with the Coastal Association; that at this meeting the Church membership voted 63 to 48 to withdraw from the State Convention; that at a subsequent meeting of the official Board of Davis Church the plaintiffs asked that officials of the Eastern Conference be called for a meeting at the Church and the defendants refused to participate in the meeting; that the defendants have continued since then to assert dominion over the physical properties of the Church, have barred plaintiffs from it, and have defied all authority of the Eastern Conference and the State Convention; that plaintiffs brought these matters to the attention of the Eastern Conference; that the executive committee of the Eastern Conference made a preliminary finding that the plaintiffs were acting in accordance with the established regulations, customs, practices, usages, and doctrines of the Denomination; that subsequently a special investigative committee was appointed which found that a controversy existed; that the executive committee met again, recognized the plaintiff faction as loyal to the Denomination, granted them authority to function as the Church and declared that defendants were out of fellowship with the Eastern Conference and the Denomination.

Continuing, plaintiffs allege that since that time the defendant faction has used the Church to the exclusion of plaintiff faction; that the plaintiff faction has held services in the Davis Community Building and has remained true to the customs and usages of the Eastern Conference and the Denomination; that in May, 1963, the executive committee of the Eastern Conference held a meeting for the purpose of bringing defendants back into the Church; that the defendants did not attend this meeting and the committee essentially repeated the findings and the actions taken by it earlier; that in June, 1963, the Davis Church controversy was referred to a special session of the Eastern Conference; that the Conference resolved to establish a trial committee and directed it to hold a hearing on the Davis Church controversy and let the defendants show cause why they should not be expelled from the Eastern Conference and why further action should not be taken against them; that the trial committee notified defendants of a hearing and advised them of the charges; and that the defendants continue to exercise exclusive control over the Church property in defiance of the Eastern Conference and the State Convention.

The prayer for relief is that the plaintiff faction be declared the true and rightful congregation of the Davis Church and entitled to the sole control over property of the Church, and that the defendant faction be permanently restrained from holding themselves out to be the true congregation of the Davis Church and from interfering in its operation.

The case came on for hearing at the August, 1966 Session. At the conclusion of the plaintiffs' evidence the defendants moved for judgment of involuntary nonsuit and from the order of the court allowing this motion, plaintiffs appealed.

An appeal from a judgment of nonsuit presents the question whether the evidence, considered in the light most favorable to plaintiff, is sufficient to be submitted to the jury. 1 Strong, N. C. Index 2d, Appeal and Error, § 59; *Thames v. Teer Co.,* 267 N.C. 565, 148 S.E. 2d 527. Plaintiffs are entitled to all reasonable inferences in their favor which properly may be drawn from the evidence. *McDonald v. Heating Co.*, 268 N.C. 496, 151 S.E. 2d 27.

Plaintiffs' evidence, though not as voluminous, comparatively, as the pleadings, equals the pleadings in legal conclusions. The evidence is abundant of the existence of factions, and of church organizations, conventions, associations, and conferences. On the crucial issues, however, the evidence is totally lacking.

The civil courts have no jurisdiction over, nor concern with, purely ecclesiastical questions and controversies. However, where

the controversy involves property rights, the courts will inquire into ecclesiastical questions to the extent necessary to determine such rights. *Conference v. Piner,* 267 N.C., *supra; Conference v. Miles,* 259 N.C. 1, 129 S.E. 2d 600; *Conference v. Creech,* 256 N.C. 128, 123 S.E. 2d 619; *Reid v. Johnston,* 241 N.C. 201, 85 S.E. 2d 114. Where factions are involved, the courts will determine which is the true congregation by virtue of adherence to the articles of faith and polity and the customs and usages of the denomination. *Conference v. Creech, supra.* In such cases the right to possession and use of the property belongs to those of the congregation who have remained faithful to the doctrines, polity and fundamental customs and rules of the denomination accepted and followed by the congregation prior to the disagreement. *Conference v. Miles, supra.* "The title to the church property of a divided congregation is in that part of it [whether a minority or a majority] which is acting in harmony with its own law; and the ecclesiastical laws, usages, and principles which were accepted among them before the dispute began are the standards for determining which party is right." *Schnorr's Appeal,* 67 Pa. 138, quoted with approval in *Dix v. Pruitt,* 194 N.C. 64, 138 S.E. 412, and also in *Conference v. Piner,* 267 N.C., *supra.* As in *Reid v. Johnston, supra,* the question presented is whether defendants have diverted the property to the support of usages, customs, doctrines and practices radically and fundamentally opposed to the characteristic usages, customs, doctrines, and practices recognized and accepted by both factions of the congregation before the dissension between them arose. For one faction in the church to be entitled to its property to the exclusion of the other faction there must be a showing that one faction has remained true to the doctrines, polity, usages, and customs of the Denomination as recognized and followed in the church prior to the time of disagreement and that the other faction has departed from such doctrines and practices. *Conference v. Miles, supra.*

There is ample evidence in the record to show that some type of controversy existed between the factions of the Davis Church. However, there is no substantial evidence from which a jury could determine the existence of a doctrinal dispute. For example, plaintiffs' witness Reginald Styron testified that at a special conference of the Davis Church in July 1960 it was resolved to uphold Rev. Randy Cox, pastor of the Beaufort Church in his refusal to sign a pledge of loyalty demanded by Eastern Conference. The pastor of Davis Church departed the following month and the defendant Terry came to Davis Church as pastor in April 1961. Styron further testified that between these two dates, "It became evident that two factions

were developing along two different lines of thinking in the church." There is nothing in the record to indicate what these two lines of thinking were.

The pleadings imply the existence of a conspiracy on the part of members of the defendant faction to divert the Davis Church from the faith which it formerly followed. If any such conspiracy existed, it never resulted in any outward action revealed in the evidence. The only revealed basis for the disagreement is a dispute which existed at higher echelons in the Denomination. At the 1961 meeting of the National Association certain delegates from North Carolina were removed from office. At the subsequent State Convention, the Convention voted to withdraw from the National Association. The Eastern Conference also withdrew from the National Association. The 1961 Eastern Conference meeting refused to seat certain delegates and the pastor from Davis Church who had voted in 1961 for the National Association position at the National meeting or at the State Convention. This culminated in a called business meeting which was held on April 8, 1962. The Church Bulletin for April 1, 1962, carried the following announcement: "A called business meeting is announced for next Sunday, April 8th, following the morning worship service. Due to the action taken by the State Convention in withdrawing fellowship from the National Association, it becomes necessary for the local church to determine its standing with those two bodies." At the meeting a Motion was made and seconded to place the Davis Church on the side and in fellowship with the National Association. The Motion was carried by vote of 63 to 48. Another witness testified that the Motion was "I move we go with the National."

The evidence indicates that individual Free Will Baptist Churches in North Carolina, including Davis Church, had been in the practice of sending delegates to the National Association. It appears that the Davis Church, the Eastern Conference, and the State Convention, through the National Association supported joint church projects, such as the Bible College, missions, and a superannuated wage fund prior to the dispute in controversy. Subsequent to this dispute the Eastern Conference and some Free Will Baptist Churches supported separate but similar institutions and programs. Thus the defendant faction, as a result of the majority vote at a duly called meeting, now follows the practices of the National Association which were formerly followed by both factions in the Davis Church, the Eastern Conference and the State Convention, while the plaintiff faction has adopted or continued separate, but similar practices, and remains loyal to the Eastern Conference and the State Convention. These matters demonstrate the wisdom of the courts in refusing to

exercise jurisdiction over purely ecclesiastical questions and controversies.

The evidence shows that the plaintiff faction turned over the church records and the bank account to the defendant faction, that the defendant faction agreed to assume the church indebtedness, that no member of the plaintiff faction has been called upon to make a payment on the church indebtedness since the transfer, and that no member of the plaintiff faction has made any attempt to hold services in the Davis Church building since that time.

After a careful and thorough examination of the record, we hold that there is no evidence from which a jury could find that the defendant faction has diverted the church property to the support of usages, customs, doctrines and practices substantially and fundamentally opposed to the characteristic usages, customs, doctrines, and practices recognized and accepted by both factions before the dissension arose.

Affirmed.

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

STATE OF NORTH CAROLINA v. VIRGINIA TAYLOR SWINNEY.

(Filed 24 July, 1967.)

1. **Criminal Law § 25—**

A plea of *nolo contendere* has the same effect insofar as punishment is concerned as a plea of guilty.

2. **Homicide § 30—**

Punishment for involuntary manslaughter may be by fine or imprisonment not to exceed 10 years, or both, in the discretion of the court. G.S. 14-18.

3. **Criminal Law § 138—**

A sentence within the statutory limit will be presumed regular and valid, but such presumption is not conclusive, and if the record discloses that the court considered irrelevant and improper matter in determining the severity of sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights.

4. **Same— Record held to show that court increased punishment for lawful conduct of defendant unrelated to crime charged.**

The evidence tended to show that the court, in determining sentence upon defendant's plea of *nolo contendere* to the crime of manslaughter,

heard evidence and cross-examined defendant with respect to a party at which there was dancing and drinking, held in defendant's home on the night of the offense, but the evidence disclosed that at the time defendant's husband attacked her and she shot him the party was entirely over and the guests had departed. There was no evidence that there was anything unlawful in connection with the party. The record contained remarks of the court disclosing that the court increased the severity of the sentence because of the unconventional conduct at the party. *Held:* The judgment must be vacated and the cause remanded.

5. Criminal Law § 25—

If upon the hearing of evidence in determining sentence upon defendant's plea of *nolo contendere* it appears that defendant is not guilty of the offense, the court may advise defendant to withdraw his plea of *nolo contendere*, although the court will not ordinarily do so *ex mero motu.*

PARKER, C.J., dissenting.

LAKE and PLESS, JJ., join in the dissent.

APPEAL by defendant, Virginia Taylor Swinney, from *McLaughlin, J.*, October 31, 1966 Mixed Session, UNION Superior Court.

The defendant was indicted for the murder of her husband, Granville Wayne Swinney. When arraigned she tendered, and the solicitor with the approval of the court accepted, a plea of *nolo contendere* to the crime of involuntary manslaughter.

The State called as its only witness the investigating officer, J. C. Clontz, who testified that pursuant to a call he went to the Swinney home in Waxhaw, Union County, about 3:00 on Sunday morning, October 9, 1966. In a bedroom downstairs, he found an oversized bed in disarray, a woman's night garment on a chair, two bullet holes in the wall, and a .22 caliber pistol with three exploded shells in the cylinder. The pistol was under the mattress. He found footprints near the center of the bed. "In my opinion the marks on the bed was *(sic)* those of a man's shoe."

Officer Clontz, acting on information, proceeded at once to the hospital in Charlotte, where he observed the body of Granville Wayne Swinney with a bullet hole in his chest. Defendant said, "I've killed my husband." On cross-examination, Mr. Clontz said she made the further statement "She didn't mean to do it, she loved her husband, she didn't mean to kill him." Mr. Clontz further testified that he saw marks and scratches on Mrs. Swinney's neck and arms — some were fresh, some were old. He stated, "To my knowledge, Mrs. Swinney does not have any record. She has never been in any trouble." Mr. Swinney was 53 years old and weighed about 175 pounds.

The defendant testified in her own defense. Her evidence is here

summarized: She and Mr. Swinney had been married for 25 years. Five children were born of the marriage; the oldest now 15; the next oldest is 14 — both boys. "There are three little ones." A short time before October 9, 1966, the deceased had assaulted the defendant causing her to leave home with the three little children. She returned, however, at his request after he became sober. Defendant's mother, now 80, who lives close by, stated that defendant and the deceased got along well except when he was drinking. She knew of his having committed a number of assaults on the defendant.

According to defendant's further evidence, her husband wanted a dinner party and dance at the home on his birthday. The invited guests were the best customers of Swinney's TV Shop, operated by the deceased and the defendant. She did not want the party though she participated in it. Liquor, beer, and punch were served at the party. Defendant said she took three drinks during the evening but nothing but coffee subsequent to 11:00.

After the guests departed, she went to bed and went to sleep, leaving the light on for her husband. "The next thing I knew Mr. Swinney was on the bed choking me. . . . (F)inally I pushed my head down on the mattress and slipped out from underneath his hands, and when I did, he 'throwed' me up beside of the window . . . I bounced back on the bed, and he grabbed me again by my arms . . . He then grabbed me by the throat again, then stopped and walked out of the bedroom. . . . He turned around in the hall and I said 'Granville, don't come back in here and beat me any more.' . . . He said, 'I'm going to kill you this time.' Then I ran over there and got the gun, and I thought I could scare him, and he would stop; and I shot, I thought the ceiling, and then I just shot until I saw blood and then I rammed the pistol back under the mattress and went to call for help." She went with him to the hospital.

The court cross-examined the defendant at great length and announced reasons for his sentence, then entered the judgment that she serve from 5-7 years in the Women's Prison. She excepted and appealed.

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

Sanders, Walker & London by Robert G. Sanders and Larry Thomas Black for defendant appellant.

HIGGINS, J. The defendant entered a plea of *nolo contendere* to the charge of involuntary manslaughter. While the plea is not a confession of guilt for all purposes, *State v. Thomas,* 236 N.C. 196,

72 S.E. 2d 525, nevertheless it has the same effect insofar as punishment is concerned as a plea of guilty. *State v. Cooper,* 238 N.C. 241, 77 S.E. 2d 695; *State v. Shepherd,* 230 N.C. 605, 55 S.E. 2d 79. Punishment for involuntary manslaughter may be by fine or imprisonment or both in the discretion of the court. G.S. 14-18; *State v. Adams,* 266 N.C. 406, 146 S.E. 2d 505; *State v. Blackmon,* 260 N.C. 352, 132 S.E. 2d 880; *State v. Grice,* 265 N.C. 587, 144 S.E. 2d 659; *State v. Dunn,* 208 N.C. 333, 180 S.E. 708. The imprisonment, however, may not exceed ten years. The defendant's contention that involuntary manslaughter is a misdemeanor for which punishment cannot exceed two years is not sustained.

By exception and assignment of error, the defendant challenges the sentence of 5-7 years in prison upon the ground the record clearly shows the presiding judge imposed the sentence, not for involuntary manslaughter to which the defendant had entered a plea, but for having participated in the dinner and dance party held in the Swinney home at which liquor was served. The record shows the party was over and the guests had departed; the defendant had gone to bed and was asleep when the deceased jumped on the bed and began assaulting her. The defendant had introduced evidence of her good character; there was none to the contrary. The State's only witness, Officer Clontz, said there was nothing against her. He corroborated her story that she first fired warning shots. He found two bullet holes in the walls of the bedroom. He corroborated her story that she was assaulted by testifying he saw the bruises and marks on her neck and arms. He corroborated her story that she was in bed when the attack began by testifying he found tracks in the bed "made by a man's shoe."

Notwithstanding evidence the defendant shot in self-defense, the plea of *nolo contendere* would permit the court to impose a sentence of not more than ten years for involuntary manslaughter. Being within the limits there is a presumption the judgment and sentence are regular and valid. That presumption, however, is not conclusive, and if the judge by his own pronouncement shows clearly that he imposed this sentence for a cause not embraced within the indictment and the plea, then the presumption of regularity is overcome, and his sentence is in violation of the defendant's rights. When Judge McLaughlin acted as he said he did under the belief that it would be a dereliction of his duty to the community if he did not punish the defendant severely on account of the party, he exceeded his judicial power and committed error of law. His lengthy cross-examination of the defendant and the statement in connection with and as a part of the sentencing procedure permitted no other reasonable conclusion or inference but that he was punishing not for involun-

tary manslaughter but because of the party in the Swinney home. If there was anything unlawful in connection with the party of which there was no evidence in the record implicating the defendant, that should be the subject of another indictment. The evidence is conclusive, however, that the entire trouble between the defendant and her husband occurred after the party was over, the guests were gone, and the defendant had gone to bed and was asleep.

We commend Judge McLaughlin for placing in the record the reason for his sentence. It clearly appears that sentence was not for involuntary manslaughter. "A fair jury in criminal cases and an impartial judge in all cases are basic requirements of due process." *Rice v. Rigsby,* 259 N.C. 506, 131 S.E. 2d 469; ***Ponder v. Davis,*** 233 N.C. 699, 65 S.E. 2d 356; *In Re Murchison,* 349 U.S. 133, 99 L. Ed. 942. "Every suitor is entitled by the law to have his cause considered with the cold neutrality of the impartial judge." *State v. Belk,* 268 N.C. 320, 150 S.E. 2d 481.

Upon a plea of *nolo contendere* it is usual procedure for the court to hear evidence "to enable it to exercise a *sound discretion* in determining the extent of the punishment." *State v. Cooper,* 238 N.C. 241, 244, 77 S.E. 2d 695, 698. It may be, therefore, that in this case the State had other evidence which it did not produce; that defendant knew of this evidence; and that she was well advised to enter the plea of *nolo contendere.* However, the evidence in this record before us — which was also the evidence before the judge — is amply sufficient to make out a case of self-defense.

As Parker, J. (now C.J.), said in *State v. Barbour,* 243 N.C. 265, 267, 90 S.E. 2d 388, 390: "If, after hearing evidence to aid the Court in determining the sentence to be imposed, it appears that the defendant is not guilty, the Court may advise him to withdraw his plea of *nolo contendere,* and stand a jury trial." Of course, in the absence of a request by a defendant to withdraw his plea of *nolo contendere,* the court ordinarily will not strike out such a plea *ex mero motu. State v. Shepherd,* 230 N.C. 605, 55 S.E. 2d 79. The evidence at the next hearing will no doubt chart the correct course for court and counsel.

For the reasons assigned, the judgment is vacated, and the cause is remanded for further consideration as to punishment. The judge on whom falls the responsibility may review the record of the trial and conduct such further inquiry as will enable him to enter a proper judgment.

The prison sentence is vacated and the cause remanded for a proper judgment.

PARKER, C.J., dissenting: This was stated in the majority opinion:

> "The defendant was indicted for the murder of Granville Wayne Swinney, her husband. Upon arraignment she tendered, and the solicitor, with the approval of the Court, accepted a plea of *nolo contendere* to the crime of involuntary manslaughter."

Both the State and the defendant offered evidence, defendant testifying in her own behalf.

Before passing judgment upon defendant, the trial judge in open court made extended remarks concluding with this statement: "I'm not going to turn my back on law and order, I don't 'intent' (intend) to." The defendant voluntarily took the stand. Her purpose was to give the court her version of the case and of related matters so that the court might determine what sentence to impose. The defendant's testimony was that there were about 20 people, including herself and her husband, at a party at her house, which she described as "a supper party, dancing, drinking," in a 14 x 20 living room from 9 p.m. to 2 a.m. The defendant testified: "I picked the liquor up myself the first of the week. . . . I bought eight pints. . . . I went to Charlotte to get the liquor. . . . I made preparations for the party, but I was not looking forward to it." She and her husband drank liquor and danced with their guests. The picture disclosed by defendant's testimony in this case is not that of a quiet dinner party but of a drunken brawl, the sequel being an assault by the drunken husband upon the hostess and the fatal shooting of the host. Killing a man under those circumstances and the defendant entering a plea of *nolo contendere* to the crime of involuntary manslaughter is not a slight and trivial matter. I respectfully dissent from this statement in the majority opinion:

> "When Judge McLaughlin acted as he said he did under the belief that it would be a dereliction of his duty to the community if he did not punish the defendant severely on account of the party, he exceeded his judicial power and committed error of law. His lengthy cross-examination of the defendant and the statement in connection with and as a part of the sentencing procedure permitted no other reasonable conclusion or inference but that he was punishing not for involuntary manslaughter but because of the party in the Swinney home."

In my opinion, the unanimous decision of this Court in *S. v. Sullivan,* 268 N.C. 571, 151 S.E. 2d 41, is in point and is controlling. In that case the defendant was charged in two indictments, Nos.

9494 and 9495, with breaking, entering, larceny and receiving. Through his counsel and in his own proper person, he entered a plea of guilty to breaking and entering and larceny in both cases. The State offered testimony showing his guilt as charged. Defendant was a resident of the State of Maryland. Defendant offered no evidence. The trial court consolidated the two cases for judgment and entered a sentence of imprisonment for not less than five nor more than seven years. He appealed to the Supreme Court. The unanimous opinion of the Supreme Court is as follows:

> "The defendant's sole exception is that he did not receive a fair and impartial trial before a fair tribunal. In support of his claim he quotes the presiding judge at the time of sentencing him: 'North Carolina has been made a picking place for criminals from Maryland. They are riding down here regularly from Maryland, robbing people who are trying to make an honest living. I find this true in about every court I hold.'
>
> "This Court does not intend to restrict informal remarks made by a judge at the time of pronouncing judgment, but there is nothing in Judge Burgwyn's statements to justify the defendant's exception, even though he be a resident of Maryland.
>
> "The undisputed facts in the cases, plus the defendant's plea of guilty in both, justified a substantial sentence. The fact that the court imposed only a 5-year sentence when a total of 40 years imprisonment was permissible, refutes his claim that he was not treated fairly.
>
> "No error."

I entirely agree with this statement in the *Sullivan* case: "This Court does not intend to restrict informal remarks made by a judge at the time of pronouncing judgment. . . ." Every judge who has had experience on the trial court in criminal practice knows that often, and properly so, a defendant's lawyer makes an impassioned plea before a crowded courtroom that the court should grant leniency to his client and impose a sentence of probation or suspend judgment, and the solicitor for the State as a rule does not reply. Quite often the trial judge feels that it is proper for him to give his reasons for not granting the request of defendant's counsel, and at other times to give his reasons for imposing a severe sentence. In my opinion the trial judge here did not make a happy choice of words in his extended remarks before pronouncing judgment, but I think it can be fairly seen from his language that it was in reply to an impassioned plea for leniency from defendant's counsel and to explain his reason why he felt that punishment of imprisonment should be imposed.

What is said by the Supreme Court of Mississippi in *Spiers v. State,* 231 Miss. 307, 94 So. 2d 803, is relevant here: "It may be conceded that the judge's remarks evince a zeal for the maintenance of law and order. . . . We cannot, however, under the facts of this case, translate this laudable zeal into bias, prejudice and passion against the appellant, or construe it as a prejudgment of the appellant's case."

I think the language of the Court in *People v. Clemmon,* 51 Ill. App. 2d 216, 201 N.E. 2d 11 (1964), is apposite:

> "The second question raised is the alleged prejudice of the trial judge. When the case was heard and the defendant found guilty, the judge in a hearing to determine the penalty asked if the defendant had a record. The State disclosed that he had been convicted in Arkansas of Grand larceny in 1950, burglary in 1954, and grand larceny in 1955, and had been discharged in January 1961, a month or so before the robbery in question. At that point the court said: 'Why didn't he stay down in Arkansas? The county and state here are paying for his keep. We have enough of our own problems here without getting some of these fellows coming up and staying a month and then getting into trouble.' This remark made after the defendant was found guilty, affords no basis for the charge of prejudice."

See *United States v. Lattimore,* 125 F. Supp. 295.

It is clear to my mind from the statement of the trial judge, that he thought defendant should receive a prison sentence because of her plea of *nolo contendere* of involuntary manslaughter, and not be placed on probation or given a suspended sentence, or some lesser form of punishment. The sentence imposed upon defendant's plea of *nolo contendere* to the crime of involuntary manslaughter was well within the maximum limits of punishment for that offense. Such being the case, it is not for the Court to say that it was excessive. That is a matter for those vested with the power to exercise clemency. While not approving of the trial judge's extended remarks before sentencing, I can see no legal reason to disturb the judgment below. I vote to affirm the judgment below.

LAKE and PLESS, JJ., join in this dissenting opinion.

HARRY ALAN WELCH, A MINOR, BY HIS NEXT FRIEND, M. R. JOHNSON, PLAINTIFF, v. JIM ERVIN JENKINS, AND FLAKE B. CHIPLEY, INC., DEFENDANTS.

(Filed 24 July, 1967.)

1. Automobiles § 39—

An instruction to the effect that plaintiff, a 14 year old boy riding a bicycle, was required to maintain a proper lookout and control of the vehicle, and to exercise the degree of care which a person of ordinary prudence would have used under the same or similar circumstances, and that if the jury should find that defendant motorist, approaching from the rear, gave appropriate warning by horn as he was attempting to pass, it was the duty of the plaintiff to give way to the right and allow defendant to pass, *held* without error.

2. Negligence §§ 16, 28—

A 14 year old boy is presumed capable of contributory negligence to the same extent as an adult, and this presumption obtains as a matter of law in the absence of evidence that the boy did not have the capacity, discretion and experience which would ordinarily be possessed by a boy of his age; therefore, in the absence of such evidence, the court is not required to charge the jury that a different rule should be applied in considering the question of his contributory negligence than the rule which should be applied in the case of an adult.

3. Appeal and Error § 53—

Where the rights of a party are determined by the answer of the jury to one issue, exceptions relating to other issues are rendered moot and need not be considered on appeal.

APPEAL by plaintiff from *Bone, E.J.*, December 1966 Civil Session of LEE.

Plaintiff, a minor 14 years of age, sues by his next friend to recover damages for personal injuries resulting from a collision between the bicycle he was riding and an automobile owned by the corporate defendant and driven by its employee, defendant Jim Ervin Jenkins.

Plaintiff alleges that defendant Jenkins, traveling east on Highway No. 43 west of Pinetops about 2:00 p.m. on 25 December 1964, overtook him as he traveled in the same direction on his bicycle; that Jenkins was operating his automobile at a high and unlawful rate of speed, without keeping a proper lookout and without having it under control; that he attempted to pass plaintiff without first giving an audible warning as required by G.S. 20-149(b); and that he failed to pass at least two feet to the left of plaintiff's bicycle. In consequence, he collided with plaintiff, seriously and permanently injuring him. Answering, defendants denied the allegations that Jenkins was negligent and the allegation that, at the time of the accident, he was acting in the scope of his employment for the cor-

porate defendant. They averred that, when Jenkins observed plaintiff and another bicyclist ahead of him on the highway, he reduced his speed, drove into the left lane and blew his horn; that as he was about to pass the bicyclists, plaintiff suddenly turned to the left, directly into the path of defendants' approaching automobile, thereby rendering a collision inevitable. Defendants pled plaintiff's contributory negligence in bar of his right to recover.

Upon the trial, plaintiff's evidence tended to show: About 2:00 p.m. on Christmas day, 1964, plaintiff and his 16-year-old stepbrother, Jimmy Harrellson, were riding their new bicycles in an easterly direction on the right side of Highway No. 43 between Jenkins Crossroads and Pinetops enroute to the home of Jimmy's grandmother. At this point, No. 43 is a 2-lane highway with pavement 20 feet wide and shoulders 5-8 feet wide. It was drizzling, and the road was a little slick, but visibility was unimpaired. Jimmy was riding on the right shoulder and plaintiff on the pavement, about a foot and a half from the right edge and 2-3 feet from Jimmy. Plaintiff was slightly behind the older boy — at the rear of his pedals. Both boys knew how to ride a bicycle. When they were about 75 yards from their destination, Jimmy looked over his shoulder and saw defendants' automobile coming over a hillcrest behind them. "It was a long straight road" — straight for several hundred yards from the bottom of the hill over which defendant Jenkins came. In Jimmy's opinion, defendants' car was traveling at "a rather high speed." Jimmy warned plaintiff that a car was approaching from the rear and told him to pull over. No other vehicle was approaching from either direction. Plaintiff was turning to the right when defendant Jenkins collided with the front of his bicycle. "There was no damage to the rear of the bicycle, but the front wheel was torn up."

Plaintiff testified that he did not know an automobile was right on top of him until it hit and that he never at any time crossed the center line of the highway. Jimmy said he did not see the impact, but he heard it and saw plaintiff going over the car and then to the ground on the left shoulder about 35-40 yards from where he was hit. Neither boy heard a horn blow. The automobile, after colliding with the bank and scraping it for a considerable distance, stopped in the left ditch about 50 yards from the point of impact. The bicycle was on the right-hand side of the road, about 45 yards from the point of impact. Its rear tire was off, lying crosswise in the road. The boys had been racing, but, according to Jimmy, they were not racing at the time of the collision.

In the collision, the bones in plaintiff's left leg were badly broken, and he sustained a concussion of the brain which rendered him unconscious for five days. Plaintiff testified that, prior to the accident,

he made "real good grades" but that now "when it comes to a test" his mind is "a blank." He no longer is able to play basketball, baseball, and football as he did before.

Defendants' evidence tended to show: At the time and place in question, as defendant Jenkins, traveling at a speed of 50-55 MPH rounded a curve and came onto a long straight stretch of highway, he saw plaintiff and Jimmy riding their bicycles 200-300 yards ahead of him. They were on the right side of the road, one a little in front of the other, and about three feet apart. Jenkins also observed a car traveling west at a slow rate of speed. This car, operated by Daniel Roundtree, stopped on its right shoulder and Jenkins slowed down 5-10 MPH and pulled out to pass the boys. One was very near the right side of the highway and the other near the centerline. When he was 50-75 feet behind them, and traveling at about 40 MPH, he blew his horn twice. When he did, plaintiff made a sudden turn to the left in front of his car. Defendant applied his brakes and pulled to the left. At the time he collided with the bicycle, his two left wheels were off the highway. Plaintiff came up on the hood of the car. His leg came through the windshield, and he then slid off the side of the car onto the left shoulder near the pavement. After the collision, the automobile hit the bank and stopped in the north ditch. The rear part of the bicycle was in the center of the road, and the front wheel was on the left side of the highway.

State Highway Patrolman Miller testified that when he arrived at the scene, he found plaintiff lying unconscious on the north shoulder about one car's length behind the Jenkins automobile. The automobile was in the north ditch, 75 feet from the point where its tracks left the pavement at a sharp angle. The car had struck the bank and scraped along it to the place where it stopped. He observed a hole in the right windshield of the automobile and that the right headlight had been damaged. He asked Jimmy Harrellson what took place, and the boy stated that he did not know what had happened; that plaintiff was behind him on the bicycle.

Defendant Jenkins testified that, at the scene, Jimmy had told his father that plaintiff had "just made the wrong turn." Jimmy denied having made that statement; he also testified that he did not remember having had any conversation with Patrolman Miller. The testimony of Daniel Roundtree tended to corroborate that of defendant Jenkins. He said, *inter alia,* that as he watched the boys coming down the hill, plaintiff "got up and was walking the pedals as fast as he could." Roundtree "thought he was going to pass his brother, but he just whipped away from him in the middle of the highway."

The jury answered the issues of negligence and contributory neg-

ligence YES. From the judgment dismissing the action, plaintiff appealed.

Pittman, Staton & Betts for plaintiff appellant.
Gavin, Jackson & Gavin for defendant appellees.

SHARP, J. After defining contributory negligence and explaining that if the negligence of both plaintiff and defendants concurred as proximate causes of plaintiff's injuries, he could not recover, the court charged the jury as follows:

"Now it becomes necessary to consider what duty or duties the law imposed upon the plaintiff in the riding of his bicycle upon the highway. In the first place, the law requires the plaintiff to keep a reasonable and proper lookout for other vehicles on the highway, and to have reasonable and proper control of his bicycle, *which, in law, is considered a vehicle, such reasonable and proper lookout and control as a person of ordinary prudence would have had and kept under the same or similar circumstances.* The law also imposed upon the plaintiff the duty to exercise due care for his own safety, due care being that degree of care which a person of ordinary prudence would have used under the same or similar circumstances. Another duty imposed upon the plaintiff arises out of a statute which provides that the driver of a vehicle and I pause here to say that when it uses the term driver of a vehicle, that includes a person riding a bicycle:

" 'The driver of a vehicle about to be overtaken and passed by another vehicle approaching from the rear shall give way to the right in favor of the overtaking vehicle on suitable and audible signal being given by the driver of the overtaking vehicle.'

* * *

"(S)o that if you find from the evidence that the defendant Jenkins gave an audible and suitable signal by blowing his horn, then and in that event, it would have been the duty of the plaintiff to give way to the right and allow the defendant to pass. But if you find that no suitable or audible signal was given by the defendant before attempting to pass then that statute would not have any application. But whether that statute has application or not, it was the duty of the plaintiff, in the operation of his bicycle, to do so in a reasonable and careful manner and to make no movement of it on the road by turning from left to right which a person of ordinary prudence similarly situated would not have made."

The foregoing portion of the charge is the subject of plaintiff's assignment of error No. 17. Plaintiff also assigns as error the failure of the court to instruct the jury (1) "that a different rule should be applied in considering the question of contributory negligence in the case of the plaintiff, a 14-year-old child, from that applicable in the case of an adult"; and (2) "that the plaintiff was not chargeable with the same degree of care as an experienced adult but only required to exercise such prudence as one of his years may be expected to possess." (Assignment of error No. 23.)

In determining whether a child is contributorily negligent in any given situation, the rule in North Carolina is this: An infant under 7 years of age is conclusively presumed to be incapable of contributory negligence. *Walston v. Greene,* 247 N.C. 693, 102 S.E. 2d 124. An infant between the ages of 7 and 14 is presumed to be incapable of contributory negligence, but this presumption may be rebutted by evidence showing capacity. "The test in determining whether the child is contributorily negligent is whether it acted as a child of its age, capacity, discretion, knowledge and experience would ordinarily have acted under similar circumstances." *Adams v. Board of Education,* 248 N.C. 506, 512, 103 S.E. 2d 854, 858; *accord, Wilson v. Bright,* 255 N.C. 329, 121 S.E. 2d 601; *Hutchens v. Southard,* 254 N.C. 428, 119 S.E. 2d 205. "An infant of the age of fourteen years is presumed to have sufficient capacity to be sensible of danger and to have power to avoid it, and this presumption will stand until rebutted by clear proof of the absence of such discretion as is usual with infants of that age." *Baker v. R. R.,* 150 N.C. 562, 564, 64 S.E. 506, 507; *accord, Burgess v. Mattox,* 260 N.C. 305, 132 S.E. 2d 577; *Tallent v. Talbert,* 249 N.C. 149, 105 S.E. 2d 426; *Van Dyke v. Atlantic Greyhound Corp.,* 218 N.C. 283, 10 S.E. 2d 727; *Moore v. Order Minor Conventuals,* 164 Fed. Supp. 711, *aff'd,* 267 F. 2d 296.

In *Baker v. R. R., supra,* plaintiff's intestate, a boy within one month of 15 years of age, who had been permitted to ride on defendant's work train, was killed when he jumped from it while it was running about 30 MPH. The jury found for plaintiff in his action for wrongful death. This Court reversed, saying:

> "He (intestate) was not an infant of tender years, and in the absence of evidence to the contrary, had the capacity of an adult to appreciate danger. * * * This presumption of discreet judgment which arises after fourteen years of age must stand until it is overthrown by clear proof of the absence of such natural intelligence as is usual with infants of similar age. If such evidence is offered by the plaintiff to rebut such presumption its weight and value are for the jury to estimate." *Id.* at 564 and 568, 64 S.E. at 507, 509.

In *Burnett v. Mills Company,* 152 N.C. 35, 67 S.E. 30, the plaintiff was 15 years old, an intelligent and bright boy, who was injured while attempting to unclog a cotton picker without stopping the machine. The plaintiff's evidence tended to show that he had not been properly instructed in the operation of the machine. The jury found that the plaintiff was injured by his own negligence. He appealed, assigning as error the court's charge "that the law raises the presumption that a person over fourteen years of age is endowed with sufficient intelligence to perform the work assigned to him, but the presumption is not a conclusive one and may be rebutted by proof satisfactory to the jury that the plaintiff did not, in fact, have such intelligence or capacity." *Id.* at 37, 67 S.E. at 31. In affirming the judgment dismissing the action, Walker, J., said: "This objection is clearly answered by this Court in the case of *Baker v. R. R.,* 150 N.C. 562, in which Mr. Justice Brown, for the Court, stated the law with clearness and precision. . . ." *Id.* at 37, 67 S.E. at 31.

In *Rimmer v. R. R.,* 208 N.C. 198, 179 S.E. 753, the plaintiff's intestate, a girl 17 years of age, was fatally injured when she was struck by defendant's train as she ran across the track with a cloak over her head as a protection from the rain. The train, which gave no signal, was running at a high rate of speed in violation of the city ordinance. There was no evidence tending to show intestate's experience or intellectual capacity. Without reference to plaintiff's age, in an opinion by Stacy, C.J., the Court sustained the judgment of nonsuit upon the ground of intestate's negligence.

In *Van Dyke v. Atlantic Greyhound Corp., supra,* a case closely resembling the one at bar, the plaintiff's intestate, a 14-year-old boy was killed in a bus-bicycle accident. The Court sustained a nonsuit saying, "While plaintiff's intestate was only fourteen years of age, the evidence as to his intelligence and capacity was sufficient to show that he was amenable to the ordinary rule of contributory negligence as a bar to the action." *Id.* at 286, 10 S.E. 2d at 729.

In *Burgess v. Mattox, supra* at 307, 132 S.E. 2d at 578, we said: "A seventeen-year old plaintiff is presumed to have sufficient capacity to understand and avoid a clear danger, and he is chargeable with contributory negligence as a matter of law if he fails to do so."

In this case, there was no contention and no evidence tending to show that plaintiff was lacking in the ability, capacity, or intelligence of the ordinary 14-year-old boy. On the contrary, there was evidence that before the accident he made good grades in school, played basketball, baseball, and football. Since the accident, he plays in the high school band, works part-time at a grocery, and swims. He is still able to learn and to "know it all" until he gets the test in his hands. Then his mind "is a blank." There being no attempt to

rebut the presumption of plaintiff's capacity to exercise care for his own safety, the court's charge was correct. Had he instructed the jury according to plaintiff's contentions as set out in his assignment of error No. 23, he would have nullified the presumption of capacity in the 14-year-old plaintiff. As pointed out in *Baker v. R. R., supra,* at what age the presumption of capacity arises is not a question of fact, but one of law.

> "The inquiry, At what age must an infant's responsibility for negligence be presumed to commence? can not be answered by referring it to a jury. That would furnish us with no rule whatever. It would simply produce a shifting standard, according to the sympathies or prejudices of those who composed each particular jury. One jury might fix the age at fourteen, and another at eighteen, and another at twenty." *Id.* at 565, 64 S.E. at 507-8.

In the absence of evidence to the contrary, our law fixes the age at 14. At that age there is a rebuttable presumption that he possessed the capacity of an adult to protect himself and he is, therefore, presumptively chargeable with the same standard of care for his own safety as if he were an adult. *Accord, Sheetz v. Welch,* 89 Ga. App. 749, 81 S.E. 2d 319; *Bugg v. Knowles,* 33 Ga. App. 710, 127 S.E. 813; *Brush v. Public Service Co. of Indiana,* 106 Ind. App. 554, 21 N.E. 2d 83; *Kent v. Interstate Public Service Co.,* 97 Ind. App. 13, 168 N.E. 465; *West v. Southern Ry. Co.,* 20 Tenn. App. 491, 100 S.W. 2d 1004; *Ambrose & Company v. Booth,* 301 S.W. 2d 223 (Tex. Ct. Civ. App., 1957); *Nelson v. Arrowhead Freight Lines,* 99 Utah 129, 104 P. 2d 225; *White v. Kanawha City Co.,* 127 W. Va. 566, 34 S.E. 2d 17.

It is noted that plaintiff did not allege that defendant Jenkins waited until he was immediately behind the boys to blow his horn and that a sudden blast frightened plaintiff into making a sudden turn. On the contrary, plaintiff's allegation and evidence is that no horn was sounded. *Webb v. Felton,* 266 N.C. 707, 147 S.E. 2d 219.

Plaintiff's assignment of error relating to the first issue, which was answered in his favor, and to the issues of agency and damages, which the jury did not answer, are rendered moot by plaintiff's contributory negligence. The other assignments of error disclosed

No error.

ALGIE J. FULLAM, INDIVIDUALLY AND IN HIS CAPACITY AS ADMINISTRATOR C. T. A. OF THE ESTATE OF LILLIAN CLARK BROCK, v. DEAVER DUNSMORE BROCK, INCOMPETENT, J. M. BALEY, JR., AS GUARDIAN OF DEAVER DUNSMORE BROCK, INCOMPETENT, EUGENIA COLE STEVENS, SADIE STEVENS, ANNIE JUSTICE GREENE, MARJORIE FULLAM, MARY O. VEHORN, THE DIOCESE OF WESTERN NORTH CAROLINA OF THE PROTESTANT EPISCOPAL CHURCH THROUGH ITS TRUSTEES: M. GEORGE HENRY, KINGSLAND VAN WINKLE, CHARLES E. WADDELL, V. JORDAN BROWN, J. G. ADAMS, JR., BRUCE V. SELVIS; HERMAN STEVENS AS LAST SURVIVING TRUSTEE OF BOARD OF CEMETERY TRUSTEES OF LEICESTER EPISCOPAL CEMETERY; METHODIST CHURCH OF LEICESTER, NORTH CAROLINA THROUGH ITS TRUSTEES: WILLIAM E. "BILL" REEVES, HAL WELLS, STAN C. SLUDER, PAUL PARRIS; BELL METHODIST CHURCH OF LEICESTER THROUGH ITS TRUSTEES: G. F. BRIDGES, GAY KENNERLY, JAMES MOORE; EVERETT CLARK; THE CHILDRENS HOME, INCORPORATED, A CORPORATION.

(Filed 24 July, 1967.)

1. Wills § 1—

A person has no inherent or constitutional right to dispose of his property by will, but such right is conferred and regulated solely by statute.

2. Constitutional Law § 6—

Even though existing constitutional provisions do not authorize the General Assembly to enact a particular statute, it may enact such statute in anticipation of a constitutional amendment authorizing it to do so, and provide that the statute should become effective, in the event of the approval of the amendment, on the date of its certification.

3. Wills § 60—

At the time of the wife's death, the constitutional amendment authorizing the Legislature to empower the husband to dissent from his wife's will had been certified, but Chapter 849, Session Laws of 1965, re-enacting G.S. 30-1, 30-2, and 30-3 had not become effective. However, the statute directing the submission of the amendment provided that upon its certification, the word "spouse" in statutes dealing with testate and intestate successions, should apply alike to both husband and wife. *Held:* The husband had a right to dissent from his wife's will under the anticipatory provisions of the statute directing the submission of the amendment. Constitution of North Carolina, Art. X, § 6.

4. Same; Insane Persons § 4—

The guardian of an incompetent widower is authorized to file a dissent by him from his wife's will. G.S. 30-2.

APPEAL by Deaver Dunsmore Brock, an incompetent person, appearing by his guardian, J. M. Baley, Jr., from *Martin, S.J.*, 9 January 1967 Civil "A" Session of BUNCOMBE.

Civil action, pursuant to the provisions of G.S. 1-253, for a determination of the rights, status, and other legal relations under the last will and testament of Lillian Clark Brock, a deceased person, and the guidance of the Court in the administration of the estate.

Lillian Clark Brock, late of Buncombe County, North Carolina, died testate without issue or parent surviving her on 14 March 1965. On 27 April 1965 her last will and testament was duly admitted to probate by the clerk of the Superior Court of Buncombe County, North Carolina, and is duly recorded in Will Book KKK, p. 417 *et seq.*, in the office of the clerk of the Superior Court of Buncombe County. On 17 May 1965 Algie J. Fullam qualified as administrator c. t. a. of the estate of Lillian Clark Brock, and is now acting as such administrator.

On 22 March 1962 Deaver Dunsmore Brock, the second husband of Lillian Clark Brock, was adjudged incompetent to manage his affairs by the clerk of the Superior Court of Buncombe County. On 7 April 1965 J. M. Baley, Jr., was appointed by the clerk of the Superior Court of Buncombe County as general guardian of Deaver Dunsmore Brock, and is now acting as such guardian. On 6 July 1965 J. M. Baley, Jr., as guardian of said incompetent, filed in his behalf a dissent from the will of Lillian Clark Brock, deceased.

Lillian Clark Brock at the time of her death owned a farm in Leicester Township, Buncombe County, North Carolina. In her last will and testament she devised to Deaver Dunsmore Brock a life interest in this farm, with remainder in fee to Algie J. Fullam, plaintiff administrator, and to Everett Clark (Items 2 and 11 of her last will and testament). Also, in Item 2 of her will she bequeathed to her husband the sum of $10,000 cash, and her solitaire diamond ring. This bequest and devise was dependent upon Deaver Dunsmore Brock surviving her, which in fact he did.

Everett Clark, a devisee under Item 2 of her last will and testament, questioned the right of the surviving husband to dissent from her last will and testament, upon the ground that no statute permitting a dissent by him had been enacted prior to the death of Lillian Clark Brock, and subsequent to the ratification on 6 February 1964 of the constitutional amendment relevant thereto.

Algie J. Fullam, individually and in his capacity as administrator c. t. a. of the estate of Lillian Clark Brock, instituted this civil action to obtain a declaratory judgment, pursuant to the provisions of G.S. 1-253 *et seq.*, to have a determination of the rights, interests, and status of persons to whom bequests and devises were given in the will, and particularly advice and guidance in the administration of the estate as to the legal effect of the dissent of Deaver Dunsmore Brock, an incompetent person appearing by his general guardian J. M. Baley, Jr., from the last will and testament of Lillian Clark Brock.

It appears that all parties who have or claim any interest which

would be affected by this judgment have been made parties defendant and have been duly served with process.

In the hearing before Judge Martin, the plaintiff was represented by the Honorable Sam M. Cathey; the incompetent person, Deaver Dunsmore Brock, was represented by his general guardian, J. M. Baley, Jr., of the law firm of Parker, McGuire and Baley; the defendant, Bell Methodist Church of Leicester, North Carolina, was represented by John Geizentanner; and the defendant Everett Clark was represented by Lamar Gudger.

The court recited in its judgment that all the ultimate facts material to the judgment entered were admitted by the pleadings or were within the judicial notice of the court. The court found as facts, *inter alia,* as follows:

> 9. "That the General Assembly of North Carolina, in its 1963 Session enacted legislation directing submission of a constitutional amendment to a vote of the people whereby Article X, Section 6 of the State Constitution would be amended so as to eliminate said article's prohibition of male spouse's dissent as said article had theretofore been construed by the Supreme Court of North Carolina, in *Dudley v. Staton,* 257 N.C. 572 (1962), and in a separate section of said act stated that 'from and after the date of certification of the amendments set out in section 1 of this Act wherever the word "spouse" appears in the General Statutes with reference to testate or intestate successions, it shall apply alike to both husband and wife.' "
>
> 10. "That the said constitutional amendment to Article X, Section 6 of the North Carolina Constitution was submitted to a vote of the people on January 14, 1964, and was approved, and that the results of said vote were certified by the Governor of the State of North Carolina on February 6, 1964."
>
> 11. "That the General Assembly of North Carolina in its 1965 Session enacted Chapter 849 which was to become effective on June 8, 1965."

Based upon the above findings of fact the court made the following conclusions of law:

> 1. "That Article X, Section 6 of the Constitution of North Carolina was in force and effect throughout the year 1963, and placed it beyond the power of the General Assembly to restrict, abridge or impair the right of a married woman to dispose of her property by Will as if she were unmarried."
>
> 2. "That at the time of its enactment, Section 4.1 of Chapter 1209 of the Session Laws of 1963 was in contravention of Article

X, Section 6 of the North Carolina Constitution and therefore void."

3. "That on March 14, 1965, at the time of the death of Lillian Clark Brock, Deaver Dunsmore Brock had no right to dissent to the Will of his deceased wife."

4. "That the paper writing (Exhibit "2" attached to plaintiff's complaint) purporting to be the dissent of Deaver Dunsmore Brock and executed by J. M. Baley, Jr., as his Guardian is void and of no legal force and effect."

7. "That as result of the failure of the dissent of Deaver Dunsmore Brock under the court's conclusions 1 through 5 aforesaid, the funeral expenses of Lillian Clark Brock, deceased, shall be paid by the Administrator c. t. a. of her Estate pursuant to Item 1 of her Will."

Based upon its findings of fact and conclusions of law, the court adjudged and decreed, *inter alia,* as follows: "1. That the dissent of Deaver Dunsmore Brock is void and of no force and effect."

From the judgment Deaver Dunsmore Brock, an incompetent person, by and through his general guardian J. M. Baley, Jr., excepted and appealed. We have not incorporated in the statement of facts the findings of fact, conclusions of law, and judgment of Judge Martin in respect to other matters sought in this action, for the simple reason that no party has excepted to a single one of them, and appealed.

Parker, McGuire & Baley by Richard A. Wood, Jr., for J. M. Baley, Jr., Guardian of Deaver Dunsmore Brock, incompetent, defendant appellant.

Gudger & Erwin by Lamar Gudger and Ronald W. Howell for Everett Clark, defendant appellee.

PARKER, C.J. There is no common-law right to make a will. The right to make a will is not a natural, inalienable, inherited, fundamental, or inherent right, and it is not one guaranteed by the Constitution. The right to make a will is conferred and regulated by statute. *Paul v. Davenport,* 217 N.C. 154, 7 S.E. 2d 352; 94 C.J.S., Wills, § 3.

In *Irving Trust Co. v. Day,* 314 U.S. 556, 86 L. Ed. 452, the Court said, *inter alia:* "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the Legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."

The General Assembly has power to enact a statute not authorized by the present Constitution where the statute is passed in anticipation of a constitutional amendment authorizing it or provides that it shall take effect upon the adoption of such constitutional amendment. 16 Am. Jur. 2d, Constitutional Law, § 180.

In *Bennett v. Cain,* 248 N.C. 428, 103 S.E. 2d 510, the Court said, with plenary citation of authority to support the statement: "The power of the Legislature to determine who shall take the property of a person dying subsequent to the effective date of the legislative act cannot be doubted."

This is said in Annot. 171 A.L.R. 1075: "A Legislature has power to enact a statute not authorized by the present Constitution where the statute is passed in anticipation of a constitutional amendment authorizing it or provides that it shall take effect upon the adoption of such a constitutional amendment." In support of the statement, cases are cited from the Supreme Court of the United States, and from nine states.

In *Druggan v. Anderson,* 269 U.S. 36, 70 L. Ed. 151, the Court considered the Eighteenth Amendment to the Federal Constitution which was ratified and became effective 16 January 1916, but provided that prohibition therein declared should not become operative until after one year. The National Prohibition Act was passed after the ratification of the amendment, but before the expiration of the year, and provided that it was not to go into effect until after the amendment did. The Court in upholding the act and holding that it went into effect on 16 January 1920, made the incidental observation that "indeed it would be going far to say that while the fate of the amendment was uncertain Congress could not have passed a law in aid of it, conditioned upon the ratification taking place."

In *Dudley v. Staton,* 257 N.C. 572, 126 S.E. 2d 590, (opinion filed 10 July 1962), this Court held, as correctly summarized in the headnote in the North Carolina Reports:

> "G.S. 30-1, G.S. 30-2, and G.S. 30-3, insofar as they give a husband the right in certain instances to dissent from his deceased wife's will and take a specified share of her estate are unconstitutional to the extent that they diminish *pro tonto (sic)* a devise of her separate estate in accordance with a will executed by her. Constitution of North Carolina, Art. X, § 6."

To abrogate the effect of that decision, and to make the rights of husbands and wives the same in each other's separate property, the General Assembly in its 1963 Session enacted Chapter 1209 which is entitled: "AN ACT TO AMEND ARTICLE X, SECTION 6 OF THE CONSTITUTION OF NORTH CAROLINA, WITH RESPECT TO A

MARRIED WOMAN'S RIGHT TO TRANSFER HER SEPARATE PROPERTY BY DEED AND BY WILL TO EXERCISE POWERS OF ATTORNEY CONFERRED UPON HER BY HER HUSBAND." This Act of the General Assembly directed the submission of a constitutional amendment at the next general election whereby Article X, Section 6 of the Constitution would be amended to read, in substance: The real and personal property of any female in this State may be devised and bequeathed by her "subject to such regulations and limitations as the General Assembly may prescribe." Section 4½ of this Act provided in substance that in the event a majority of the voters in such general election be in favor of the amendments hereinbefore provided for, G.S. 52-4 shall be repealed and said repeal shall be effective on the date the Governor certifies the amendments to the Secretary of State. Section 4.1 provided: "From and after the date of certification of the amendments set out in Section 1 of this Act, wherever the word 'spouse' appears in the General Statutes with reference to testate or intestate successions, it shall apply alike to both husband and wife." This Act was ratified on 26 June 1963. A majority of votes cast by the qualified voters of this State on 14 January 1964 were in favor of the amendments, and such result was duly certified by the Governor of the State of North Carolina on 6 February 1964.

The General Assembly at its 1965 Session enacted Chapter 849, which is entitled: "AN ACT TO RE-ENACT G.S. 30-1, 30-2, AND 30-3, RELATING TO DISSENT FROM WILLS." Section 2 of this Act reads as follows:

> "This re-enactment of G.S. 30-1, G.S. 30-2 and G.S. 30-3 shall not be construed as a legislative determination that, with respect to the right of a husband to dissent from his wife's will, these Sections were invalid between the date of certification of the amendments to Article X, Section 6 and the date of ratification of this Act. This intention is manifested by the following language of Section 4.1 of Chapter 1209 of the Session Laws of 1963: 'From and after the date of certification of the amendments set out in Section 1 of this Act, wherever the word "spouse" appears in the General Statutes with reference to testate or intestate succession, it shall apply alike to both husband and wife.'"

Section 4 of this Act provides that it shall be in full force and effect from and after its ratification. It was ratified on 8 June 1965.

Pursuant to Chapter 1209, Session Laws 1963, the constitutional amendment to Article X, Section 6 was submitted to a vote of the people on 14 January 1964, and was approved, and the result of the

vote was duly certified on 6 February 1964. In Section 4 of the Act it is expressly provided that if a majority of the voters cast their votes in favor of the amendment, "the amendment so certified shall be in full force and effect from and after the date of certification." The 1965 Session of the General Assembly re-enacted the law of dissent in its 1965 Session by passing Chapter 849, Session Laws 1965, which Act was ratified on 8 June 1965. The dissent of Deaver Dunsmore Brock in this case was filed on 6 July 1965.

At the time of testatrix's death, the State Constitution, Article X, Section 6, read in part: "The real and personal property of any female in this State acquired before marriage. . . , shall be and remain the sole and separate estate and property of such female . . . and may be devised and bequeathed and conveyed by her subject to such regulations and limitations as the General Assembly may prescribe."

The testatrix here died on 14 March 1965. At her death the Constitution, Article X, Section 6 had been amended as set forth above. Her absolute power to dispose of her property by will and to deprive her husband of the right to dissent therefrom, had been abrogated by the Legislature and the express vote of the people. ". . . (A)ccording to most authorities, the right to make a testamentary disposition of property is not an inherent, natural, or constitutional right, but is purely a creature of statute, and, as such, is subject to legislative regulation and control, at least in respect of the disposition of real estate. Aptly stated, the dead hand rules succession only by sufferance." 57 Am. Jur., Wills, § 52. Under the facts here no vested rights of plaintiff and Everett Clark have been impaired.

It is our opinion, and we so hold, that the effect of the adoption of the amendment by the voters to Article X, Section 6 of the Constitution was to restore, subject to the qualifications set forth in the statute, the right of the husband to dissent from the will of his wife. See 1 Wiggins, Wills and Administration of Estates in North Carolina, p. 537.

At the time the will of Lillian Clark Brock was probated, her husband Deaver Dunsmore Brock had been legally adjudged incompetent from want of understanding to manage his affairs. As authorized by G.S. 30-2, as set forth in the 1961 amendment, J. M. Baley, Jr., his general guardian, was authorized to file a dissent for him from his wife's will.

The judgment of the lower court to the effect "that the dissent of Deaver Dunsmore Brock is void and of no force and effect" is

Reversed.

NORTH CAROLINA STATE HIGHWAY COMMISSION v. HILDA COOPER HETTIGER AND HUSBAND, E. P. HETTIGER; J. H. WHICKER, JR., TRUSTEE; NORTHWESTERN BANK; RAY JENNINGS, TRUSTEE; AND J. H. C. HUITT.

(Filed 24 July, 1967.)

1. Eminent Domain § 13—

Title to property condemned for highway purposes passes at the time of the filing of the complaint and declaration of taking by the Highway Commission and the deposit by it into court of the amount estimated by it as just compensation. G.S. 136-104.

2. Eminent Domain § 14—

The right to compensation for property taken for highway purposes vests in the persons owning the property at the time title passes to the Commission, and their right to compensation is limited to such interest as they own at the time of the taking.

3. Same; Eminent Domain § 5—

Respondents sold a part of their tract of land to third persons prior to the time the Highway Commission acquired title to the remaining tract. Respondents alleged that the price obtained by them for the tract sold prior to the taking was greatly decreased because of public knowledge that the Commission had decided upon the location for the limited access highway and the taking of property therefor. *Held:* G.S. 136-104 provides compensation on the basis of the date title vests in the Commission, and respondents are not entitled to compensation in regard to land conveyed by them to third persons prior to such date.

4. Same—

Respondents may not by agreement made in anticipation of the condemnation of a portion of their property change the statutory provision relating to the time of and the basis for compensation to be paid upon the condemnation of the property.

5. Same—

Allegations of unwarranted delay and *mala fides* on the part of employees of the Highway Commission in effecting a condemnation of respondents' land are irrelevant to the determination of what constitutes just compensation for the property condemned for highway purposes.

ON *certiorari* to review an order entered by *Lupton, J.*, at September 1966 Civil Session of WILKES.

The North Carolina State Highway Commission (Commission) instituted this civil action March 5, 1965, pursuant to G.S. 136-19 and G.S. 136-103 *et seq.*, to acquire for highway purposes the fee simple title to certain lands in Wilkes County owned by defendants Hettiger. Simultaneously with the filing of the complaint and declaration of taking, the Commission deposited with the Clerk of the Superior Court of Wilkes County the sum of $14,250.00, the sum estimated by the Commission to be just compensation for said tak-

ing. The named defendants other than defendants Hettiger filed disclaimers in which they asserted the indebtedness secured by certain deeds of trust executed by defendants Hettiger had been paid and that they had no further interest in the property involved in this proceeding.

The "Description of Property Affected" is set forth in Exhibit B of the complaint and declaration. The property is described as being those parcels of land "retained by E. P. Hettiger, Jr., and wife, Hilda C. Hettiger, *by way of an exception* contained in the deed dated July 13, 1964, to George B. Collins and wife, Ida M. Collins, and C. E. Ashley and wife, Ruth Ashley, recorded in Book 425, page 211, Wilkes County Registry; said description being specifically incorporated herein by reference." (Our italics.)

In their answer proper, defendants Hettiger, hereafter referred to as "defendants," assert the tract of land described in said Exhibit B is not "the only land affected by the taking." They alleged, as a further answer and "by way of affirmative relief," the following:

"I. That prior to the 13th day of July, 1964, the defendants were the owners of a tract of land containing 79.80 acres acquired from D. J. Brookshire and wife, Rebecca Brookshire, said land being specifically described in a deed recorded in Book 209, page 627, Wilkes County Registry, reference to which deed is hereby made for more exact description, and were also the owners of Lots 1 through 8 inclusively as shown and described on map of the Duane Church subdivision of the D. J. Brookshire farm, said lots being specifically described in the deed recorded in Book 430, page 223, Wilkes County Registry, reference to which deed being hereby made for more complete description.

"II. That these defendants had constructed their home on a portion of said lands at a cost in excess of $105,000.00; that they had erected and constructed other farm buildings on said lands at a cost in excess of $75,000, and that prior to the time the plaintiff located its Project No. 8.17824 in such a manner as to go across the lands of these defendants, the reasonable market value of said lands was in excess of $250,000.00.

"III. That, prior to the 13th day of June, 1964, the plaintiff selected the route for its Project No. 8.17824, which was a relocation of U. S. Highway 421, so as to go across the north side of the defendants' property and to form a so-called 'clover leaf' intersection of U. S. Highway 421 and Highway 115 at the west end of the defendants' property. That the property owned by the defendants fronting on Highway 115 was placed in a controlled access area so that the same could not be utilized by the defendants. That the plaintiff, during the year 1963, conducted meetings at the City Hall

in North Wilkesboro and at other public places, in which it exhibited maps showing the location of new Highway 421 and apprised and notified the public in general of its intention to construct new Highway 421 in accordance with the location shown on maps it exhibited. That the plaintiff began negotiations with property owners through whose lands new Highway 421 would be located and acquired rights of way from the property owners during 1963. That the plaintiff commenced actions against other property owners affected by said project to condemn and appropriate lands necessary for said project during 1963.

"IV. That for a number of years prior to 1964, the defendants were the owners of businesses connected with the poultry industry, including a hatchery, feed mill, processing plant, poultry farm and related businesses. That during the Fall of 1963, and continuing into the Fall of 1964, the poultry industry was depressed and unprofitable.

"V. That, after it became publicly known that the plaintiff had decided upon a location of new Highway 421 which would lead across the defendants' farm and prevent the defendants from utilizing any of their road frontage on Highway 115, the reasonable market value of the defendants' property declined at least $120,000.00.

"VI. That the plaintiff, as these defendants are advised and believe, and therefore allege, knew that these defendants were having to go out of business and were having to dispose of their property in order to pay obligations of their businesses for which they were personally liable. That the plaintiff had caused an appraisal to be made of the defendants' property, which appraisal, as these defendants are advised, disclosed that the defendants' property was being damaged in an amount in excess of $50,000, because of the taking of the lands of the defendants necessary to relocate Highway 421. That, although the plaintiff had the appraisal made, it did not contact these defendants, knowing that the defendants would have to dispose of their property in order to pay obligations incurred in their business.

"VII. That, because the relocation of Highway 421 caused the new Highway to be constructed through their property, the defendants were forced to sell their property at a price at least $100,000 less than they would have received if the plaintiff had located its project at another site, and that under the terms of their sales contract, the defendants retained the right to all damages occasioned by the construction of the highway through their premises.

"VIII. That the defendants retained title to the lands actually taken by the plaintiff in its Project No. 8.17824, which lands are described in the complaint, that they are entitled to full compensa-

tion for that part of their property taken by the plaintiff and are entitled to the decreased value of the property sold on the 13th day of July, 1964, to George B. Collins and wife, Ida M. Collins, and C. E. Ashley and wife, Ruth Ashley."

A motion to strike filed by the Commission was allowed in its entirety. Defendants' assignments of error relate to the part of the court's order which, except as to formal and immaterial clauses, strikes all of defendants' further answer.

Defendants filed a petition in this Court for writ of *certiorari* to review Judge Lupton's ruling. The Commission attached to its answer to said petition what purports to be a copy of an agreement dated June 13, 1964, between E. P. Hettiger, Jr., and wife, Hilda C. Hettiger, therein called "Seller," and George B. Collins and C. E. Ashley, therein called "Purchaser," recorded in Book 425, Page 133, Wilkes County Registry, and also what purports to be a copy of a deed dated July 13, 1964, recorded in Book 425, Page 211, said registry, from E. P. Hettiger, Jr., and wife, Hilda C. Hettiger, to George B. Collins and wife, Ida M. Collins, and C. E. Ashley and wife, Ruth Ashley.

This Court, allowing defendants' petition for *certiorari*, set the case for hearing with regular appeals from the Twenty-Third Judicial District, Spring Term 1967.

Attorney General Bruton, Deputy Attorney General Lewis, Trial Attorneys Briley and Hensey, and Associate Counsel E. James Moore for plaintiff appellee.

Whicker, Whicker & Vannoy for defendant appellants.

BOBBITT, J. In passing on the Commission's motion to strike, the facts alleged in defendants' further answer are deemed admitted. The question is whether these facts entitle defendant to recover compensation in excess of the fair market value as of March 5, 1965, of the property described in said Exhibit B. See G.S. 136-106(a)(3). If not, the order of Judge Lupton striking the further answer should be affirmed.

G.S. 136-104, in pertinent part, provides: "Upon the filing of the complaint and the declaration of taking and deposit in court, to the use of the person entitled thereto, of the amount of the estimated compensation stated in the declaration, title to said land or such other interest therein specified in the complaint and the declaration of taking, together with the right to immediate possession hereof shall vest in the State Highway Commission and the judge shall enter such orders in the cause as may be required to place the Highway Commission in possession, and said land shall be deemed to be

condemned and taken for the use of the Highway Commission and the right to just compensation therefor shall vest in the person owning said property or any compensable interest therein at the time of the filing of the complaint and the declaration of taking and deposit of the money in court, and compensation shall be determined and awarded in said action and established by judgment therein." This portion of G.S. 136-104 is based on Chapter 1025, Session Laws of 1959.

Prior to the enactment of said 1959 Act, title was not divested until compensation was paid; and the person who owned the property when the award was confirmed was the person to be compensated. *Highway Commission v. Industrial Center,* 263 N.C. 230, 139 S.E. 2d 253. In the cited case, Rodman, J., after noting the changes made by the enactment of statutes now codified as G.S. Chapter 136, Article 9, and after quoting the above portion of G.S. 136-104, says: "Now the right to compensation rests in the person who owned the land immediately prior to the filing of the complaint and declaration of taking."

Upon the filing of the complaint and declaration of taking and deposit in court on March 5, 1965, the title to the property described in Exhibit B, the only property then owned by defendants, vested in the Commission. Admittedly, defendants are entitled to compensation for this property.

Emphasizing the words, "compensable interest therein," in the quoted portion of G.S. 136-104, defendants contend they have an additional *compensable interest* growing out of their prior ownership of the property they conveyed to Collins and Ashley. The statute affords no basis for this contention. It provides the right to just compensation for the property condemned "shall vest in the person owning *said property* or any compensable interest *therein* at the time of the filing of the complaint and the declaration of taking and deposit of the money in court." (Our italics.) The *compensable interest* referred to in the statute is an interest *in the property condemned.* The only property being condemned in this action is that described in said Exhibit B.

G.S. 136-112 prescribes the rule for determining what constitutes just compensation, *viz.:* "(1) Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes. (2) Where the entire tract is taken the measure of damages for said taking shall be the fair market value

of the property at the time of taking." The court's instructions in *Highway Commission v. Pearce,* 261 N.C. 760, 136 S.E. 2d 71, were approved as in accord with G.S. 136-112(1).

What constitutes just compensation to defendants is determinable on the basis of conditions existing on March 5, 1965, the date title vested in the Commission and the right to compensation vested in defendants. The property described in said Exhibit B is *all*, not a part, of the property owned by defendants on that date. Although defendants, prior to July 13, 1964, owned a larger tract which included the property described in said Exhibit B, on the determinative date, March 5, 1965, the property taken by the Commission was a separate tract in which only defendants had title or interest. In *Barnes v. Highway Commission,* 250 N.C. 378, 109 S.E. 2d 219, cited by defendants, Moore, J., in his discussion of rules "for determining the unity of lands for the purpose of awarding damages or offsetting benefits in eminent domain cases," says: "The parcels claimed as a single tract must be owned *by the same party or parties.*" (Our italics.)

It is noteworthy that Collins and Ashley, or their successors in title, notwithstanding no portion of their property is being condemned, will actually receive, appertaining to the property conveyed to them by defendants on July 13, 1964, all special and general benefits resulting from the utilization of the property described in Exhibit B for highway purposes.

Defendants cite *Powell Appeal,* 385 Pa. 467, 123 A. 2d 650; *Covert Appeal,* 409 Pa. 290, 186 A. 2d 20; and *Empie v. United States,* 131 F. 2d 481 (4th Cir. 1942). The factual situation in each of these cases is readily distinguishable. Suffice to say, they involve a transfer of the *entire* tract of land prior to the condemnation proceedings. In the Pennsylvania decisions the principal controversy related to the interpretation of provisions in the contract between seller and purchaser concerning which of them should receive compensation for a condemnation. The basis for determining the amount of compensation was not involved. In the *Empie* case, the seller did not attempt to reserve a right to a claim for compensation.

Defendants could not, by agreement made in anticipation of the condemnation of a portion of their property, change the statutory provisions relating to the time of, and basis for, the compensation to be paid when the Commission condemns the property for highway purposes. Nor are these statutory provisions affected by conditions peculiar to defendants, such as their alleged financial reverses and difficulties.

Certain of defendants' allegations are to the effect that there was inconsiderate and unwarranted delay on the part of the Com-

mission in its negotiations with defendants and in instituting the condemnation action. These allegations, suggestive of improper conduct on the part of employees of the Commission, are irrelevant to the determination of what constitutes just compensation for property condemned for highway purposes.

For the reasons stated, the compensation to which defendants are entitled is determinable in accordance with G.S. 136-112(2). Hence, the order of Judge Lupton must be and is affirmed.

Affirmed.

YORK INDUSTRIAL CENTER, INC. AND YORK BUILDING COMPANY v. MICHIGAN MUTUAL LIABILITY COMPANY.

(Filed 24 July, 1967.)

1. **Appeal and Error § 57—**

   Findings of the trial court supported by evidence are conclusive on appeal.

2. **Insurance § 3—**

   An ambiguous provision of an insurance contract will be given that meaning most favorable to insured, and exception to coverage is not favored; nevertheless the policy must be construed as written.

3. **Same—**

   Where insurer receives an additional premium for amending the policy by substituting another word for a word used in the original policy, the parties must necessarily intend that the word used in substitution should cover a larger field of liability.

4. **Same—**

   Where a word used in an insurance policy is defined therein, it must be given the meaning as defined in the policy, regardless of whether a broader or narrower meaning is customarily given to such word, since the parties are free to contract and give words embodied in their agreement the meaning they see fit.

5. **Insurance § 95—**

   Where a proviso in a policy of property damage insurance excepts from coverage injury or destruction of property intended by the insured, such exclusionary clause will be construed to except from the coverage only those acts of the insured in wilfully and knowingly damaging property.

6. **Trespass § 1—**

   While trespass requires an intentional entry upon the land of another, it does not require that such entry be with wrongful motive, and therefore there is a trespass even though the entry is made under a *bona fide* belief by the trespasser that he owned the land or was entitled to enter thereon as a matter of right.

7. Insurance § 95—

The policy in suit provided coverage for liability incurred by insured for injury to or destruction of property caused by an unexpected event or happening. The findings were to the effect that insured's surveyor made a mistake in locating a corner between insured's land and the contiguous land of another, and that due to this mistake insured damaged trees along a 20 foot strip of the contiguous land for which the owner recovered damages. *Held:* Insured is entitled to recover from insurer under the policy.

APPEAL by defendant from *Canaday, J.*, at the Second January 1967 Regular Session of WAKE.

The plaintiffs were insured under a policy of liability insurance issued by the defendant. Dr. Louis N. West and wife obtained judgment against the present plaintiffs in the Superior Court of Wake County for damages for trespass upon their land by driving and operating a bulldozer thereon, resulting in the destruction of trees and shrubs. The present plaintiffs paid the judgment and demanded reimbursement therefor from the defendant. Upon the defendant's denial of liability therefor under its policy, this action was entered. The parties waived trial by jury and consented that the judge hear the evidence and find the facts. The amount of the plaintiffs' recovery, if any, was stipulated.

The facts found by the court, which are significant upon this appeal, are as follows:

> "5. That the general liability coverage under said policy as originally written obligated the defendant * * * 'To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, * * * caused by accident'; that * * * the plaintiffs * * * upon the payment of an additional premium * * * secured an endorsement to the policy where the word 'occurrence' was substituted for the word 'accident' in the policy, and occurrence was defined in the policy as follows:
>
> " 'Occurrence means an unexpected event or happening or a continuous or repeated exposure to conditions which results during the policy period in * * * injury to or destruction of property * * * provided the insured did not intend that injury * * * or destruction would result. * * *'
>
> "6. That in the late Spring of 1958, the plaintiffs were the owners of and interested in the development of a tract of land located on the east side of U. S. Highway 1A (known as the Old Wake Forest Road), Raleigh, North Carolina; that said tract lay to the south and east of the property of Louis N. and

Betsey John West; that J. W. York, who was President of both plaintiff corporations, in furtherance of the developments of the York property, employed John C. Castleberry, a registered engineer and an expert in the field of land surveying, to make a survey of the York property and to establish and mark the dividing line between the York property and the West property; that Castleberry * * * established the south line of the West property * * *; that as he surveyed said south line, he followed the line * * * to an old existing iron stake * * * approximately 21 feet short of the length of the south line as called for in the West deed; that Castleberry searched for an iron pipe or other evidence of a corner to the east of the old existing iron pipe along the same course but was unable to find any further sign of the southeast corner of the West property; * * * that Castleberry turned the angle called for in the West deed at the point of the old iron to run in a northerly direction the eastern line in the West property; * * * that in establishing the lines dividing the York and West property, which lines were the south and east lines of the West property, Castleberry chopped the survey line and placed stakes thereon at intervals of approximately 200 feet.

"7. That Castleberry was instructed to, and in fact did point out to W. H. Gilliam, who was engaged by the plaintiffs to clear and grade their property, the location of the Wests' southern and eastern property lines; that thereafter Gilliam cleared and graded the York property along the south line of West, and along the east line of West for a distance of 200 — 250 feet north from West's southeast corner; that Gilliam never crossed the line staked by John Castleberry on either the southern or eastern sides of the West property. * * *

"9. * * * [T]hat West instituted an action entitled *L. N. West and Betsey John West v. York Industrial Center, Inc., et al.,* alleging that York had carelessly, negligently, willfully, wrongfully and unlawfully damaged the West property; that York filed answers denying the allegations in the West complaint, praying that the Court appoint a surveyor under G.S. 38-4 to determine the true boundary lines of West and York * * *; that said action was tried at the June 1960 Term of Wake County Superior Court, and resulted in a verdict against the plaintiffs herein * * *

"10. That the survey by the Court-appointed surveyors in the action of *West v. York* showed that the eastern line of the West property as located by Castleberry was approximately 21

feet west of the eastern line of the West property as established by the Court-appointed surveyors * * *

"11. That judgment was entered on said verdict against the plaintiffs herein * * *; that York demanded that the defendant herein pay said judgment but that the defendant herein refused to do so; that * * * the plaintiffs herein paid [the judgment].

"12. That during the grading and clearing along the eastern line of the West property as established by Castleberry, which is the area where the West property was damaged, the plaintiffs herein were acting under the belief that the grading and clearing was being done on property owned by them; that the plaintiffs at no time graded, cleared or went upon the lands of the Wests with knowledge that said land was in fact owned by the Wests and not by the plaintiffs."

Upon these findings of fact, the court concluded that York's entry upon the property of the Wests was "an unexpected event or happening within the meaning of the policy issued by the defendant," that York did not intend to damage or destroy the property of the Wests within the meaning of those terms as used in the policy issued by the defendant, and that the damage to the Wests' property by the plaintiffs herein constituted an occurrence within the meaning of the policy issued by the defendant. The court accordingly gave judgment in favor of the plaintiffs for the amount of their damage as stipulated.

In the action brought by the Wests against the present plaintiffs, the jury found that the present plaintiffs did "trespass upon the land of the" Wests. In that action, as the result of a motion by the present plaintiffs, the then defendants, for a bill of particulars and for an order requiring the Wests to make the allegations of their complaint more definite and certain and to strike certain portions thereof, the Wests filed a response stating that their complaint contained only a single cause of action, which was "one for damages growing out of trespass." All of the pleadings, motions and responses in the suit by the Wests against the present plaintiffs were offered in evidence at the hearing of the present case.

Holding, Harris, Poe & Cheshire for defendant appellant.
Manning, Fulton & Skinner for plaintiff appellees.

LAKE, J. The appellant states in its brief that in this case there is no issue of fact. As it concedes, the evidence is sufficient to

support the findings of fact by the trial judge. These are, therefore, conclusive. *Sherrill v. Boyce,* 265 N.C. 560, 144 S.E. 2d 596.

The determinative question is, Does the policy issued by the defendant insure the plaintiffs against liability for damage to the land of a third person by the insured's entry thereon and acts thereon due to a *bona fide* mistake as to the location of the boundary line between the land of the insured and the land of such third person? The basic principles to be applied in answering this question were recently stated by us in *Insurance Co. v. Insurance Co.,* 269 N.C. 341, 152 S.E. 2d 436, as follows:

> "It is well settled that, in the construction of a policy of insurance, ambiguous provisions will be given the meaning most favorable to the insured. Exclusions from and exceptions to undertakings by the company are not favored. *Insurance Co. v. Insurance Co.,* 266 N.C. 430, 146 S.E. 2d 410; *Anderson v. Insurance Co.,* 266 N.C. 309, 145 S.E. 2d 845. Nevertheless, it is the duty of the Court to construe an insurance policy as it is written, not to rewrite it and thus make a new contract for the parties. *Hardin v. Insurance Co.,* 261 N.C. 67, 134 S.E. 2d 142; *Richardson v. Insurance Co.,* 254 N.C. 711, 119 S.E. 2d 871; *Pruitt v. Insurance Co.,* 241 N.C. 725, 86 S.E. 2d 401."

The policy, as originally issued, provided coverage against legal liability for the payment of damages because of injury to or destruction of property "caused by accident." Subsequently, it was amended by the attachment of a rider providing for the substitution of the word "occurrence" for the word "accident" and defining "occurrence." For this change in the policy, the plaintiffs paid a substantial additional premium. The necessary inference is that the parties intended that the policy, as amended, would provide substantial additional protection to the policyholder; that is, they intended that the word "occurrence," as defined in the rider, would bring within the protection of the policy substantial risks not included under the original limitation to damage to property "caused by accident."

Since the word "occurrence" is defined in the amended policy, it must be given that meaning, regardless of whether a broader or narrower meaning is customarily given to the term, the parties being free, apart from statutory limitations, to make their contract for themselves and to give words therein the meaning they see fit. Substituting this agreed definition of "occurrence" for the word "accident" in the policy, the undertaking of the defendant is thus stated in the contract of the parties:

> "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

injury to or destruction of property, * * * caused by an unexpected event or happening * * * which results during the policy period in * * * injury to or destruction of property * * * provided the insured did not intend that injury * * * or destruction would result. * * *"

We turn first to the proviso which excepts from the coverage, otherwise provided by the policy, liability of the insured for injury to or destruction of property intended by him. This, like other exceptions from coverage, otherwise provided by a policy of insurance, is to be strictly construed against the company.

It is obvious that the plaintiffs intended to cut down and destroy every tree which they did destroy on the land of the Wests. It is equally clear that they did so in the belief that these trees and shrubs belonged to them and not to the Wests. That is, the plaintiffs did not destroy the trees with the intent to injure or destroy any property right of the Wests. A fair construction of this excluding clause in the policy is that it is intended to remove from the protection otherwise afforded by the policy only the liability of an insured who wilfully damages property, knowing that he has no right to do so. Therefore, if the judgment rendered against the plaintiffs was for damage to the land of the Wests "caused by an unexpected event or happening," the proviso does not eliminate the plaintiffs' claim from the coverage of the policy.

The basis of the plaintiffs' present claim against the defendant is a judgment rendered against the plaintiffs in favor of the Wests for trespass. In the absence of negligence, which is not shown in the present case, trespass to land requires an intentional entry thereon. *Schloss v. Hallman,* 255 N.C. 686, 122 S.E. 2d 513. It does not, however, require that such entry be wilful and an action for trespass lies even though the entry was made under a *bona fide* belief by the defendant that he was the owner of the land and entitled to its possession or was otherwise entitled to go upon the property. See *Lee v. Stewart,* 218 N.C. 287, 10 S.E. 2d 804; 52 Am. Jur., Trespass, §§ 7, 35; 87 C.J.S., Trespass, § 5; Restatement, Torts, 2d, § 164; Prosser on Torts, 3d ed., § 17. Consequently, there is no inconsistency between the claim of the plaintiffs for reimbursement for their payment of the judgment rendered against them for trespass and their contention that they "did not intend" the injury or destruction of the property of the Wests, which was the basis for such judgment against them. The testimony of the plaintiffs' witnesses Castleberry, Gilliam, Edwards and York, the admission of which the defendant assigns as error on the ground of irrelevance to any issue in the present action, was relevant to this question of the plaintiffs' intent

to injure or destroy the property of the Wests. It showed a *bona fide* effort by the plaintiffs to determine the location of the boundary of the West property so as to avoid injury to it. This assignment of error is, therefore, without merit.

We are brought next to the question of whether the injury to or destruction of the property of the Wests was caused by "an unexpected event or happening" within the meaning of the policy issued by the defendant. The cause of the injury to the property of the Wests was the crossing of the boundary line by the plaintiffs and their acts subsequent thereto without knowledge of such crossing. This invasion of the land of the Wests was, in turn, due to the error of the surveyor in locating the line. This error of the surveyor was "an unexpected event" within the meaning of this policy.

In *Haynes v. American Casualty Co.*, 228 Md. 394, 179 A 2d 900, employees of a contractor, by mistake, crossed a boundary, entered the property of another person and cut down trees thereon. The court held the damage so done was "caused by accident" within the meaning of the liability insurance policy there in question, which was similar to the original policy issued by the defendant here. In *J. D'Amico, Inc., v. City of Boston*, 345 Mass. 218, 186 N.E. 2d 716, an excavating contractor, following lines established for his guidance by the city engineer, went over the line of an adjoining property owner and destroyed trees on his land. The contractor, having been sued by the landowner, brought a proceeding to compel his liability insurer to defend the claim made against him by the property owner. The policy was similar to the one originally issued to the defendant here. The Supreme Court of Massachusetts, though reversing a judgment in favor of the insured on grounds not presented in the matter before us, said, "[T]respass by D'Amico by mistake or without actual intent to invade property upon which it knew it was not entitled to carry on work under its contract, would be 'caused by accident' within the policy." A like result was reached under a like policy in *McAllister v. Hawkeye-Security Ins. Co.*, 68 Ill. App. 2d 222, 215 N.E. 2d 477. See also *Gray v. State* (La. App.), 191 So. 2d 816.

The policy issued by the defendant in this case, as amended, was designed to provide coverage substantially more extensive than that limited to liability for damages "caused by accident." We hold, therefore, that the invasion of the land of the Wests by the plaintiffs, and the resulting damage thereto and liability therefor, was "caused by an unexpected event or happening," namely, an error as to the location of the boundary line, and that such injury to the land of the Wests was not intended by the plaintiffs. Consequently, the liability of the plaintiffs to the Wests for such damages was

within the coverage of the policy and there was no error in the denial of the defendant's motion for nonsuit or in the entry of the judgment for the plaintiffs.

Affirmed.

C. H. CUTTS v. S. WORTH (WIRT) CASEY AND WIFE, MARTHA B. CASEY.

(Filed 24 July, 1967.)

1. Trial § 19—

Motion to nonsuit presents the question whether the evidence, considered in the light most favorable to plaintiff, is sufficient to be submitted to the jury.

2. Trial § 21—

On motion to nonsuit, plaintiff is entitled to every reasonable inference to be drawn from his evidence, resolving all discrepancies and contradictions in his favor.

3. Trespass to Try Title § 2—

In an action for the recovery of land and damages for trespass thereon, denial by defendant of plaintiff's title places upon plaintiff the burden of showing title in himself and that the descriptions in his chain of title fitted the land claimed by him, and of showing trespass by defendant.

4. Boundaries § 8—

What are the boundaries of a tract of land is a question of law for the court, the location of the boundaries on the ground is a factual question for the jury.

5. Boundaries § 2—

A call to a fixed monument is controlling over a conflicting call for course and distance, and an established line of an adjacent tract is a fixed monument within the purview of this rule.

6. Trespass to Try Title § 4—

In this action in trespass to try title, the descriptions in plaintiff's chain of title called for a tract fronting the ocean and for the lines of the tracts lying respectively on each side of plaintiff's tract, and plaintiff's evidence tended to support the location of these lines on the ground in accordance with his contentions. *Held:* Nonsuit was improperly entered, notwithstanding that the location of the lines of the contiguous tracts resulted in a distance between such adjacent boundaries greatly in excess of that called for in the descriptions in plaintiff's chain of title.

APPEAL by plaintiff from *Fountain, J.*, October 1966 Session of PENDER.

This action to have original plaintiffs declared the owners of a

certain tract of land and to be put in possession thereof, to recover the sum of $2,000 from defendants, and to permanently enjoin defendants from trespassing upon the premises was instituted in July 1956 by the heirs of Levi Batson, deceased. Plaintiffs alleged that they were the owners in fee simple of a certain described tract of land in Topsail Township, Pender County, North Carolina; that the defendants had wrongfully trespassed upon the land and were continuing to trespass thereon; that the defendants claimed an adverse interest in the land; that the claim was invalid but that it constituted a cloud on plainiffs' title; that plaintiffs had been damaged $2,000 by defendants' trespass; and that unless defendants were permanently enjoined from trespassing on the land, plaintiffs would suffer irreparable damage for which they had no adequate remedy at law.

Defendants answered, asking that plaintiffs be held to strict proof of their allegation of ownership of the certain described tract of land; admitting that defendants were constructing a building on certain land claimed by themselves; and alleging that defendants are the owners of the land on which they were building. Further answering, defendants allege that they are the owners of a certain described tract of land in Topsail Township, Pender County, North Carolina (this tract overlaps the northeast corner of the tract described in plaintiffs' complaint); that they were in the process of erecting a building thereon and because of the injunction have been damaged in the amount of $1,000; that unless plaintiffs are permanently enjoined from trespassing upon defendants' land they will suffer irreparable damages; that defendants or those under whom they claim have possessed the property claimed by plaintiffs, under known and visible lines and boundaries adversely to all other persons for more than twenty years next preceding the commencement of the action; and that defendants or those under whom they claim have possessed the land under colorable title for more than seven years next preceding the commencement of the action. Defendants prayed judgment that they be declared owners of and be put in possession of the tract of land described in their answer; that they recover the sum of $1,000 from plaintiffs; and that plaintiffs be permanently enjoined from trespassing upon defendants' land.

On 25 September 1956 the court ordered a survey.

At the November 1964 session of Pender County Superior Court the presiding judge ordered that C. H. Cutts be substituted as party plaintiff because original plaintiffs had conveyed the land to him, making him the real party in interest. Plaintiff Cutts then filed a complaint alleging that he had acquired all right, title and interest in and to the land described in the original complaint, and adopting every allegation of the original complaint except the allegation of

ownership of the land. His prayer for judgment was similar to that contained in the original complaint except that it asked that the restraining order theretofore entered be made permanent.

Defendants answered denying plaintiff's acquisition of right, title and interest in and to the land in controversy, renewing all of the allegations of their original answer, and renewing the prayer for judgment contained therein.

On 7 September 1965 the presiding judge ordered a compulsory reference. Both parties objected and excepted to the order and demanded a jury trial.

The referee held a hearing at which he approved stipulations of the parties, took the testimony of witnesses, accepted exhibits, and heard arguments of counsel. He filed his report containing findings of fact, conclusions of law, and decision in favor of defendants.

Plaintiff filed exception to the referee's report, submitted proposed findings, tendered issues and demanded jury trial on all issues. The cause was heard before Judge Fountain and a jury at the October 1966 session. At the conclusion of the plaintiff's evidence the defendants' motion for judgment of nonsuit was allowed and the court in its discretion withdrew a juror and declared a mistrial as to the cross-action filed by the defendants. Plaintiff appeals from the judgment entered.

Wyatt E. Blake and George Rountree, Jr., for plaintiff appellant.
Corbett & Fisler by Leon H. Corbett for defendant appellees.

PARKER, C.J. A motion to nonsuit presents the question whether the evidence considered in the light most favorable to plaintiff is sufficient to be submitted to the jury. *Walker v. Story*, 256 N.C. 453, 124 S.E. 2d 113. Discrepancies and contradictions in plaintiff's evidence are for the jury, not the court. *Clinard v. Trust Co.*, 264 N.C. 247, 141 S.E. 2d 271. Plaintiff is entitled to every reasonable inference to be drawn from his evidence. *Pinyan v. Settle*, 263 N.C. 578, 139 S.E. 2d 863. In an action for the recovery of land and for trespass thereon a denial by defendant of plaintiff's title places upon plaintiff the burden of proving title in himself and the trespass of defendant. *Day v. Godwin*, 258 N.C. 465, 128 S.E. 2d 814; *Tripp v. Keais*, 255 N.C. 404, 121 S.E. 2d 596; *Andrews v. Bruton*, 242 N.C. 93, 86 S.E. 2d 786; *Powell v. Mills*, 237 N.C. 582, 75 S.E. 2d 759. Where title to land is in dispute, claimant must show that the area claimed lies within the area described in each conveyance in his chain of title and he must fit the description contained in his deed to the land claimed. *Day v. Godwin, supra; Paper Co. v. Jacobs*, 258 N.C. 439, 128 S.E. 2d 818. The determination of what the bound-

aries are is a question of law for the court. The location of the boundaries on the ground is a factual question for the jury. *Batson v. Bell,* 249 N.C. 718, 107 S.E. 2d 562; *Moore v. Whitley,* 234 N.C. 150, 66 S.E. 2d 785.

Rodman, J., said in *Batson v. Bell, supra:*

> "The location of the boundaries of a parcel of land should be determined by following the directions and in the sequence given in the conveyance to each designated corner. If a particular corner is unknown and cannot be determined by adhering to the directions in the sequence specified, it is permissible to go to a subsequent known or established corner and by reversing the direction fix the location of the unknown corner. This backtracking is permissible only because it permits the location of an otherwise unknown corner."

The fifth headnote in our Reports correctly summarizes the decision in that case:

> "Plaintiffs introduced in evidence their grant which called for the northern line of the 'William B. Sidbury' grant as its southern boundary, and introduced evidence tending to locate the northern line of the 'William B. Sidbury grant.' *Held:* Plaintiffs had introduced evidence sufficient to permit the jury to find the northern line of that grant as their southern boundary, notwithstanding that this boundary would almost double the north-south line as called for in plaintiffs' grant and notwithstanding the absence of testimony that the William B. Sidbury line located by the witnesses was the same line called for in their grant, there being no evidence that the line was not in fact the line referred to in their grant."

The parties stipulated that plaintiff and defendants claim title to the property in dispute from a common source, Jesse W. Batson. Plaintiff introduced in evidence copy of land grant #1696 issued to Jesse W. Batson on 20 April 1859. This grant contained the following description:

> "Beginning at a stake, William B. Sidbury's corner on the sound; running thence with said Sidbury's line across the banks South twenty-five East sixty-six poles to a stake at the edge of the Ocean, thence with the edge of the ocean North fifty-three, East one hundred and seven poles to Frederick Rhue's line; thence with Rhue's line North twenty-five, West eighty-eight poles to a crooked creek, thence with the meanders of said creek to the Beginning."

The Batson grant is located by reference to the Sidbury and Rhue lines. The Sidbury grant, a copy of which was also introduced in evidence by plaintiff, is for the following described land:

> "Beginning on a dead cedar at the East end of a hammock near Cockle Creek Pond, thence South twenty-three East fifty poles to a stake, thence South fifty, West two hundred and sixty poles to a stake between the Hammock and the Atlantic, thence North twenty-three West one hundred and sixty poles to a stake in the Sound, thence to the Beginning."

The Sidbury grant was dated 4 January 1845. Plaintiff also introduced in evidence copy of a grant to Frederick Rhue dated 18 November 1854 containing the following description:

> "Beginning at a stake at Cockle or Crooked Creek landing on the sound side, then south thirty-five east ninety two poles to the Ocean, then along the ocean North Fifty East two hundred poles to a stake in the ocean, then North thirty five West ninety two poles to a stake in the sound side, then with the sound to the Beginning."

These three grants relate to land on Topsail Island. The Batson grant is located between the Sidbury grant to the southwest and the Rhue grant to the northeast. The southwestern boundary of the Rhue grant is stipulated by the parties and is agreed to as the northeastern boundary of the Batson grant. The southwestern boundary of the Batson grant is the same as the northeastern boundary of the Sidbury grant. The location of this boundary is one point of contention.

On 1 August 1879 J. W. Batson and his wife executed a deed to Milly Bishop conveying a portion of his land described as follows:

> "Beginning at a stake Vashti Atkinson's corner in the Sound running thence with said Vashti Atkinson's line across the banks south twenty five East sixty six poles to a stake at the edge of the ocean, thence with the edge of the ocean, north fifty three East fifty three poles to a stake, thence North twenty five west eighty eight poles to the sound, thence with the meanders of the sound back to the Beginning."

Defendants' claim is based upon a deed from the heirs of Milly Bishop conveying a portion of this tract. The location of this tract is in dispute.

On 21 January 1956 summons was issued in a Petition to divide the lands of Jesse W. Batson, deceased. The Petition sought a division of the land described in the original Batson grant except for

the portion conveyed to Milly Bishop. In the course of this special proceeding the remainder of the Batson grant was divided into twelve lots beginning with number one at the southwestern boundary of the Rhue grant. These lots were assigned to the heirs of Jesse W. Batson and to one S. G. Blake who had acquired an interest in the land.

In the course of the above division of lands a map was prepared showing the twelve lots assigned. Lot number three was assigned to the heirs of Levi Batson and subsequently conveyed by these heirs and others to plaintiff. The description in plaintiff's complaint is to lot number three of this division.

As in *Batson v. Bell, supra,* plaintiff offered evidence from which the jury could find the location of the boundary between the Batson and Sidbury grants. Although placement of this boundary at the location supported by plaintiff's evidence will result in making the ocean boundary of the Batson grant more than twice the length called for in the grant in order to reach the Rhue boundary, this will not prevent such placement. Where there is a conflict between course and distance and a fixed monument, the call for the monument will control. An established line of another tract is such a monument. *Batson v. Bell, supra; Coffey v. Greer,* 241 N.C. 744, 86 S.E. 2d 441.

Plaintiff introduced a copy of a document which divided some of the lands contained within the Sidbury grant. This division allotted certain described lands to Amos Atkinson and wife. Plaintiff produced exhibits and testimony of witnesses that the Vashti Atkinson named in the Milly Bishop deed was the daughter of William B. Sidbury and the wife of Amos Atkinson, that the southwestern boundary of the Milly Bishop tract was the northeastern boundary of the Vashti Atkinson division and that the northeastern boundary of the Vashti Atkinson division was the same as the northeastern boundary of the Sidbury grant and consequently the southwestern boundary of the Batson grant. He introduced evidence of the location of the beginning point of the Vashti Atkinson line and of the Sidbury line and consequently of the Batson grant. His evidence tends to locate the southwestern boundary of the Batson grant and to place the Milly Bishop tract in that portion of the Batson grant rather than in the northeastern portion near the Rhue boundary as contended by defendants. If the southwestern boundary of the Batson grant is established, the remaining boundaries are settled. The ocean and the sound form the southeastern and northwestern boundaries, and the Rhue line is stipulated as the northeastern boundary.

Defendants admit in their answer that they were constructing a building on the described tract of land. Therefore, if plaintiff is found

to be the owner of the land in controversy, trespass by defendants is established.

The pleadings, exhibits, and evidence of the plaintiff provide a sufficient basis for the Court to determine the boundaries of the Batson grant and of the land described in subsequent conveyances in plaintiff's chain of title. There is some evidence from which the jury could find that plaintiff acquired the tract of land in controversy through a connected chain of title. Further, there is some evidence from which the jury could locate the boundaries of this disputed tract on the ground and within the original Batson grant. *Paper Co. v. Jacobs, supra; Batson v. Bell, supra.*

Therefore, the judgment of nonsuit is

Reversed.

STATE OF NORTH CAROLINA v. H. L. LACKEY AND AL WHITE.

(Filed 24 July, 1967.)

1. Assault and Battery § 11—

Allegations in an indictment that a named defendant, a highway patrolman, and another named defendant, a municipal police officer, did assault and beat a named victim, one by beating the victim with his fists while the other defendant threatened to shoot the victim if the victim resisted the unlawful beating, are sufficient to charge both defendants with criminal assault.

2. Indictment and Warrant § 15—

A motion to quash addressed to the indictment in its entirety is properly overruled if the entire indictment, disregarding irrelevant or defective matter, sufficiently charges a criminal offense.

3. Common Law—

The common law of England which is not repugnant to, or inconsistent with, the freedom and independence of this State, and not abrogated or repealed by statute, or become obsolete, is in force in this State. G.S. 4-1.

4. Indictment and Warrant § 9—

An indictment charging a common law offense must set forth all essential factual elements necessary to identify and to constitute such offense.

5. Public Officers § 11— Indictment held insufficient to charge offense of official oppression.

An indispensable element of the common law crime of official oppression is that the acts constituting the alleged offense must be committed by a public officer in the exercise or under color of exercising the duties of his office, and therefore allegations that a highway patrolman and a municipal police officer under pretense of acting in their official capacity, but acting

for their own selfish and vindictive motives, criminally assaulted a citizen upon private premises, but without allegation that defendants were attempting to arrest the citizen or that either defendant was on duty at the time of the alleged occurrence, or even in uniform, is fatally defective in failing to allege facts showing that the assault was committed in the exercise or under color of the duties of their offices.

APPEAL by the State of North Carolina from *Martin, Special Judge,* December 1966 Criminal Session of BUNCOMBE.

At said December 1966 Criminal Session, the grand jury returned as a true bill an indictment in words and figures as follows:

"The Jurors for the State upon their oath present, That H. L. Lackey, a North Carolina State Highway Patrolman, and Al White, a Black Mountain, North Carolina, Police Officer, late of the County of Buncombe, on the 24th day of November, in the year of our Lord one thousand nine hundred and 66, with force and arms, at and in the County aforesaid, did unlawfully, willfully and maliciously, while under pretense of acting in their respective official capacities, to wit: H. L. Lackey being at the time a North Carolina State Highway Patrolman, and Al White being at the time a police officer for the town of Black Mountain, North Carolina, and without first having obtained a warrant of arrest for Thomas V. Stepp and without having placed said Thomas V. Stepp under arrest, did curse, assault, beat, wound and oppress said Thomas V. Stepp by the said Lackey beating Stepp with his fists and hands while simultaneously said White threatening to shoot Stepp with a pistol he was carrying if Stepp resisted said unlawful beating and oppression; all the while, said Lackey and White acting in and for their own selfish interests and vindictive reasons; said unlawful acts being committed over a period of several hours and after each had been requested to leave the private premises they were upon, subjecting said Stepp to their domination and to cruel and unjust hardship and to official oppression, against the form of the statute in such case made and provided and against the peace and dignity of the State."

Each defendant, prior to pleading thereto, moved, through his separate counsel, to quash said bill of indictment; and the court, being of the opinion the bill failed "to charge a criminal offense under the law of North Carolina," allowed each motion and quashed the bill; and, as to each defendant, dismissed the action.

The State excepted and appealed.

Attorney General Bruton and Staff Attorney Partin for the State.

Riddle & Briggs for defendant appellee H. L. Lackey.

Harold K. Bennett and E. Glenn Kelly for defendant appellee Al White.

BOBBITT, J. The allegations that defendants "unlawfully, willfully and maliciously" did assault, beat and wound Thomas V. Stepp "by the said Lackey beating Stepp with his fists and hands while simultaneously said White (was) threatening to shoot Stepp with a pistol he was carrying if Stepp resisted said unlawful beating," sufficiently charge each defendant with an assault, a criminal offense under the laws of North Carolina. For this reason, the motions to quash, which are addressed to the indictment in its entirety, should have been overruled.

The applicable rule has been stated as follows: "A motion to quash the entire indictment or information ordinarily will be overruled where, after the defective matter is rejected, it contains a valid and sufficient charge or one good count." 42 C.J.S., Indictments and Informations § 213.

The briefs are devoted largely to a discussion of the common law crime bearing the generic name of "official oppression" and to the extent, if any, the law with reference thereto has been superseded by statute.

In 10 Halsbury's Laws of England (3d ed.), Criminal Law, p. 615, it is stated: "Any public officer is guilty of oppression if while exercising, or under colour of exercising, his office he inflicts upon any person from an improper motive any illegal bodily harm, imprisonment, or any injury other than extortion. Oppression is a misdemeanor at common law."

In 2 Wharton's Criminal Law § 1898 (12th ed.), it is stated: "It is a misdemeanor at common law for a public officer, in the exercise or under color of exercising the duties of his office, to abuse any discretionary power with which he is invested by law, from an improper motive. In such cases the existence of the motive may be inferred either from the nature of the act or from the circumstances of the whole case."

See, also: Miller on Criminal Law § 162(c); 1 Burdick, Law of Crime § 281; Annot., "What constitutes offense of official oppression," 83 A.L.R. 2d 1007.

G.S. 4-1, a statutory provision in effect since its enactment in 1715, provides: "All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State." The term, "common law," as used in G.S. 4-1, refers to the common law of England. *State v. Willis,* 255 N.C. 473, 121 S.E. 2d 854.

In *State v. Glasgow,* 1 N.C. 264 (1800), the defendant, Secretary of State of North Carolina, was charged with the issuance of a duplicate land warrant, wickedly, fraudulently and in violation of the duties of his said office. It was held the facts alleged constituted an indictable offense at common law.

In *State v. Hawkins,* 77 N.C. 494, the Court, in opinion by Rodman, J., states: "There can be no doubt that the defendant is a public officer in the sense of being liable at common law for any neglect of his duties, and for any abuse of his powers." The defendant, an overseer of a poorhouse, was charged with wilful failure to provide suitably for the paupers committed to his custody and care. Judgment was arrested on the ground the indictment did not allege facts sufficient to constitute an indictable offense.

In *State v. Snuggs,* 85 N.C. 541, the defendant, a register of deeds, was indicted for issuing a marriage license in violation of a designated statute. This Court held the indictment was properly quashed on the ground the statute that created the offense prescribed a method of enforcement other than by indictment. Although unnecessary to decision, the opinion of Ruffin, J., states: "(W)e have not the least doubt that any officer who perverts his authority and uses it for the sake of oppression or fraudulent gain or any other wicked motive is guilty of an offense highly criminal in its nature and punishable by indictment, and this whether he is expected to take an oath of office or not, or whether there be any statute so declaring or not. It was so held in this State at a very early day in the case of *S. v. Glasgow,* 1 N.C. 264, and seems never to have been doubted since."

In 83 A.L.R. 2d 1008, it is stated: "There is no exact common-law definition of official oppression and the possible acts which may constitute the crime are as many and varied as the forms of corruption that may exist in public office." Hence, it would be futile to attempt to mark the extent, if any, the common law crime of official oppression has been modified or superseded by G.S. 14-230, a statutory provision discussed in detail by Denny, C.J., in *State v. Hord,* 264 N.C. 149, 141 S.E. 2d 241.

An indictment must charge all essential elements of the alleged criminal offense. *State v. Sossamon,* 259 N.C. 374, 130 S.E. 2d 638. With reference to statutory offenses, an indictment following substantially the language of the statute is sufficient if and when it thereby charges the essentials of the offense "in a plain, intelligible, and explicit manner." G.S. 15-153; *State v. Eason,* 242 N.C. 59, 86 S.E. 2d 774. However, if the statutory words fail to do this, they "must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the of-

fense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged." *State v. Cox,* 244 N.C. 57, 60, 92 S.E. 2d 413, 415. It is equally true that an indictment for the common law crime of official oppression must set forth all essential factual elements necessary to identify and to constitute the crime of official oppression.

In 67 C.J.S., Officers § 134b, it is stated: "In criminal proceedings against officers, an indictment, information, or affidavit must set forth with clearness the particular facts constituting the illegality and allege a violation of official duty or the commission of an official crime, and should charge the offense in ordinary and concise language in such manner and with such certainty as to give the officer notice of the particular offense with which he is charged." In this connection, see *State v. Hawkins, supra,* and *State v. Anderson,* 196 N.C. 771, 147 S.E. 305.

In the definitions of the common law crime of official oppression set forth above, one indispensable element is that the acts alleged to constitute official oppression be committed by a public officer "in the exercise or under color of exercising the duties of his office." The indictment now under consideration alleges: Defendant Lackey is a State Highway Patrolman. Defendant White is a Police Officer of Black Mountain. The alleged unlawful acts (assaults) were committed over a period of several hours after each had been requested "to leave the private premises they were upon." What private premises? Whose private premises? What was in progress on the private premises during this "period of several hours?" It is not alleged that they attempted to arrest Stepp either with or without a warrant. Although it is alleged *generally* that defendants' conduct was "under pretense of acting in their respective official capacities," it is also alleged that "all the while, said Lackey and White (were) acting in and for their own selfish interests and vindictive reasons." It is not alleged that either of the defendants was on duty at the time of the alleged occurrences, indefinite as to time and place, nor is it alleged that either of the defendants was in uniform. We need not consider whether the indictment in other respects sufficiently charges the common law crime of official oppression. It is sufficient to say that it is fatally defective in that it fails to set forth facts sufficient to show what official duty, if any, either defendant was exercising or purporting to exercise on the occasion of the alleged assaults on Stepp. Indeed, it may be reasonably inferred from the facts alleged that defendants were acting *on their own,* "in and for their own selfish interests and vindictive reasons," and not while exercising or purporting to exercise any official duty.

Although the indictment is considered fatally defective with

reference to the common law crime of official oppression, it sufficiently charges defendants with assault. Accordingly, the court erred in granting the motion to quash. Further prosecution on this bill of indictment must be limited to the criminal offense of assault.

Reversed.

ILEEN STUTTS v. SAMMIE LEROY BURCHAM AND CLAYTON SMITH, T/A CLAYTON SMITH LANDSCAPING.

(Filed 24 July, 1967.)

1. Appeal and Error § 31—

An assignment of error for failure of the court to charge on an aspect of the law presented by the evidence should set forth appellant's contention as to what the judge should have charged.

2. Automobiles § 87— Whether negligence of driver in turning left was a proximate cause of collision held for jury.

In an action by a passenger injured in a collision between the car in which he was riding and a truck making a left turn at an intersection, the driver of the truck may not successfully contend that the negligence of the driver of the car in attempting to pass at the intersection was the sole proximate cause of the accident when there is evidence that the driver of the truck turned left without seeing the car, which had been immediately behind him, and which had been for some time beside him when he started to turn, since, upon the evidence, it is for the jury to determine whether the truck driver's negligence in failing to ascertain whether he could turn left in safety before attempting to do so was a proximate cause of the collision. G.S. 20-154.

3. Automobiles § 93— Passenger is entitled to recover of either driver whose negligence was one of proximate causes of injury.

Where a passenger in one vehicle sues the driver of the other vehicle for injuries received in a collision between the vehicles, plaintiff is entitled to recover if the negligence of defendant driver was one of the proximate causes of the collision and, even though defendant driver's general denial entitles him to show that the sole proximate cause of the collision was the negligence of plaintiff's driver, when plaintiff's evidence tends to show negligence on the part of defendant driver constituting a proximate cause of the injury, and neither plaintiff's nor defendant's evidence supports the hypothesis that the negligence of the driver of the car in which plaintiff was riding was the sole proximate cause of the collision, the court is not required to charge upon this hypothesis.

4. Automobiles § 94—

Neither allegation nor evidence in this action presented the question of plaintiff passenger's contributory negligence.

APPEAL by defendants from *Riddle, S.J.*, 12 September 1966 Civil Session of GUILFORD (High Point Division).

Civil action for personal injuries resulting from a collision between two motor vehicles.

On 19 October 1963 about 8:00 a.m., plaintiff was a passenger in a Volkswagen which was being driven by her husband, W. O. Stutts, in a northerly direction on North Main Street (U. S. Highway No. 311) in the city of High Point. The weather was clear, and the sun was shining. The Stutts vehicle was following a dump truck owned by defendant Smith and operated by his employee, defendant Burcham. When the Volkswagen attempted to pass the truck, there was a collision, in which plaintiff received head injuries. She alleges that the collision was proximately caused by the negligence of Burcham in that, as the Volkswagen was in the act of passing the dump truck, he suddenly, and without signaling, turned the truck to his left across the center line of the highway in front of the Volkswagen. Defendants' answer is merely a categorical denial that negligence on the part of Burcham was a proximate cause of plaintiff's injuries.

Plaintiff's evidence tended to show: When Stutts was about 800 feet south of the intersection of Peachtree Drive and North Main Street, he began the "act of passing" the dump truck. Visibility was unobstructed for a mile. He gave a left-turn signal, sounded his horn, and pulled into the left lane at a speed of approximately 30-35 MPH. This was also the speed of the truck. At that point, there was no yellow line in the lane for northbound traffic, and Stutts was unaware that he was approaching an intersection. A faded yellow line, however, did begin in that lane 483 feet from the intersection. There was also a solid white line in the center of No. 311, which extended into the intersection. After the Volkswagen overtook the truck, according to Mr. Stutts, the following events occurred:

> "I was following parallel along with him a good long distance on up to 50 or 75 feet from the Peachtree Road, at which time he veered across the line. Mr. Burcham cut the corner short and hit my car, and dragged me into the ditch on the far corner of Peachtree. He started his turn 50 to 75 feet south of Peachtree Drive. I didn't see a signal of any sort. . . . Just at the time I began to pass I blew my horn and then blew again when he cut across my line and hit my vehicle."

The entire right side of the Volkswagen was damaged; the dump truck was damaged on the left side. A motorist, traveling behind the Volkswagen, testified that, as Stutts attempted to pass the truck at a speed of 40-45 MPH, it turned left and knocked the Stutts vehicle

off the road and into a ditch; that, before it turned, he saw no signal from the truck, and he was in a position to have seen one had it been given; that after the accident he examined the rear-signal light on the truck and found it covered with mud or cement.

Defendants' evidence tended to show: At the time of the collision, the dump truck was in the center of the intersection of Peachtree Drive and No. 311, starting a left turn into Peachtree. Defendant Burcham, the driver, had previously turned on his left-turn signal when he was 300 feet south of the intersection. At that time, he looked in his rear-view mirror and saw no car in the left lane. At no time did he hear a horn blow. When he got to Peachtree, he once more looked in the mirror and saw no cars in the left lane. He then started to turn — and the Volkswagen hit his truck on the left side behind the door. The front bumper and the left-front wheel were also damaged. Burcham had not seen the Volkswagen prior to the collision. At the time of the impact, the speed of the truck was 5-15 MPH. All the signal lights on the truck were working, and they were clean except for "light dust."

The investigating officer, who arrived at the scene 5-10 minutes after the collision, found the dump truck in the southbound lane of No. 311, headed in a northwesterly direction. The front end of the Volkswagen was in the ditch on the northwest corner of the intersection. He observed that 90 feet of skid marks angled from the center of No. 311 to debris in the middle of Peachtree Drive and the southbound lane of No. 311 and that a yellow line extended south from the intersection for 477 feet.

Issues were submitted to the jury and answered as follows:

"1. Was the plaintiff injured and damaged by the negligence of the defendants, as alleged in the Complaint? ANSWER: Yes.

"2. What amount of damages, if any, is the plaintiff entitled to recover of the defendants? ANSWER: $16,000.00."

From judgment entered upon the verdict, defendants appeal.

Bencini & Wyatt; Silas B. Casey for plaintiff appellee.

Holt, McNairy and Harris; Deal, Hutchins and Minor for defendant appellants.

SHARP, J. Defendants' first three assignments of error are that the court failed to refer to G.S. 20-150(c) (passing at city intersections), G.S. 20-147 (keeping to the right half of highway at intersections), and G.S. 20-150(e) (observance of no-passing signs), and to explain the application of these statutes to the evidence re-

lating to the manner in which Stutts operated the automobile in which plaintiff was riding. These three assignments do not comply with the rules of this Court in that they fail to set out defendants' contentions as to what the judge should have charged. *Bank v. Hackney,* 270 N.C. 437, 154 S.E. 2d 512; *State v. Malpass* and *State v. Tyler,* 266 N.C. 753, 147 S.E. 2d 180; *State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736. The rules of practice in this Court are mandatory, and an assignment which does not comply with the applicable rule *requires* no consideration. *Walter Corporation v. Gilliam,* 260 N.C. 211, 132 S.E. 2d 313. Appellants' failure to observe the rule with reference to assignments based on the judge's failure to charge illustrates the reason for the rule; we are unable to determine what they think the error of omission was. In the brief, they point to the evidence that Stutts attempted to pass the dump truck at an intersection; that he drove to his left of the center line at an intersection; and that he drove on the left side of the highway when there was a yellow line in his proper lane of travel. From this they argue that "any negligence on the part of the driver of the other car in the collision (Stutts) was relevant on the question of proximate cause"; that "the answer raised the issue by the specific denial of proximate cause"; and that "if Stutts had not attempted to pass at the intersection in all probability there would have been no collision."

As authority for their contention "that Stutts was negligent" they cite, *inter alia, Tillman v. Bellamy,* 242 N.C. 201, 87 S.E. 2d 253, a case in which the plaintiff, a passenger injured in a two-car collision, sued only one of the drivers. The one sued denied negligence and pled the sole negligence of the other. The plaintiff was awarded a new trial because the judge failed to charge the jury that if both drivers were guilty of negligence which contributed proximately to the plaintiff's injury, the one whom she had sued would not be relieved of liability therefor unless the negligence of the other was the sole proximate cause of the injury. *Tillman v. Bellamy, supra,* appears to us to control this case, but it offers no comfort to defendants. Had plaintiff sued defendants and Stutts or had defendants made Stutts an additional party-defendant for contribution under G.S. 1-240, the evidence here would have supported a finding that plaintiff was injured by the concurring negligence of Stutts and defendant Burcham. Plaintiff, however, sued only defendants, and they did not interplead Stutts, but all this is immaterial to this appeal. If Burcham's negligence was one of the proximate causes of plaintiff's injury, defendants are liable to her. *Tillman v. Bellamy, supra.* She is not concerned with any claims they may have against a third party for contribution.

Although defendants do not specifically make the contention that

Stutts' negligence was the sole proximate cause of the collision, their argument seems to be: (1) Stutts was negligent in that he attempted to pass the truck at an intersection in violation of G.S. 20-150(c) and G.S. 20-147, and in that he had been driving to the left of a yellow line for at least 477 feet before the collision. (2) He was not required to anticipate such negligence on the part of Stutts. (3) Therefore, Burcham was not negligent in turning left at the time when Stutts was alongside the truck; so Stutts' negligence was the sole proximate cause of the collision. This contention is untenable. It overlooks the positive duty which G.S. 20-154 imposed upon Burcham to see that the movement could be made in safety before he turned left from No. 311 into Peachtree Drive. Indisputably, the Stutts Volkswagen had been behind the dump truck for some time and it was beside the truck when Burcham started his left turn, whether he cut the corner or turned after he had passed the center of the intersection. Yet, by his own admission, Burcham never saw the Stutts vehicle until after the collision. Obviously, it was there to be seen, had he looked.

The conclusion is inescapable that Burcham's failure to exercise reasonable care to ascertain that his turn could be made in safety contributed to plaintiff's injuries. The judge correctly charged that, in order to recover of defendants, plaintiff need only satisfy the jury by the greater weight of the evidence that Burcham's negligence was *one* of the proximate causes of the collision. In *Finch v. Ward,* 238 N.C. 290, 77 S.E. 2d 661, an action brought by a passenger against the driver of one of two cars involved in a collision, a different factual and procedural situation was presented. The defendant impleaded the driver of the other car for contribution, alleging that he was a joint tort-feasor. The second driver filed answer in which he alleged that the first driver's negligence was the sole proximate cause of the collision. He also alleged a cross action for his own damages against the original defendant. The jury found both defendants guilty of negligence proximately causing plaintiff's damage. Upon additional defendant's appeal, a new trial was granted because the judge failed to instruct the jury upon the effect of additional defendant's evidence which tended to show that the negligence of the original defendant was the sole proximate cause of the collision. That case, therefore, is not pertinent here. The evidence and pleadings in *Finch v. Ward* brought into direct issue, *in a suit by one driver against another,* the question of sole negligence, for, if both drivers were negligent, neither could recover from the other. In the case at hand, however, plaintiff-passenger could recover from either driver if his negligence was one of the proximate causes of the collision. The evidence in this case, which tended to show the negligence of both driv-

ers, did not require the court to charge on the hypothesis that the negligence of the one whom she had not sued (and whom defendant had not impleaded for contribution) was the sole proximate cause of her damage.

Several of our cases contain the statement that, under a general denial, a defendant may show that the sole proximate cause of the injury in suit was the negligence of some third person. *Kimsey v. Reaves,* 242 N.C. 721, 723, 89 S.E. 2d 386, 387; *Lovette v. Lloyd,* 236 N.C. 663, 670, 73 S.E. 2d 886, 892-93. This is an application of the rule: "The plea of denial controverts and raises an issue of fact between the parties as to each material allegation denied, and forces the plaintiff to prove them." *Chandler v. Mashburn,* 233 N.C. 277, 278, 63 S.E. 2d 553, 554. Notwithstanding, whenever a defendant charged with actionable negligence plans to contend at the trial that the negligence of another person was the sole proximate cause of a plaintiff's injuries, it is by far the better practice for him to name that person in the answer and to particularize the conduct which he contends constituted the proximate cause. This method of pleading conforms to our general practice, and it not only puts a plaintiff on notice but it also alerts the trial judge to a defendant's contentions.

Under defendant's general denial of plaintiff's allegations in this case, she was required to prove only that negligence on the part of Burcham was a proximate cause of her injuries. This she did to the satisfaction of the jury. Neither plaintiff's nor defendants' evidence suggests that Stutts' conduct was the *sole* proximate cause of the collision.

Defendants assign as error the judge's statement to the jury that neither the pleadings nor the evidence raised an issue of plaintiff's contributory negligence. This was a correct statement of which defendants have no right to complain.

In the trial below, we find

No error.

D. C. STANDARD HOMES CO., A PARTNERSHIP, A. G. JOHNSON AND EDNA A. JOHNSON, TRUSTEE, PLAINTIFFS, v. N. C. STANDARD HOMES CO., A PARTNERSHIP, WILLIAM W. JOHNSON AND LOIS F. JOHNSON, TRUSTEE, PARTNERS, DEFENDANTS.

(Filed 24 July, 1967.)

1. Pleadings § 18—

Where the complaint is insufficient to state a cause of action as to one of the two purported causes of action asserted, there can be no misjoinder of parties and causes.

2. Limitation of Actions § 16—

Ordinarily, the statute of limitations may not be taken advantage of by demurrer.

3. Pleadings § 19—

Where the complaint alleges that under written contract plaintiff furnished plans, plates and plan books to defendant partnership without cost, plaintiff being a partner, it will be assumed that plaintiff's remuneration was to be from the profits of the partnership, and the complaint fails to state a cause of action to recover under the agreement a percentage of the amount received by the partnership from its resale of such plans, notwithstanding allegations that under the "agreement, custom and usage, and the said written contract" plaintiff was to be paid such percentage, since conflicting allegations neutralize each other.

APPEAL by plaintiffs from *Johnson, J.*, 25 July 1966 Assigned Civil Session of WAKE. This case was docketed and argued at the Fall Term as Case No. 539.

Action for an accounting. Defendants demurred to the complaint, which — except when quoted — is summarized below:

Since 1 January 1954, plaintiff, D. C. Standard Homes Company (D. C. Homes), has been a partnership composed of A. G. Johnson and Edna A. Johnson, trustee, with its principal office in Washington, D. C. Defendant, N. C. Standard Homes Company (N. C. Homes), is a partnership composed of William W. Johnson and Lois F. Johnson, trustee, with its principal office in Fuquay-Varina, North Carolina. Prior to 1 January 1954, plaintiff-partnership was composed of the four Johnsons, and defendant-partnership belonged to A. G. Johnson and William W. Johnson. On 31 December 1953, by a written agreement (attached to the complaint as Exhibit A and incorporated therein by reference), A. G. Johnson transferred one-half of his 50% interest in N. C. Homes to William W. Johnson and Lois F. Johnson, trustee. In consideration therefor, they transferred to him their entire interest in D. C. Homes. In the division contract it was agreed, *inter alia:*

> "That William W. Johnson will be primarily responsible for the operation, and obligations, of the N. C. office, though A. Glendon Johnson will contribute such time as may be practical, such assistance as may be possible, and such legal liability as required by N. C. law for his retained 25% interest.
>
> "That services to, and benefits from, the N. C. office will be in proportion to the ownership interest of the parties, as far as practical, it being contemplated that A. Glendon Johnson's contribution shall be primarily in the field of adequate preparation of new designs in advance of time for publications, furnished by himself or his assistants, and that William W. Johnson shall

have undisturbed responsibility for general office management and production, by himself or his assistants.

"That territory, as such, shall not be divided, except as made practical by specialization for better service to the public; plates, plans, trade agreements, personnel, customers, trade-name prestige, etc., will be shared on a mutually profitable basis."

Prior to 1 January 1954, both D. C. Homes and N. C. Homes were engaged in the business of selling plan books and blueprints for the construction of residences. After 1 January 1954, the custom, usage, and practice was that plaintiff-company created, composed, and marketed plans, blueprints and home plan books for the construction of residences with basements, and defendant-company created, composed and marketed plans and home plan books for residences without basements. "From and after January 1, 1954, by agreement between the parties and by custom practice and usage of plaintiff company and defendant company, and pursuant to said written agreement of January 1, 1954, plaintiff company was to receive from defendant company one-half of all proceeds received from the sales of basement-type plate plans. . . ."

Since 1 January 1954, plaintiff has fully complied with the terms of the agreement by supplying to defendant, as requested, *and without cost,* large and valuable supplies of house plans, tracings, plates, plan books, and original art works, which were produced and paid for by plaintiff. This material and property was used by N. C. Homes under and pursuant to the arrangement between the parties over the years and up until January 1963. "(F)or several years after January 1, 1954, defendant company paid over periodically to plaintiff company several thousand dollars each year as plaintiff company's one-half share of the proceeds of sales of said plates and plans, up until about the time a personal controversy arose between A. G. Johnson and William W. Johnson, at which time such payment from defendant company to plaintiff company diminished abruptly and was stopped completely in about January 1963."

On 6 February 1962, pursuant to an order of the Superior Court of Wake County, N. C. Homes was sold "as is including all assets and all liabilities" and "subject to questions as to ownership by the partnership of the 'name' and rights to use certain 'plates.' "

Plaintiff does not know the exact number and value of the properties it furnished defendant, but prior to 6 February 1962, D. C. Homes had shipped to defendant 50,000-70,000 house plan books having a value of $10,000-$20,000. Defendant stored these books and, from time to time, sold large quantities of them to various contractors, lumber dealers, etc., who thereafter ordered plans therefrom. Notwithstanding, defendant has withheld 50% of the proceeds

of said sales, and has refused to pay that amount to D. C. Homes, which is entitled to collect it. Plaintiff does not know the amount due, but defendant's record will disclose the sum it owes plaintiff.

Unless ordered to account to plaintiff, defendant will continue to use plaintiff-company's said properties and to profit unjustly therefrom without any payment to plaintiff. The prayer is that defendant be required "to file a complete accounting with the court, setting forth in detail each sale of plan books, plans, sketches, tracings, or blueprints it has made from plates or plan books owned by or furnished by plaintiff company to defendant company;" and that plaintiff recover of defendant such sum as the accounting may show it to be entitled.

Defendant demurred to the complaint (1) for a misjoinder of parties and causes of action; (2) because it appears that plaintiff's alleged cause of action arose more than three years before the institution of the action; and (3) for its failure to state a cause of action. Judge Johnson sustained the demurrer and plaintiffs appeal.

Boyce, Lake & Burns for D. C. Standard Homes Company, plaintiff appellant.

Dupree, Weaver, Horton, Cockman & Alvis for defendant appellees.

SHARP, J. Appeals in the litigation between A. Glendon Johnson and William W. Johnson growing out of the dissolution and sale of the partnership, N. C. Standard Homes Company, have been before us on three prior occasions. *William W. Johnson and Lois F. Johnson, Trustee, v. A. Glendon Johnson,* 255 N.C. 719, 122 S.E. 2d 676. *A. Glendon Johnson v. William W. Johnson and Lois F. Johnson, Trustee,* 259 N.C. 430, 130 S.E. 2d 876; *A. Glendon Johnson v. William W. Johnson,* 262 N.C. 39, 136 S.E. 2d 230.

Defendant's first ground for demurrer is that there is a misjoinder of parties and causes of action. It argues, however, that the contract of 31 December 1953 was with A. G. Johnson only and not the partnership, D. C. Homes, and that there is, therefore, a misjoinder of plaintiffs only. Although the complaint does not specifically allege an assignment, it is implicit therein that A. Glendon Johnson assigned to D. C. Homes whatever rights accrued to him under the contract executed on 31 December 1953. His partnership with his wife, Edna A. Johnson, trustee, was formed on 1 January 1954. Irrespective of any assignment, however, if the complaint discloses that Edna A. Johnson has no cause of action against defendant, there is no misjoinder of either parties or causes. *Conference v. Piner,* 267 N.C. 74, 147 S.E. 2d 581. The second ground for demur-

rer, that the complaint discloses that the cause of action arose more than three years before its institution, is likewise without merit. The statute of limitations may not be taken advantage of by demurrer. *Harrell v. Powell,* 251 N.C. 636, 112 S.E. 2d 81. We assume, therefore, that his Honor sustained the demurrer upon the basis that the complaint failed to state a cause of action, and it is to this ground that we direct our attention.

The 31 December 1953 contract between the Johnsons contains no provision that A. Glendon Johnson should receive one-half of the proceeds which N. C. Homes received from the sale of basement-type home plans. On the contrary, it provided that his contribution to the partnership, in which he had a one-fourth interest, should be the "adequate preparation of new designs in advance of time for publication, furnished by him or his agents." Although the contract speaks of sharing plans, plates, etc. "on a mutually profitable basis," it contains no provision for payment to the other by either A. Glendon Johnson (D. C. Homes) or William W. Johnson (N. C. Homes). Significantly, the complaint makes no mention of any payments made by plaintiff to defendant for the use of any basement-house plans furnished it by defendant. It does allege, however, that pursuant to the written contract plaintiff furnished the plates, plans, and house plan books to defendant *without cost.*

The written contract, which is the basis of plaintiff's action, is the antithesis of a lucid, legal document. Almost, it suggests a studied effort at ambiguity on the part of its draftsman. It does say with great clarity, however, "that this agreement contemplates no 'tax dodge' for any of the parties. . . ." Plaintiff bases its right to an accounting and a judgment against defendant upon the allegation that, by "agreement between the parties . . . custom, practice and usage of plaintiff company and defendant company, and pursuant to the said written agreement of January 1, 1954," it was to receive one-half of the proceeds from the sales of all basement-type plate plans. (Presumably, by the "written agreement of January 1, 1954," plaintiff meant the agreement of 31 December 1953, since the complaint speaks of 1 January 1954 as the "effective" date of the contract.) In its brief, plaintiff concedes that the custom and usage alleged in the complaint do not constitute a contract or take the place of a contract. Its contention is that, under the written contract, for more than nine years plaintiff and defendant "shared (plates and plans) on a mutually profitable basis," and that there was a *verbal* agreement with reference to remitting profits from sales by defendant company, which failed to remit after January 1963. Plaintiff has, however, alleged no modification of the written contract nor the substitution of a subsequent oral agreement for the written con-

tract in which A. Glendon Johnson was obligated to furnish plates and plans to defendant as his contribution to the partnership, N. C. Homes, in which he owned a one-fourth interest. The complaint, which is not the "plain and concise statement of the facts constituting the cause of action" which G.S. 1-122(2) contemplates, merely lumps "agreement, custom and usage, and the said written contract." It appears that the complaint contains conflicting and repugnant allegations of fact which "destroy and neutralize each other" — as Parker, C.J., said with reference to another complaint in one of the actions between A. Glendon Johnson and William W. Johnson. *Johnson v. Johnson,* 259 N.C. 430, 439, 130 S.E. 2d 876, 882.

The complaint reveals that on 6 February 1962, N. C. Homes was sold under an order of the Superior Court, and that, since then, defendant has had no further interest in N. C. Homes. See also *Johnson v. Johnson,* 262 N.C. 39, 136 S.E. 2d 230. The contract of 31 December 1953 was based upon A. Glendon Johnson's status as a partner in N. C. Homes. When his interest in the partnership terminated, so did the contract. According to its allegations, plaintiff furnished defendant no plans or plan books after 6 February 1962.

Nothing else appearing, we would assume that all books, plans, plates, etc. on hand on 6 February 1962 were sold as assets of the partnership and that, in the division of the proceeds, A. Glendon Johnson received his one-fourth part thereof. The complaint alleges, however, that the partnership was sold "subject to questions as to ownership by the partnership of the 'name' and rights to use certain 'plates.'" What this allegation means or connotes, we do not know. If the title to any of the property, which was sold as partnership assets, was then in dispute and the judicial sale was made "subject to questions as to ownership," it is nonetheless clear that the complaint in this case does not state a cause of action, either for conversion or for the recovery of "plates," plan books, or other personal property and damages for their detention. The demurrer was properly sustained.

Judgment affirmed.

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

HAROLD A. KOHLER v. J. A. JONES CONSTRUCTION COMPANY, A CORPORATION.

(Filed 24 July, 1967.)

1. Bill of Discovery § 2—

Plaintiff may examine officers of defendant corporation prior to the filing of complaint only upon affidavit alleging facts with reasonable particularity disclosing that such examination is necessary to enable plaintiff to prepare properly his complaint and describing with reasonable particularity the information sought to be discovered, G.S. 1-568.1, G.S. 1-568.9, G.S. 1-568.10(b)(2), and the order for examination must be restricted to matters necessary to enable plaintiff to file his pleading.

2. Same—

If the order for examination of officers of the adverse party is too extensive, such order will be modified on appeal so as to restrict it to the examination contemplated by the statute.

3. Same— Order for examination of adverse party modified in this case to exclude matter not necessary to enable plaintiff to file complaint.

In this action by plaintiff to recover compensation under a contract of employment, plaintiff applied for examination of the officers of defendant corporation concerning work done under a project, plaintiff claiming that under his contract of employment he was entitled, in addition to a stipulated salary, to a percentage of receipts from the project upon which plaintiff worked. *Held:* Plaintiff was entitled to examine the officers of defendant in regard to monies or properties received by defendant upon which plaintiff claims the stipulated percentage in order that plaintiff may compute the amount of damages, but plaintiff was not entitled to examine such officers in regard to services actually rendered by plaintiff or the compensation actually received by plaintiff for such services, or the extent of plaintiff's authority.

APPEAL by defendant from *Riddle, S.J.*, at the 8 August 1966 Schedule "D" Session of MECKLENBURG.

Summons having been issued, the plaintiff applied to the Clerk for an order for the adverse examination of the Chairman of the Board of Directors, the President and the Treasurer of the defendant corporation for the purpose of obtaining information necessary to enable him to prepare and file his complaint. The Clerk entered the order, substantially as sought, and upon appeal this was affirmed by the judge. From the order so affirming the action of the Clerk, this appeal is taken.

The affidavit states that the action has been brought "for the purpose of recovering damages in a sum of not less than $675,702, arising out of the defendant's breach of an express contract," a copy of which is attached to the affidavit.

The alleged contract provides:

"In consideration of the services which you are to render as a consultant to the J. A. Jones Company on the Derbendi Kahn Dam Project, Iraq, you are to receive $2,000.00 per month for twelve (12) months' services. * * *

"In addition to the consultant fee of $2,000.00 per month for 12 months, you will be entitled to 5% of *all cash monies* recovered on the Derbendi Kahn Project.

"This does not include any consideration for you for the return of our bank guarantees and removal of liquidated damages. However, should we lose our bank guarantees and/or monies due to liquidated damages, such net cash losses will be deducted before determining per cent of participation. * * *" (Emphasis added.)

The application and affidavit state that the information sought by the plaintiff is not otherwise available to him, he being no longer an officer of the defendant corporation, but the defendant has refused to pay the plaintiff's demand for compensation for services rendered by him under the above contract and that the information sought by the proposed examinations is as follows:

"4. * * * (a) the total dollar amount and nature of *all claims* by the defendant against the Government of Iraq, pertaining solely to defendant's construction of the Derbendi Kahn Dam Project, on June 4, 1964, the date of plaintiff's initial employment as a consultant to the defendant for an agreed commission based on the amount of defendant's recovery on the said Derbendi Kahn Dam Project; (b) the total dollar amount and nature *of all claims* by the defendant against the Government of Iraq, pertaining solely to defendant's construction of the Derbendi Kahn Dam Project October 6, 1964, the date of modification of plaintiff's initial employment contract as a consultant to the defendant for an agreed commission based on the amount of defendant's recovery against the Government of Iraq on the Derbendi Kahn Dam Project; (c) *all statements and representations* made by defendant's said Board Chairman, Edwin L. Jones, Sr., to officials of the U. S. Government, the Iraq Government and the Egyptian Government, and to persons other than the plaintiff, *pertaining to the scope of plaintiff's agency* for the defendant as consultant under the said contract between the plaintiff and defendant, as modified October 6, 1964, a copy being hereto attached as Exhibit 'A,' pertaining solely to the scope of plaintiff's agency in recovering claims against the Government of Iraq arising out of the Derbendi Kahn Dam Project; (d) *all statements and representations* made by defend-

ant's said President, Edwin L. Jones, Jr., to officials of the U. S. Government, the Iraq Government and the Egyptian Government, and to persons other than the plaintiff, *pertaining to the scope of plaintiff's agency* for the defendant as consultant under the said contract between the plaintiff and defendant, as modified October 6, 1964, a copy being hereto attached as Exhibit 'A,' pertaining solely to the scope of plaintiff's agency in recovering claims against the Government of Iraq arising out of the Derbendi Kahn Dam Project; (e) the total amount of all moneys *recovered by the defendant upon settlement of the 'Big Bend' claims,* procured at the instance of the plaintiff and defendant's General Counsel, acting jointly pursuant to authority of the defendant; (f) the total amount of *all moneys* awarded the defendant, and *recovered by the defendant, in settlement of its various claims* against the Government of Iraq, *pertaining solely to the Derbendi Kahn Dam Project,* beginning June 4, 1964, the date of plaintiff's initial employment as a consultant for the defendant, and continuing through the date of examination, inclusive; (g) the total amount of *all moneys* awarded the defendant, and *recovered* by the defendant, *in settlement of its various claims* against the Government of Iraq *pertaining solely to the Derbendi Kahn Dam Project,* beginning October 6, 1964, and continuing through the date of examination, inclusive; (h) the total value of *all properties recovered* by the defendant from the Government of Iraq, *pertaining solely to the Derbendi Kahn Dam Project,* beginning June 4, 1964, and continuing through the date of examination, inclusive; (i) the total value of *all properties recovered by the defendant* from the Government of Iraq, *pertaining solely to the Derbendi Kahn Dam Project,* beginning October 6, 1964, and continuing through the date of examination, inclusive; (j) the total value of *all bank credits released* by the Government of Iraq to the defendant, pertaining to the Derbendi Kahn Dam Project, beginning June 4, 1964, and continuing through the date of examination, inclusive; (k) the total value of *all bank credits released* by the Government of Iraq to the defendant, pertaining to the Derbendi Kahn Dam Project, beginning October 6, 1964, and continuing through the date of examination, inclusive; (l) *all correspondence* between defendant's said Board Chairman, President, Treasurer, other officials and defendant's Field Representatives in Bagdad, Iraq, *pertaining to settlement of defendant's various claims* against the Government of Iraq under the Derbendi Kahn Dam Project, and the authority delegated by the defendant to the plaintiff in negotiating said settlement, beginning June 4, 1964, and contin-

uing through the date of examination, inclusive; (m) the *location and contents of defendant's records* of account and deposit invoices pertaining to moneys, properties and bank guarantees recovered by the defendant from the Government of Iraq under the Derbendi Kahn Dam Project, beginning June 4, 1964, and continuing through the date of examination, inclusive, which records are not available to the plaintiff; (n) *the location and contents of all correspondence, judicial and administrative orders* available to the defendant, pertaining to approval of claims by the defendant against the Government of Iraq, under the Derbendi Kahn Dam Project, which correspondence and judicial and administrative orders are not available to the plaintiff; and (o) *all other matters* directly *relevant to defendant's recovery of its various claims* against the Government of Iraq under the Derbendi Kahn Dam Project, beginning June 4, 1964, and continuing through the date of examination, inclusive, and within the special knowledge of the defendant, its said Board Chairman and officers, not otherwise available to the plaintiff." (Emphasis added.)

The order of the Clerk, affirmed by the judge, found the facts set forth in the application to be true, appointed a commissioner to conduct the examination, and directed the said officers of the defendant to appear at a specified time and place for the purpose of being examined by the plaintiff concerning all matters specified in the above quotation from the application, except paragraphs (e) and (o), the Clerk finding that paragraphs (e) and (o) did not "designate with reasonable particularity matters about which the examination is sought," and so did not conform to the requirements of G.S. 1-568.10(b)(2). The defendant excepted to the entire order of the Clerk and to each part thereof, other than the portions denying the right of examination as to certain matters, and now assigns as error the overruling of each such expection by the judge.

Warren C. Stack and James L. Cole for defendant appellant.
Harkey, Faggart, Coira & Fletcher for plaintiff appellee.

LAKE, J. The procedure prescribed in G.S. 1-568.1 through G.S. 1-568.27 is the only procedure by which a plaintiff can compel the officers of a defendant corporation to submit to his adverse examination of them prior to the trial of the action. G.S. 1-568.8. The plaintiff may procure an order for such examination of the officers of his corporate adversary, prior to the filing of his complaint, only by showing "that the examination is necessary to enable him prop-

erly to prepare his complaint." G.S. 1-568.9. In such affidavit the plaintiff must show "that, in order to prepare his complaint * * * it is necessary * * * to secure information from the person proposed to be examined about certain matters, which matters must be designated with reasonable particularity." G.S. 1-568.10(b)(2).

The statute does not contemplate that compulsory examination of his adversary by one who has not filed a complaint is to be lightly allowed. This Court has said many times that the statute does not contemplate the issuance of a general permit for the plaintiff to embark upon an unrestricted "fishing expedition" through the records and recollections of his adversary. *Griners' & Shaw, Inc., v. Casualty Co.*, 255 N.C. 380, 121 S.E. 2d 572; *Cates v. Finance Co.*, 244 N.C. 277, 93 S.E. 2d 145. See also McIntosh, N. C. Practice and Procedure, 2d ed, § 2285, supp. The statute plainly requires that the affidavit must not only describe, with reasonable particularity, the "fish" to be pursued, but must also show that its capture is necessary for the proper preparation of the complaint and that it may not otherwise be brought into the possession of the plaintiff.

Under the former statute, which in this respect was not materially different from the present, this Court held that it was not sufficient for the affidavit to assert that the desired information is necessary to enable the applicant to prepare his pleading properly, it being required that the affidavit state facts upon which such claim of necessity is based. *Washington v. Bus, Inc.*, 219 N.C. 856, 15 S.E. 2d 372; *Gudger v. Robinson Brothers Contractors*, 219 N.C. 251, 13 S.E. 2d 414; *Bell v. Bank*, 196 N.C. 233, 145 S.E. 241. Where the order grants a more extensive "fishing license" than the statute permits, this Court will modify the order so as to restrict it to the examination contemplated by the statute. See *Cates v. Finance Co., supra.*

In the present case, it appears from the plaintiff's application and affidavit that the action is brought to recover damages for an alleged breach of a written contract of employment. It further appears that the alleged breach consists in the refusal of the defendant to pay the compensation demanded by the plaintiff under the contract for the services rendered by him pursuant thereto. Obviously, the plaintiff does not need to examine officers of the defendant in order for the plaintiff to know what services were required of him by the contract, what services were rendered by him or what compensation was paid him for such services. The contract provides for the payment to the plaintiff of a fixed amount, plus "5% of all cash monies recovered on the Derbendi Kahn Dam Project." The only information which the plaintiff could possibly need, in addition to that which he already has, in order properly to prepare his com-

plaint, is the amount of "cash monies recovered" by the defendant on the specified project, the exact amount apparently being unknown to the plaintiff.

By the express provision of the contract, the term "cash monies recovered" does not include the release or return to the defendant of its bank guarantees or the "removal of liquidated damages." If the defendant did not recover all of such bank guarantees or it was subjected to some loss by way of "liquidated damages," these would be deductions from, that is, partial defenses against, the claim of the plaintiff. In order for the plaintiff to be able properly to prepare his complaint, it is not necessary that he know the credits which the defendant may possibly assert against his claim.

The information specified in paragraphs (f) and (g) of the affidavit is "the total amount of all moneys * * * recovered by the defendant, in settlement of its various claims against the Government of Iraq, pertaining solely to the Derbendi Kahn Dam Project." Without this information, the plaintiff could not compute the compensation he was entitled to receive under the alleged contract. Upon the facts stated in the affidavit, he is entitled to seek this necessary information from the officers of the defendant prior to the filing of his complaint.

It appears from the affidavit of the plaintiff that he contends that under the alleged contract his compensation is to be computed by including within the terms "cash monies recovered" properties, other than money, recovered by the defendants from the Government of Iraq by reason of the Derbendi Kahn Dam Project. The amount of such properties, other than money, so recovered by the defendant is the information specified in paragraphs (h) and (i) of the affidavit. Without indicating any opinion as to the correctness of the plaintiff's construction of the contract in this respect, we are of the opinion that the plaintiff is entitled to obtain this information, by the proposed adverse examination of the officers of the defendant, so that he may compute the amount of compensation which he contends he is entitled to recover under the contract.

It is not shown in the affidavit that the plaintiff, in order to prepare his complaint in this action, requires the information set forth in paragraphs (a) to (d), inclusive, or in paragraphs (j) to (n) of the affidavit. The right, if any, of the plaintiff to examine the officers of the defendant with reference to any or all of these matters after both parties have filed their pleadings, pursuant to G.S. 1-568.9 (c), is not before us and we express no opinion with reference thereto.

The order of the superior court is modified to permit the plaintiff to examine the specified officers of the defendant with reference to the matters set forth in subparagraphs (f) to (i), inclusive, of

paragraph 4 of the plaintiff's affidavit filed 18 April 1966, and not otherwise. As thus modified, the order of the superior court is affirmed.

Modified and affirmed.

THOMAS P. RAVENEL, EXECUTOR OF THE ESTATE OF FRANCES RANDOLPH ARCHER, DECEASED, v. FRANCES R. SHIPMAN; JOSEPH ARCHER RAVENEL; THOMAS P. RAVENEL, INDIVIDUALLY; BETSY A. FOWLER; FRANCES A. HULL; ANN A. DENIO; WAINE ARCHER, JR.; ELIZABETH A. HUNGATE; CARRIE ARCHER ROBINSON; GLADE VALLEY SCHOOL, INC.; PEACE COLLEGE OF RALEIGH, INC.; BARIUM SPRINGS HOME FOR CHILDREN; THE PRESBYTERIAN HOME, INC.; NEWSWEEK, INC.

(Filed 24 July, 1967.)

1. Wills § 31—

Dispositive words may be implied when it cogently appears from the instrument that testator intended to dispose of the particular property by the will, but such words may not be implied merely to avoid intestacy or for any purpose other than to effectuate the intent of testator as gathered from the instrument.

2. Wills § 29—

Where partial intestacy would not be avoided even if the language of the will be interpreted as a testamentary disposition of the particular property in question, the presumption against partial intestacy has no application.

3. Wills § 31—

The holographic will in suit, after three pages directing disposition of the estate, contained two pages listing testatrix' possessions and a sixth page with signatures of testatrix and witnesses; on the back of the fifth page appeared a list of five charities with numbers opposite each. *Held:* The court may not supply dispositive words so as to constitute the words and figures on the back of page five a testamentary disposition of property, since a reading of the entire will does not necessarily import such intent.

4. Wills § 8—

Words and figures included in matter tendered for probate as a will are improvidently probated when they constitute no part of the testamentary instrument; when included in the probate, the proper remedy is a motion before the clerk to revoke the probate of such words and figures.

5. Wills § 12—

An instrument probated in common form is conclusive until set aside in a caveat proceeding unless the court has been imposed upon, misled, or some inherent or fatal defect appears on the face of the instrument.

6. Wills § 8—

Where the clerk has probated matter tendered as a will, he may revoke the probate of words and figures which are not a part of the testamentary instrument, but he may not exclude from probate matter on the basis of a construction of the instrument.

7. Wills § 12—

Where the clerk could have revoked probate of a part of the instrument on the ground of want of dispositive words so that such matter was not a part of the testamentary instrument, but the parties appeal from probate and the court adjudicates that such matter was void for uncertainty, the Supreme Court will not raise questions of jurisdiction *ex mero motu*, the result being correct whether the matter be treated as extraneous the testamentary instrument or as void for uncertainty.

APPEAL by defendants Glade Valley School, Inc.; Peace College of Raleigh, Inc.; Barium Springs Home for Children, and The Presbyterian Home, Inc., from *Clark, S.J.*, 1 August 1966 Non-Jury Civil Session of GUILFORD. This appeal was docketed in the Supreme Court as Case No. 695 and argued at the Fall Term 1966.

Civil action by the executor of the will of Miss Frances Randolph Archer to obtain instructions from the court with reference to the distribution of her estate. The parties stipulated the facts and waived a jury trial. This appeal involves only one item of (or notation on) the will.

Testatrix died 29 December 1965 at the age of 88. For one year before her death she was totally blind. She left a will, written entirely by her own hand on six pages of ruled loose-leaf notebook paper. On the front of each page, except the sixth, the words *Will of Frances R. Archer* appear at the top of the sheet. On the first page, after the preamble, testatrix gave directions with reference to her burial, the payment of inheritance taxes, and appointed plaintiff her executor. On pages 2 and 3, she made specific bequests of certain shares of stock to a sister and twelve nieces and nephews. Pages 4 and 5 were labeled respectively "My holdings January 1960" and "List of Holdings January 1963." These pages contained only a list of stocks and savings and loan accounts. On the back of page 5, the following item appears:

"First Federal	
Glade Valley	10000
Peace College	2000
Newsweek (Blind)	3000
Barium Orphanage	1000
Pres. Home	1000"

Page 6 contains only signatures. Testatrix' signature is written 7¼ inches from the top of the page; the intervening space is entirely

blank. Beneath her signature are the signatures of three witnesses and the typed statement: "We witnessed the signatures of Frances R. Archer of the Presbyterian Home on Jan. 24, 1963."

With reference to the item on the back of page 5, it is stipulated that Glade Valley refers to Glade Valley School, Inc.; Peace College, to Peace College of Raleigh, Inc.; Newsweek (Blind), to Newsweek Talking Magazine, published by Newsweek, Inc.; Barium Orphanage, to Barium Springs Home for Children; Presbyterian Home, to The Presbyterian Home, Inc., in High Point, North Carolina.

Miss Archer's will was admitted to probate and letters testamentary issued to plaintiff on 7 January 1966. His inventory, filed on 14 April 1966, valued her estate at $130,087.34. It consisted entirely of cash, corporate stocks, and savings and loan accounts. One of the latter was an account in the amount of $10,000.00 in First Federal Savings & Loan Association of Durham, N. C. The inventory value of the specific bequests totaled $87,300.00. The will contained no residuary clause.

The complaint states the question which plaintiff requests the court to answer as follows: "Does the writing appearing upon the reverse side of the fifth page of the will of Frances Randolph Archer constitute a valid bequest or bequests to be paid by the executor?" The court answered this question No and entered judgment accordingly. The five corporations referred to in the item on the reverse side of page 5 excepted and appealed. Newsweek, Inc., however, did not perfect its appeal.

Douglas, Ravenel, Hardy and Crihfield for plaintiff appellee.

York, Boyd & Flynn by David I. Smith for Glade Valley School, Inc., defendant appellant.

Cooke & Cooke for Peace College of Raleigh, Inc., defendant appellant.

Z. V. Turlington for Barium Springs Home for Children, defendant appellant.

Thornton H. Brooks for The Presbyterian Home, Inc., defendant appellant.

SHARP, J. The theory of this action is that the item found on the back of page 5 of Miss Archer's will is a part thereof and that plaintiff is entitled to have the court construe this provision. Appellants concur in this theory and contend that, by implication, the item is a bequest to them of sums of money in the amount set opposite their respective names. Appellee, however, contends that the so-called bequest is void for indefiniteness.

The item in question contains no dispositive expression. That Miss

Archer knew the appropriate language to use in making a testamentary gift is shown in each of the bequests appearing on pages 2 and 3 of her will. In every instance, she wrote: "I bequeath . . .," "I give . . .," or "I leave. . . ." It would be necessary for us to imply one of these phrases to make a bequest out of the notation on the reverse side of page 5. "(T)he doctrine of devise or bequest by implication is well established in our law." *Finch v. Honeycutt,* 246 N.C. 91, 98, 97 S.E. 2d 478, 484. The law, however, does not favor either, and dispositive words will be interpolated "only when it cogently appears to be the intention of the will. (Cites omitted.) Probability must be so strong that a contrary intention 'cannot reasonably be supposed to exist in testator's mind,' *and cannot be indulged merely to avoid intestacy.*" (Emphasis added.) *Burney v. Holloway,* 225 N.C. 633, 637, 36 S.E. 2d 5, 8; 57 Am. Jur., Wills § 1153 (1948).

Intestacy would not be avoided here even were we to imply the missing words. The sum of the figures appearing in the item under consideration is $17,000.00. This, plus the $87,300.00 bequeathed, would still leave $25,787.34 to be distributed to the heirs at law under the statutes governing intestate succession. The presumption against partial intestacy (which is but a rule of construction) does not arise therefore. See *Entwistle v. Covington,* 250 N.C. 315, 108 S.E. 2d 603. Unless we imply dispository words the names and figures on the back of page 5 are mere notations — a status which their location strongly suggests. The explanation of their presence there could be that, because of her failing eyesight, testatrix did not realize that she had made notes on the back of her will. It is also entirely possible that Miss Archer contemplated making bequests to appellants and that, when she signed the will on 24 January 1963, she left the blank space above her signature on the last page for the purpose of adding them. All this, however, is pure speculation. "Conjecture is not permitted to supply what the testator has failed to indicate." *La Mere v. Jackson,* 288 Mich. 99, 103, 284 N.W. 659, 661. Although she lived three years (lacking two days) after she executed her will, testatrix never filled in the blank. The list of those on whom she had specifically bestowed gifts continued to be limited to her blood kin.

We cannot say, therefore, that "a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words." *Burcham v. Burcham,* 219 N.C. 357, 359, 13 S.E. 2d 615, 616. Such a conviction is necessary before the court may supply a defect of dispository words. Without either express or implied words denoting a gift, the item in question fails as a testamentary disposition of property. *In re Johnson,* 181 N.C. 303, 106 S.E. 841;

1 Wiggins, Wills and Administration of Estates in North Carolina § 74 (1964). If it be deemed a part of Miss Archer's will, it is void for uncertainty, because, in applying the usual rules of construction, the Court "is unable to declare the intention of the testator for the reason that in legal contemplation there was no expression of intention on his part." *Fuller v. Hedgpeth,* 239 N.C. 370, 376, 80 S.E. 2d 18, 22; 94 C.J.S., Wills §§ 157, 591 (1956). In the instant case, this is another way of saying that the *animus testandi* does not appear.

If the questioned item was not intended as a part of Miss Archer's will, its probate was improvidently granted and motion should have been made before the Clerk of the Superior Court to revoke its probate. Once a paper writing has been probated as a will, every part of it stands until set aside by the appropriate tribunal. G.S. 31-19. 1 Wiggins, *supra,* § 113; 4 Strong, N. C. Index, Wills § 8 (1961). Unless the court has been imposed upon, misled, or some inherent or fatal defect appears upon the face of the instrument, the attack must be by caveat. *In re Will of Puett,* 229 N.C. 8, 47 S.E. 2d 488; *In re Will of Hine,* 228 N.C. 405, 45 S.E. 2d 526. Where, however, the Clerk of the Superior Court has probated as a will a document which has not been executed in accordance with the statutory requirements for probate or which shows on its face that it was not intended as a testamentary disposition of the author's property, or when other jurisdictional requirements for probate are shown to be lacking, the Clerk may revoke his probate. *Morris v. Morris,* 245 N.C. 30, 95 S.E. 2d 110; *In re Will of Smith,* 218 N.C. 161, 10 S.E. 2d 676; *In re Johnson,* 182 N.C. 522, 109 S.E. 373; *Springer v. Shavender,* 116 N.C. 12, 21 S.E. 397. Since the Clerk of the Superior Court of each county has original and exclusive jurisdiction of proceedings to probate a will, G.S. 28-1, he is the tribunal to which a motion is properly made to set aside the probate of a purported will — or part thereof — for any inherent and fatal defect appearing upon the face of the instrument. *In re Will of Smith, supra.*

This case presents a close question of jurisdiction. Had plaintiff moved the Clerk to revoke the probate of the item in question because the *animus testandi* was lacking as to it, his authority to strike the notation could have been sustained. *In re Will of Smith, supra.* The Clerk, however, has no right to exclude any part of a will from probate on any ground which involves the construction of the will where testamentary intent is disclosed. 95 C.J.S., Wills § 319 (1956). Since, however, the parties have treated the writing on the back of page 5 as a part of Miss Archer's will and asked the court to construe it, we treat it likewise and raise no question of jurisdiction *ex mero motu.* See *Spencer v. Spencer,* 163 N.C. 83, 88, 79 S.E. 291, 293. In this case, the law would dictate the same re-

sult irrespective of procedure. It matters not, therefore, whether the Clerk revoked the probate because the notation failed to disclose the *animus testandi* or whether the judge, in construing the will, declared the purported bequest void for indefiniteness.

The judgment of the Superior Court was "that the writing appearing upon the reverse side of the fifth page of the will of Frances Randolph Archer does not constitute a valid bequest or bequests to be paid by the executor to the defendants Glade Valley School, Inc., Peace College of Raleigh, Inc., Barium Springs Home for Children, The Presbyterian Home, Inc., and Newsweek, Inc., respectively, or to either of them." This judgment is

Affirmed.

OLLICE JOE GREGORY v. GRADY BATTLE LYNCH.

(Filed 24 July, 1967.)

1. **Appeal and Error § 24—**

Separate exceptions to the charge for failure of the court to charge the law in respect to distinct and separate legal principles arising on the evidence are improperly grouped under a single assignment of error.

2. **Automobiles § 90—**

The instruction in this case upon the duty of a motorist to maintain a proper lookout, the doctrine of sudden emergency, and the respective duties of motorists proceeding in opposite directions in passing each other, *held* free from prejudice to appellant.

3. **Negligence § 28—**

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.

4. **Automobiles § 90— Charge of court on insulating negligence held not prejudicial to defendant in this case.**

Defendant contended that he drove to the left of the highway and struck plaintiff's stationary vehicle because of an emergency created when a third vehicle, which had been traveling in front of plaintiff, turned left across defendant's lane of travel. The court instructed the jury in regard to the duty of motorists traveling in opposite directions to remain on the right side of the highway, gave correct instructions upon the doctrine of sudden emergency, recited defendant's contention that defendant was faced with an emergency and that the accident was unavoidable as far as the defendant was concerned, and then charged the jury that if the jury should find from the evidence that the injuries resulted from an unavoidable accident as far as defendant was concerned, to answer the issue of negligence in the negative, *held* not prejudicial to defendant.

5. Appeal and Error § 46—

The presumption is in favor of the correctness of the judgment of the lower court, with the burden upon appellant not only to show error but to show that the alleged error was prejudicial.

6. Appeal and Error § 50—

A charge will be construed as a composite whole, and an exception thereto will not be sustained if the charge, so construed, is not prejudicial to appellant.

APPEAL by defendant from *Hobgood, J.*, 31 October 1966 Civil Session of CHATHAM.

This is a civil action to recover for personal injury and property damage sustained by plaintiff in an automobile accident which occurred about 9:30 p.m. on 7 September 1963. Plaintiff was driving his 1956 Oldsmobile south on U. S. Highway No. 501. Defendant was driving north on the same highway in his 1963 Ford. The collision occurred at the place where a rural paved road known as "Bynum Road" enters Highway No. 501 from the east. Visibility is unobstructed for at least 600 feet to the north and south from this intersection. The highway is about 23 feet wide.

Plaintiff alleged that defendant was negligent in driving at a high and unlawful rate of speed, failing to keep a proper lookout, and driving on the wrong side of the road and running into his automobile which was over on the right-hand side of the road within a few inches of the edge of the hard surface. Plaintiff also alleged in substance that defendant turned his automobile to the left and came over on the plaintiff's right-hand side of the road and struck his automobile with great force, rendering it a total loss, and that plaintiff received personal injuries in the collision. Defendant denied negligence, and for a further answer and defense pleaded that a third automobile hereinafter referred to as the Chevrolet, whose operator has not been positively identified and is not a party to this action, turned across the highway in front of him without warning; that being confronted with a sudden emergency he applied his brakes and steered and skidded to the left, barely missed colliding with the Chevrolet, and then ran into the plaintiff's automobile. Defendant alleges that the negligence of the operator of the Chevrolet was the sole proximate cause of the collision, and that his own negligence, if any, was insulated by the negligence of the operator of the Chevrolet.

The parties are in substantial agreement as to the following facts: About 300 feet north of the point of impact, the Chevrolet entered the highway in front of plaintiff, causing plaintiff to reduce speed, and proceeded south on the highway to the point where Bynum Road enters it from the east. The Chevrolet stopped at this

point and plaintiff stopped behind him, both automobiles being on the right side of the highway in the southbound lane. The left turn signal light was flashing on the Chevrolet. The defendant was approaching from the south and was observed by plaintiff at a distance of 500 feet or more at the time plaintiff's automobile stopped. Defendant observed the lights of both automobiles at a distance of 600 feet or more. He was on his right-hand side of the road. There was no traffic in the area other than these three automobiles. Before defendant reached the point where the Chevrolet and Oldsmobile were stopped, the operator of the Chevrolet turned to the left accelerating rapidly and proceeded down Bynum Road to the east. Plaintiff did not move. Defendant's Ford traveled across the center line leaving skid marks about 23 feet long, and struck plaintiff's automobile. The left front wheel of defendant's Ford was three feet and nine inches to its left of the center line where the Ford collided with the left front of plaintiff's Oldsmobile. On cross-examination defendant testified: "This [the site of the collision] is a congested area. * * * When I saw those two cars I could not tell whether they were going to stop or whether they were going to turn off or what they were going to do and I kept right on at 50 miles an hour. . . ."

Plaintiff's evidence is that the Chevrolet had crossed the northbound traffic lane of the highway and moved out of the way when defendant's Ford was 125 feet to the south; that defendant turned to the left, turned back to the right, and again turned to the left after which defendant's Ford struck his Oldsmobile. Defendant's evidence is that he was only 50 feet away when the Chevrolet turned across his path, that he applied his brakes and skidded to his left, that he missed striking the Chevrolet by a few inches, and that his automobile then collided with plaintiff's.

The jury by its verdict found that the plaintiff was injured by the negligence of the defendant as alleged in the complaint, and awarded him $3,000 for personal injury and $600 for property damage. From a judgment in accord with the verdict, defendant appeals.

Barber & Holmes by Edward S. Holmes for defendant appellant.

Seawell & Seawell & Van Camp by H. F. Seawell, Jr., for plaintiff appellee.

PARKER, C.J. Defendant in his brief asserts that two questions are involved: "I. Did the Court err in failing to comply with G.S. 1-180? II. Did the Court express an opinion prejudicial to the defendant?"

Appellant states in his brief that he abandons his assignments of

error Nos. 1 and 2 for failure to grant his motion for judgment of compulsory nonsuit.

Defendant did not except to the court's review of the evidence nor to its instruction on damages. Excluding these two parts of the charge, the defendant bracketed more than 50% of the remainder, took nine exceptions to the bracketed portions, and grouped them into one assignment of error relating to the following questions: (1) Failure to properly define the law relating to lookout; (2) improper instruction on sudden emergency; (3) failure to instruct on respective duties of motorists proceeding in opposite directions; (4) failure to define the law of unavoidable accident; (5) failure to instruct on insulating negligence; (6) failure to apply each of these principles of law to defendant's evidence; (7) failure to give defendant's contention as to negligence of the third party; and (8) failure to give defendant's contention on maintaining a proper lookout.

"While more than one exception may be grouped under one assignment of error if all the exceptions relate to a single question of law, an assignment of error should present but a single question of law for review. Where one assignment of error is based on separate exceptions and attempts to present several separate questions of law, it is ineffectual as a broadside assignment." 1 Strong's N. C. Index 2d, Appeal and Error, § 24, p. 148; *S. v. Hamilton*, 264 N.C. 277, 141 S.E. 2d 506; *Horton v. Redevelopment Commission*, 262 N.C. 306, 137 S.E. 2d 115; *Hines v. Frink*, 257 N.C. 723, 127 S.E. 2d 509.

The court instructed on the duty of the motorist to maintain a proper lookout in substantial accord with the applicable principles of law. *Black v. Milling Co.*, 257 N.C. 730, 127 S.E. 2d 515; *Rhyne v. Bailey*, 254 N.C. 467, 119 S.E. 2d 385. The instruction on the doctrine of sudden emergency was in accordance with prior decisions of this court. *Rodgers v. Carter*, 266 N.C. 564, 146 S.E. 2d 806; *Lawing v. Landis*, 256 N.C. 677, 124 S.E. 2d 877.

The charge on respective duties of motorists proceeding in opposite directions is an accurate statement of the law. *Anderson v. Webb*, 267 N.C. 745, 148 S.E. 2d 846; *Watters v. Parrish*, 252 N.C. 787, 115 S.E. 2d 1. It is noted that the plaintiff did not specifically plead a violation of the statute in this respect and that the court did not give an instruction regarding the effect of a violation of the statute to which plaintiff would have been entitled. This could not have prejudiced the defendant.

"An unavoidable or inevitable accident is such an occurrence or happening as, under all attendant circumstances and conditions, could not have been foreseen or anticipated in the exercise of ordinary care as the proximate cause of injury by any of the parties concerned. In other words, where there is no evidence that the op-

erator of the motor vehicle was negligent in any way, or that he could have anticipated the resulting accident, the accident is deemed to have been an unavoidable or inevitable one for which no recovery may be had." 7 Am. Jur. 2d, Automobiles and Highway Traffic, § 350. A collision is not unavoidable so as to relieve a motorist of liability if he was guilty of negligence proximately contributing to the collision. 60 C.J.S., Motor Vehicles, § 256. The charge of the court was free of error on this point.

"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. . . ." *Childers v. Seay,* 270 N.C. 721, 155 S.E. 2d 259.

Defendant excepted to the following portion of the charge: "Now, in addition to this law the plaintiff also contends that the defendant was driving on his left-hand side of the road at the time that this collision occurred between the plaintiff's car and the defendant's car, and the court instructs you that under the law of the State of North Carolina, it is negligence for the defendant to drive on the left-hand side of the highway at the place and time of this collision." If this had been all that the court said on the subject, defendant may have had cause for complaint. The court immediately afterwards gave instructions on the respective duties of motorists proceeding in opposite directions and concluded with the following statement: "Now, if you find that the defendant drove his car on his left-hand side of the highway on said occasion in an unlawful manner, then that would be negligence, and if you find such negligence was a proximate cause of the injuries and damages suffered by the plaintiff, then you would answer the issue of negligence in favor of the plaintiff, that is 'Yes.' Now, on the other side of the case the defendant contends that he drove on the left-hand side of the highway at the time of the collision because he was faced with a sudden emergency and that an unavoidable accident took place, and that the proximate cause of the accident was a third car, the Chevrolet car, and not him, and therefore you should answer that first issue 'No,' as far as his negligence is concerned. So at this time, the court will instruct you as to the law in reference to that." Following the definition of the doctrine of sudden emergency the court gave the following instruction: "Now, in addition to this question of sudden emergency, the defendant contends that being faced with a sudden emergency that this, as far as the plaintiff and the defendant was concerned, was an unavoidable accident. Now the court instructs you that an unavoidable accident is one which occurs despite the exercise of reasonable care upon the part of all concerned, that is the plaintiff and the defendant in this case and specifically the defend-

ant, to avoid it. Therefore, if you find from the evidence that the plaintiff received the alleged injuries, if any, by reason of an unavoidable accident as far as the defendant is concerned, brought about as the direct and proximate result of unavoidable circumstances, as far as the defendant is concerned, then you will find for the defendant on the issue of negligence, that is you would answer the first issue 'No.'" It does not appear that the jury could have been misled by the excepted portion of the charge in view of repeated instructions correctly defining negligence and properly placing the burden of proof, and the clear statement of the law which followed it.

A careful reading of the charge fails to disclose that in it the court expressed an opinion prejudicial to defendant. That assignment of error is overruled.

"A presumption exists that the judgment is correct. Error warranting a reversal or a new trial must amount to the denial of some substantial right." *Key v. Woodlief,* 258 N.C. 291, 128 S.E. 2d 567. "The burden is on the appellant not only to show error but to show that if the error had not occurred there is a reasonable probability that the result of the trial would have been favorable to him." *Mayberry v. Coach Lines,* 260 N.C. 126, 131 S.E. 2d 671. A charge to a jury must be read and considered in its entirety, *McPherson v. Haire,* 262 N.C. 71, 136 S.E. 2d 224; *Kennedy v. James,* 252 N.C. 434, 113 S.E. 2d 889, and not in detached fragments. The pleadings, issues, contentions and evidence in this case were comparatively brief and simple. Consequently the charge to the jury was brief, simple and so clear as to be difficult to misunderstand. In the final analysis, the jury had only one question to answer: *i.e.,* whether defendant, in the exercise of reasonable care, could have avoided the collision. It answered this question in the affirmative and ended the case. As stated in *Kennedy v. James, supra,* "When the charge here is read as a composite whole, prejudicial error as to the defendant sufficient to warrant a new trial is not shown."

We have carefully examined each exception and each assignment of error. We find nothing which in our opinion would justify another trial.

No error.

CLARA COLLINS HICKS v. HORACE E. HICKS.

(Filed 24 July, 1967.)

1. Evidence § 22.1—

A tape recording of a conversation is ordinarily admissible in evidence if it is properly authenticated and if it is not excluded by some positive rule of law.

2. Evidence § 12—

A husband or wife shall not be compellable to disclose any confidential communication made by the one to the other during their marriage. G.S. 8-56.

3. Same—

A tape recording, made without the wife's knowledge by the husband, of a conversation between them while alone except for the presence of their eight year old child, who was singing and playing at the time, *held* incompetent in evidence over the wife's objection.

4. Appeal and Error § 57—

The presumption that the court disregarded incompetent evidence in making its findings of fact does not obtain when the record affirmatively discloses that a finding was based, in part at least, on incompetent evidence heard over objection.

APPEAL by plaintiff from *Johnston, J.*, in Chambers, 22 November 1966 of FORSYTH.

Civil action by wife against defendant husband, instituted under the provisions of G.S. 50-16, for the custody of an eight-year-old daughter born of the marriage, for maintenance and support of plaintiff and their minor child, and for counsel fees.

A hearing was conducted by Judge Johnston, Senior Resident Judge of the Twenty-first Judicial District, in which Forsyth County is situated, upon a motion by plaintiff for an order requiring defendant to pay alimony *pendente lite* to plaintiff for the maintenance and support of their child and herself, for the custody of their eight-year-old child, and for counsel fees. Both sides presented evidence.

The trial judge entered an order whereby custody of the child was to be alternated monthly between the husband and wife, and under the terms of the order the parties are required to alternate in their respective occupancy of the home place, and during the months the child is with the mother the defendant is to pay for the child's support $50 per month. The court in its order denied plaintiff's request for alimony *pendente lite* and counsel fees. From the order entered, plaintiff appealed.

H. Glenn Pettyjohn for plaintiff appellant.
Hayes and Hayes by James M. Hayes, Jr., for defendant appellee.

PARKER, C.J. Plaintiff assigns as error that the court admitted in evidence, over her objection and exception, conversations as recorded by a tape recording machine between the plaintiff wife and the defendant husband, in the presence of the eight-year-old child. It seems clear from the evidence that the tape recording was made in the basement of their home. There is no evidence in the record that the wife knew of the installation of this tape recording machine that recorded the conversations between her husband and herself.

It has almost uniformly been held that evidence offered in the form of a sound recording is not inadmissible because of that form, if properly authenticated, and if not excluded because of some positive rule of law. *S. v. Walker,* 251 N.C. 465, 112 S.E. 2d 61, cert. den. 364 U.S. 832, 5 L. Ed. 2d 58; *S. v. Knight,* 261 N.C. 17, 134 S.E. 2d 101; Annot. 58 A.L.R. 2d 1029, and cases cited.

G.S. 8-56 expressly provides: "No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage."

North Carolina recognized the common-law privilege before it was written in our statute. In *S. v. Jolly,* 20 N.C. 108, 112 (1838), Gaston, J., speaking for the Court said: ". . . (W)hatever is known by reason of that intimacy [marriage] should be regarded as knowledge confidentially acquired, and that neither [husband nor wife] should be allowed to divulge it to the danger or disgrace of the other."

In *McCoy v. Justice,* 199 N.C. 602, 155 S.E. 452, a letter written by the husband to his wife was excluded, on the ground that the betrayal of confidence by the wife in delivering the letter to a third person did not terminate the husband's privilege.

This is said in Stansbury, North Carolina Evidence, 2d Ed., § 60:

> "A confidential communication between husband and wife is privileged, and neither spouse may be compelled to disclose it when testifying as a witness. Only *confidential* communications are within the rule; hence a communication made in the known presence of a third person, or one relating to business matters which in their nature might be expected to be divulged, is not protected. Furthermore, it must be a 'communication during marriage' . . .
>
> "Prior to *Hagedorn v. Hagedorn* [211 N.C. 175, 189 S.E. 507] in 1937, it was assumed, in accordance with the rule prevailing elsewhere, that both spouses were protected, not only from being compelled to disclose a communication made in confidence between them, but also from disclosure by or through the connivance of the other. Thus it was held that letters passing between a husband and wife could not be admitted in evidence

> without the husband's consent where the wife had voluntarily delivered them into the hands of a third person, although the rule was different if the third person obtained the writings without the connivance of either spouse, and there was no objection to a third person's testifying as to a conversation which he overheard, although his presence was not known to the communicating spouses at the time. In the *Hagedorn* case, however, it was held, with little discussion and without citation of supporting authority, that the privilege is that of the witness only, and that if one spouse chooses to testify to a confidential communication the other may not successfully object. It remains to be seen whether this casual and perhaps inadvertent holding has permanently upset a rule of long standing and wide acceptance."

The decision in the *Hagedorn* case is criticized in 15 N.C.L. Rev. 282, in which this language is used: "Will a husband feel free to confide in his wife if she may disclose his confidence on the witness-stand, even over his objection? The Court has, it is submitted, discarded the policy which gave birth to the statute, or, at least, has destroyed the statute as a means of enforcing that policy."

The Court has had no occasion to re-examine the point, although an *obiter dictum* in accord with the decision in the *Hagedorn* case will be found in *Biggs v. Biggs*, 253 N.C. 10, 16, 116 S.E. 2d 178, 183.

Hunter v. Hunter (1951), 169 Pa. Super. 498, 83 A. 2d 401, is apposite. That case was a divorce proceeding, and the court held that it was error to admit into evidence a wire recording, made at the plaintiff's instigation, of conversations between the plaintiff and defendant wife in the privacy of their bedroom, since confidential communications between husband and wife cannot be divulged by either spouse without the consent of the other, the court stating that the plaintiff should not be permitted to circumvent this rule by divulging his wife's statements indirectly by mechanical means.

Defendant stated in an affidavit introduced in evidence that "all of these conversations occurred in the presence of their little eight-year-old child." Under the factual situation here, the wife had not waived her privilege. The question for decision here is: Has the veil of confidence been removed by their eight-year-old daughter being present during these conversations?

The tape recordings of the conversations between the plaintiff and defendant on 18 October 1966, on 27 October 1966, and on 1 November 1966 were transcribed by order of the trial judge, and were offered by defendant in evidence. According to these tape recordings, plaintiff used vile and profane language in respect to her husband, in the presence of their eight-year-old daughter.

The relation between husband and wife is the most intimate of human relations. It cannot be successfully contended that conversations between husband and wife in the presence of small children, and in particular in the presence of their eight-year-old daughter here, were not intended by them to be privileged. It may be urged that the privilege cannot extend to the tape recorded conversations here between husband and wife made in the presence of their eight-year-old daughter. In our opinion, the policy of G.S. 8-56, as construed by this Court for nearly a hundred years, except for the decision in the *Hagedorn* case and the *obiter dictum* in the *Biggs* case, does not require so narrow a construction. In addition, a reading of the tape recordings in the record shows that during one of these conversations their eight-year-old daughter was "singing or playing in the area." Under the factual situation here, the recorded conversations admitted in evidence were confidential utterances of the wife. The circumstances clearly so stamp them. By admitting this tape recording of plaintiff's conversation, the court enabled defendant to use mechanical means of repeating her words, thus accomplishing indirectly what he could not do directly. G.S. 8-56; 58 Am. Jur., Witnesses, § 381, p. 224; Annot. 63 A.L.R. pp. 118 and 120. Some courts apparently have a contrary view depending upon the competency of the child to comprehend the conversation. See Annot. 63 A.L.R., p. 119.

If Hagedorn is applicable here under the factual situation, we are not inclined to follow it, because of our many decisions otherwise since 1838. Nor are we inclined to follow and adopt the *obiter dictum* in the *Biggs* case, where there is a completely different factual situation.

It is our opinion, and we so hold, that the presence of their eight-year-old daughter during these conversations did not destroy the veil of confidence thrown over these confidential conversations between husband and wife, and that these conversations were privileged, and were improperly admitted in evidence by the trial judge.

Their prejudicial effect is shown in the following remarks of the trial judge recorded in the record: "The defendant tendered to the court an electronic tape of three voices, which the defendant testified was made by an electronic device placed in the home of the plaintiff and the defendant, and the court heard this tape over the objection of the plaintiff . . . that the transcription is before the court at this time and is being considered by the court." On another occasion the court remarked, as shown in the record, "Something has gone wrong and that conversation there was a pretty ugly conversation in the presence of that little girl. A good portion of it was in her presence."

It affirmatively appears that the action of the trial judge was influenced by this incompetent testimony. *Bizzell v. Bizzell,* 247 N.C. 590, 101 S.E. 2d 668.

For error in the admission of this evidence of the tape recording of plaintiff's conversations with her husband, the plaintiff is entitled to a

New trial.

HELEN JUSTICE FAST v. DONALD GULLEY, EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF OLIVER T. JUSTICE, DECEASED, AND MRS. OLIVER T. JUSTICE.

(Filed 24 July, 1967.)

1. Appeal and Error § 57—

Findings of fact by the trial court which are supported by competent evidence are conclusive on appeal.

2. Courts § 20—

The interpretation of a contract is governed by the law of the place where the contract was made, and the place at which the last act was done by either of the parties essential to a meeting of the minds determines the place of the contract.

3. Contracts § 12; Estates § 9—

Plaintiff and her father agreed to hold certain shares of stock "as joint tenants with the right of survivorship and not as tenants in common." The law of the state where the agreement was made recognized joint tenancy in personalty with right of survivorship. *Held:* Upon the father's death, plaintiff took title as the survivor.

APPEAL by plaintiff and defendants from *Braswell, J.*, 2 September 1966 Regular Civil Session of WAKE.

Civil action to have plaintiff declared the sole owner of stock and that defendants be required to deliver the certificates of said stock in their possession to her.

Helen Justice Fast is the only child and daughter of Oliver T. Justice and his first wife Anna M. Justice. Her mother died in 1949. Oliver T. Justice married a second time and died testate a resident of Wake County, North Carolina.

The parties in open court waived trial by jury and agreed that the court might find the facts, make conclusions of law, and render judgment accordingly.

Pursuant to agreement the court made the following findings of fact:

"That pursuant to agreement between Helen J. Fast and Oliver T. Justice, as contained in Pages 3 and 4 of Deposition of Dora W. Vellenoweth, introduced by plaintiff, the Farmers and Mechanics National Bank of Woodbury, New Jersey, did on June 21, 1951, cause fifty shares of Pittsburgh Plate Glass Company capital stock, Certificate No. NY033877, and ten shares of United States Steel Corporation Common stock, Certificate No. P706238, to be issued with name of owner as follows: 'Oliver T. Justice and Helen Justice Fast, as joint tenants with the right of survivorship and not as tenants in common'; that said transaction is identifiable and traceable through Plaintiff's Exhibit No. 2, being Safe Keeping Receipt No. 02206;

"That said certificates have been at all times since their issuance in the possession of Oliver T. Justice or his estate, and at no time have they been in the physical possession of the plaintiff, Helen Justice Fast;

"That there has been introduced in evidence United States Steel Corporation stock certificate No. X182083, dated May 31, 1965; Pittsburgh Plate Glass Company stock Certificate No. PO26171, dated December 21, 1955; Pittsburgh Plate Glass Company stock Certificate No. PO90806, dated December 20, 1960; Pittsburgh Plate Glass Company stock Certificate No. PO138184, dated January 19, 1962; Pittsburgh Plate Glass Company stock Certificate No. PO16048, dated January 21, 1963; and Pittsburgh Plate Glass Company stock certificate No. PO60111, dated December 21, 1959; that although these said certificates were introduced in evidence by the plaintiff, that it was stipulated by the parties that the same had at all times been kept and maintained in the possession of Oliver T. Justice, or the possession of his Executor for the Estate, and at no time has any of them been in the possession of Helen Justice Fast."

Based upon these findings of fact, the court made the following conclusions of law:

"(T)here was an intent on June 21, 1951, by and between Oliver T. Justice and Helen Justice Fast, to create a joint tenancy, with right of survivorship in the stock referred to upon Safe Keeping Receipt No. 002206; that Oliver T. Justice is now deceased; that Helen Justice Fast is his survivor; and that under the substantive law of the State of New Jersey that Helen Justice Fast is now the owner of and entitled to the immediate possession of the said fifty shares of Pittsburgh Plate Glass Company capital stock No. NY033877, and ten shares of United States Steel Corporation common stock No. P70623, and that

Helen Justice Fast has no legal interest in any of the other stock referred to above in this judgment; that there has been insufficient evidence offered to prove that Helen Justice Fast has any ownership in the other Certificates mentioned above in this judgment; that even if we assume that there is an inference that some of them may have come about by way of stock splits or dividends that there is no legal proof thereof in this case; and that, therefore, the Estate of Oliver T. Justice is the owner of, entitled to the possession and use of, said stock in keeping with the terms and provisions of the last will and testament of Oliver T. Justice; and that said Estate now is the sole owner of the following shares of stock: United States Steel Corporation No. X182083, and Pittsburgh Plate Glass Company shares numbers PO26171, PO90806, PO138184, PO160849, PO60111."

Based upon his findings of fact and his conclusions of law, Judge Braswell

"ORDERED, ADJUDGED AND DECREED, that Helen Justice Fast is the owner of Pittsburgh Plate Glass Company stock No. NY033877, and No. P706238; and that the Estate of Oliver T. Justice, subject to the terms and provisions of his last will and testament, is the owner of United States Steel Corporation stock Certificate No. X182083, and Pittsburgh Plate Glass Company stock Certificate Nos. PO26171, PO90806, PO138184, PO160849, and PO60111.

"IT IS FURTHER ORDERED AND DIRECTED that Donald Gulley, as Executor of the Estate of Oliver T. Justice, and Mrs. Oliver T. Justice is hereby directed to turn over and deliver unto Helen Justice Fast the aforesaid Pittsburgh Plate Glass Company Certificate No. NY033877, and United States Steel Corporation Certificate No. P706238. The remaining stock certificates herein described are ORDERED RETURNED TO THE SAID EXECUTOR.

"Let court costs be taxed against the defendant."

From this judgment, both plaintiff and defendants appealed.

Plaintiff through her counsel filed in this Court a written motion on 21 March 1967 that she be allowed to withdraw her appeal. The Court allowed this motion by order in conference on 28 March 1967.

On 31 March 1967 counsel for the defendants filed a written motion in this Court stating that since the defendants' appeal was docketed in this court the defendant Donald Gulley, Executor under the

last will and testament of Oliver T. Justice has died, and that Edward Paschal has been duly appointed administrator *de bonis non cum testamento annexo* of his estate, and prayed the Court that he be made a party defendant in this action. This order was allowed by the Court in conference the first day of July 1967.

Mordecai, Mills and Parker for defendant appellants.
Sanford and Cannon by Charles G. Rose, III, for plaintiff appellee.

PARKER, C.J. Defendants have two assignments of error to the admission of evidence. The evidence was clearly admissible, and these assignments of error are overruled. Defendants' assignments of error to the findings of fact by Judge Braswell are overruled, for the simple reason that they are supported by competent evidence.

The agreement or contract between Helen J. Fast and her father Oliver T. Justice was entered into in the State of New Jersey, as shown by the finding of fact. In interpreting a contract made outside of this State our courts long ago established the principle that the law of the country where the contract is made is the rule by which the validity of it, its exposition, and consequences are to be determined. *Watson v. Orr,* 14 N.C. 161; *Anderson v. Doak,* 32 N.C. 295; *Williams v. Carr,* 80 N.C. 294; *Hall v. Telegraph Co.,* 139 N.C. 369, 52 S.E. 50.

In *Cannaday v. Railroad,* 143 N.C. 439, 55 S.E. 836, Justice Connor, speaking for the Court, explained this principle at some length as follows:

> "It is settled that 'Matters bearing upon the execution, interpretation and validity of a contract are determined by the law of the place where it is made.' *Scudder v. Nat. Union Bank,* 19 U.S. 406. 'The interpretation of a contract and the rights and obligations under it, of the parties thereto, are to be determined in accordance with the proper law of the contract. *Prima facie* the proper law of the contract is to be presumed to be the law of the country where it is made.' Dicey Conft. Law, 563. Bowen, L. J., in *Jacobs v. Credit Lyonnais,* 12 Q.B. 589, says: 'It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought, therefore, to prevail in the absence of circumstances indicating a different intention.' 9 Cyc. 667."

Accord, *Keesler v. Ins. Co.,* 177 N.C. 394, 99 S.E. 97 (1919); *Bundy v. Commercial Credit Co.,* 200 N.C. 511, 515, 157 S.E. 860 (1931). A

recent case, *Roomy v. Allstate Ins. Co.*, 256 N.C. 318, at 322-23, 123 S.E. 2d 817 (1962), reiterates the now well-established rule in North Carolina by citing *Cannaday v. Railroad, supra,* and quoting with approval the portion of Justice Connor's opinion set forth above.

Competent evidence in the record shows that the plaintiff Helen J. Fast and the testator Oliver T. Justice intended between themselves in New Jersey on 21 June 1951 that the 50 shares of Pittsburgh Plate Glass Company capital stock, Certificate No. NY033877 and the 10 shares of United States Steel Corporation common stock, Certificate No. P706238 should be issued with the name of owner as follows: "Oliver T. Justice and Helen Justice Fast, as joint tenants with the right of survivorship and not as tenants in common," as shown by Judge Braswell's finding of fact. Both the testimony of Helen J. Fast and the deposition of Dora W. Vellenoweth show that New Jersey was the place where the last act of the parties was performed which resulted ultimately in the issuing of the stock certificates as above stated.

In *Bundy v. Commercial Credit Co., supra,* our Court said:

> "Moreover, it is a generally accepted principle that 'the test of the place of a contract is as to the place at which the last act was done by either of the parties essential to a meeting of minds. Until this act was done there was no contract, and upon its being done at a given place, the contract became existent at the place where the act was done. Until then there was no contract.' [Citing authority.]"

Appellants in their brief contend that there exists in this case an *inter vivos* gift which fails for lack of donative delivery, and rely upon *Buffaloe v. Barnes,* 226 N.C. 313, 38 S.E. 2d 222. In our opinion, and we so hold, the principle of an *inter vivos* gift as discussed in *Buffaloe v. Barnes, supra,* is not here involved, but rather the question is: Is there a right of survivorship in a joint tenancy under the law of the State of New Jersey?

New Jersey Statutes Annotated, § 46:3-17, reads as follows:

> "From and after February fourth, one thousand eight hundred and twelve, no estate shall be considered and adjudged to be an estate in joint tenancy, except it be expressly set forth in the grant or devise creating such estate that it was or is the intention of the parties to create an estate in joint tenancy and not an estate of tenancy in common, any law, usage, or decision theretofore made, to the contrary notwithstanding."

It clearly and affirmatively appears from Judge Braswell's findings of fact that it was the intention of plaintiff and her father to

create a joint tenancy with the right of survivorship and not as tenants in common in respect to the 50 shares of Pittsburgh Plate Glass Company capital stock and the 10 shares of the United States Steel Corporation common stock as set forth above. Such being the case, it is the law in the State of New Jersey, as we understand it, that Helen J. Fast and her father became in respect to this stock joint tenants, and hence with the right of survivorship for the reason that "the incident of survivorship exists by implication in a joint tenancy." *Burlington County Trust Co. v. Di Castelcicala,* 2 N.J. 214, 66 A. 2d 164, at 168.

Shearin v. Allen, 137 N.J. Eq. 276, 44 A. 2d 210, at 211, involved the construction of a will with a devise and bequest by testator of all her property, real, personal, and mixed, which she may own or have the right to dispose of at the time of her death unto her sister and unto her brother "to have and to hold the same in equal shares as joint tenants and not as tenants in common." The Court in the unanimous opinion affirmed for the reasons expressed in the opinion of Vice-Chancellor Lewis, who said:

> "The words 'in equal shares' standing alone create a gift in severalty with all donees taking as tenants in common. But the will under consideration provides that donees should take 'as joint tenants and not as tenants in common.' The donees under this will took as joint tenants with the right of vesting the whole interest in the survivor who does not die before the testator."

The court properly overruled defendants' motion for judgment of compulsory nonsuit. All defendants' assignments of error have been carefully considered and all are overruled.

We have received valuable help from the excellent brief of plaintiff's counsel in this case.

The judgment of Judge Braswell is

Affirmed.

STATE OF NORTH CAROLINA EX REL UTILITIES COMMISSION v. COUNCIL OF SOUTHERN GREYHOUND AMALGAMATED DIVISIONS.

(Filed 24 July, 1967.)

Appeal and Error § 9—

The Utilities Commission denied the motion of a labor union that the reorganized boards of directors of two bus terminals be required to recognize the rights of the union and its employees as set forth in an existent labor contract. Pending appeal, the contract between the union and the bus line expired, and a new contract was negotiated. *Held:* The expiration of the old contract rendered the question moot, requiring dismissal of the appeal.

APPEAL by Council of Southern Greyhound Amalgamated Divisions from *Gwyn, J.*, 22 August 1966 Session of FORSYTH.

On 2 October 1966, the North Carolina Utilities Commission, acting on its own motion based on complaints of motor bus carriers, initiated a sweeping investigation of forty union bus stations and of the twenty-two franchised motor passenger carriers operating into and using the facilities of those stations. The purpose of the investigation was to determine whether those stations were being operated in accordance with Commission rules, with particular attention to impartiality and lack of discrimination in the sale of tickets of the competing carriers to the public and proper quotation of their several schedules to the end that the traveling public would be enabled to obtain the bus service best suited to its wishes, and the several carriers would be fairly treated.

All motor bus carriers using these stations were made parties to the proceeding. All forty union station managers were also made parties. The Commission's staff conducted its independent investigation and participated in the hearings. The hearings consumed a total of twelve hearing days, requiring 2,065 pages of transcript. Some 135 witnesses testified, and 165 exhibits were received in evidence. The evidence is not in the record before us. From the evidence, the Commission concluded that in nine of the forty stations there was a failure to provide impartial service, there being preferential treatment by station personnel accorded the carrier controlling the station operation. Two of the stations were at Winston-Salem and Greensboro, which were managed and operated by Greyhound Lines, Inc. The Commission ordered that a board of directors composed of representatives of each carrier operating in such stations be established for their management. It prescribed certain regulations for the selection of the boards of directors and operating procedures, none of which related to the wages or working conditions of the em-

ployees or whether collective bargaining contracts should be entered into or existing collective bargaining contracts assumed.

No appeals were taken from that final order. At the date of its entry and at the time of the motion of appellant Union, almost three months later, there was in effect a collective bargaining agreement between Greyhound and the Union covering Greyhound's employees throughout much of the United States, and specifically including the employees at Winston-Salem and Greensboro. The original order of the Commission is dated 13 April 1965. On 7 July 1965, Council of Southern Greyhound Amalgamated Divisions made a motion before the Utilities Commission stating that it is the legally recognized collective bargaining representative of the employees of Southern Greyhound Lines, including the terminal employees of Southern Greyhound Lines at Winston-Salem and Greensboro, North Carolina, terminals; that the movant Council is a labor union and is a constituent part of Amalgamated Transit Union, AFL-CIO, and it requested that it be made a party to this proceeding and that the original order of the Commission be amended by a further order requiring the boards of directors at the Winston-Salem and Greensboro, North Carolina, terminals to recognize the rights of the Southern Council and the employees of the said terminals as set forth in the respective labor contracts; and that a temporary order be entered staying the operation of the said terminals at Winston-Salem and Greensboro by an independent board of directors until the Commission has heard and determined their motion.

The North Carolina Utilities Commission entered an order on 29 July 1965 denying the motion. The Council of Southern Greyhound Amalgamated Divisions appealed to the Superior Court, and Judge Gwyn entered a judgment on 8 September 1966 affirming the order of the Utilities Commission.

Council of Southern Greyhound Amalgamated Divisions filed a petition for a writ of *supersedeas* with the Chief Justice of this Court, who, on 31 October 1966, denied the petition. The labor contract between appellant Union and Greyhound, which is the subject of this appeal (and which is the subject of appellant's motion filed with the North Carolina Utilities Commission, out of the denial of which this appeal grew), is not printed in the record but was filed with this Court as Exhibit A attached to appellant's petition to this Court for a writ of *supersedeas*. As appears by the express provisions of the contract, it was for a term expiring 31 October 1966.

From Judge Gwyn's judgment, Council of Southern Greyhound Amalgamated Divisions appealed.

White, Crumpler, Powell & Pfefferkorn by Harrell Powell, Jr., and James G. White for appellant.

Edward B. Hipp for North Carolina Utilities Commission, appellee.

Newsom, Graham, Strayhorn & Hedrick by James L. Newsom for appellee Greyhound Lines, Inc.

Joyner & Howison by R. C. Howison, Jr., for appellee Queen City Coach Company.

Allen, Steed & Pullen by Arch T. Allen for appellee Carolina Coach Company.

PARKER, C.J. On 13 March 1967, counsel for Queen City Coach Company and Carolina Coach Company filed a motion in this Court to dismiss the present appeal for the reason that the question presented for decision in this appeal has become moot. On 13 July 1967, Council of Southern Greyhound Amalgamated Divisions filed an answer to the motion to dismiss. Appellees allege in their motion that they are informed that the said bargaining agreement between Southern Greyhound Lines and appellant dated 1 November 1964 expired, or was terminated on or about 31 October 1966. The answer filed by appellant admits the truth of this allegation. The motion by appellees to dismiss sets forth the provisions of this agreement dated 1 November 1964 have, in fact, terminated with respect to the Winston-Salem and Greensboro union bus terminals and their respective employees, and different employment agreements have been substituted therefor. Appellant, in answer to that allegation, says, in part: "(I)t is admitted that Southern Council and Greyhound Corporation have negotiated another contract, which contract continues a bargaining agreement between Southern Council and Greyhound Corporation and continues certain vested rights herein set forth."

It is perfectly manifest from the allegations in the motion to dismiss and the admissions in the answer thereto that this appeal has become moot and no purpose would be served by a determination of the issues now academic which appellant seeks by this appeal to review. "It is not after the manner of appellate courts to decide moot or academic questions." *Rice v. Rigsby,* 259 N.C. 506, 131 S.E. 2d 469.

In *Archer v. Cline,* 246 N.C. 545, 98 S.E. 2d 889, plaintiff brought an action to enjoin defendants from conducting an election on the issuance of water and sanitary bonds. Pending appeal, the election was held and the official results were announced. The Court dismissed the appeal, declaring that the question involved "is now an academic or moot question, and the appeal will be dismissed."

In *Walker v. Moss,* 246 N.C. 196, 97 S.E. 2d 836, plaintiff brought

an action for a declaratory judgment to have his vote for one member of the county board of education counted in the tally for the votes for that office. Pending appeal, the General Assembly, pursuant to a public law enacted by it, appointed the members of the county board of education. The Supreme Court dismissed the appeal, declaring: "The appointment already having been made by the proper authority, the questions raised by plaintiff are now moot."

In *Topping v. Board of Education,* 248 N.C. 719, 104 S.E. 2d 857, plaintiff, a resident freeholder and taxpayer of Hyde County, instituted an action to restrain the Hyde County Board of Education, and others, from entering into a contract for the erection of a consolidated high school building, which was heard upon an order to appear and show cause why a temporary restraining order should not be issued. After hearing the evidence, Judge Paul denied plaintiff's motion for a temporary restraining order, and plaintiff appealed. During the argument before us, counsel for plaintiff and defendants admitted that pending the appeal the defendants had already entered into the contract, which the plaintiff had sought to enjoin. The Court said: "Since the contract has been made, a court cannot restrain the making of it. The question whether Judge Paul should have enjoined the making of the contract is now academic. Therefore, in accord with many decisions of this Court, the appeal will be dismissed." In support of its opinion, the Court cited many of our decisions.

According to the appellant's answer to the motion to dismiss its appeal, the bargaining agreement between Southern Greyhound Lines and appellant dated 1 November 1964 expired 31 October 1966, and appellant and Greyhound have negotiated another contract, which contract continues a bargaining agreement between appellant and Greyhound and continues certain vested rights therein set forth. It is ordered that the appeal be, and it is hereby, dismissed as moot.

Appeal dismissed.

ROSA M. BARNES v. HOME BENEFICIAL LIFE INSURANCE COMPANY.

(Filed 24 July, 1967.)

1. Insurance §§ 26, 34—

Plaintiff beneficiary has the burden of showing that the death of the insured resulted from accident or accidental means within the language of the policy sued on.

2. Same—

When the evidence of the beneficiary tends to show that the insured died by unexplained and external violence not wholly inconsistent with

an accident, the presumption arises that death was accidental, since the law will not presume that the injuries were inflicted intentionally by the deceased or some other person.

3. Same—

Evidence of plaintiff beneficiary to the effect that the insured was found, still alive, between the rails and under the cars of a train, with his right leg severed, his left leg broken, and cuts and bruises about the body, and that his death occurred some thirty minutes after the discovery, *held* sufficient to be submitted to the jury on the issue of whether insured's death was the result of accident or accidental means.

APPEAL by plaintiff from *Cowper, J.*, October 1966 Civil Session of HALIFAX.

Plaintiff is the beneficiary named in two policies of insurance issued by defendant on 23 January 1961 to her son, Horace R. Moseley, whose age was then 29. Insured died on 12 June 1965 at the age of 33. Policy No. 61047640 insured Moseley's life for $1,000.00. It provided for double indemnity if the insured, prior to attaining age 60, sustained bodily injury solely through external, violent, and accidental means which, directly and independently of all other causes, resulted in his death within ninety days. If, however, death was caused directly or indirectly from disease, alcoholism, violence intentionally inflicted by another person (robbery excepted), or from suicide, no additional benefit is payable.

In Policy No. 61047641, defendant agreed to pay Moseley's beneficiary the principal sum of $1,000.00 if, within 90 days of bodily injury effected solely by violent, external and accidental means as evidenced by a visible contusion or wound on the exterior of the body, his death was directly, independently, and proximately caused by such injury prior to age 64. Each year the policy was in force, the insurance increased $100.00. This accident policy, like the life-insurance policy, excluded coverage for death from suicide, violence intentionally inflicted by another person, or death resulting directly or indirectly from disease, alcoholism, bodily or mental infirmity, sunstroke, poison, infection, gas inhalations, or insured's committing or attempting to commit an assault or felony.

Defendant admits the execution and delivery of both policies of insurance, the payment of all premiums due, and the death of the insured. It has paid plaintiff $1,000.00 under Policy No. 61047640 but declines to pay the accidental death benefit on the ground that "the circumstances under which insured's death occurred were such as to make his death an excluded risk under the provisions of said policies." Upon the same ground, it denies any liability on Policy No. 61047641. Plaintiff brought this action to recover the sum of $1,000.00 upon the double indemnity provision of the life insurance

policy, and the sum of $1,400.00, the amount of coverage provided by the accident insurance policy at the time of insured's death.

At the trial, plaintiff's evidence tended to show: About 11:28 p.m. on 12 June 1965, D. N. Beale, a police officer, went to the place where the tracks of the Seaboard Air Line Railroad cross Virginia Avenue in the city of Roanoke Rapids. He found the crossing blocked by a train of 6-7 cars. A man had been run over. His body was between the rails and still under the cars, which had not been disconnected from the train. When the cars were uncoupled, the officer recognized the man as the insured, Moseley, whom he knew. His right leg had been severed about the middle of the calf; his left leg was broken; he had cuts on the head and bruises about the body. Moseley was still alive and "did not appear to be bleeding so much." When the officer saw him thirty minutes later at the hospital, however, he was dead.

At the conclusion of plaintiff's evidence, the court granted defendant's motion for judgment of involuntary nonsuit. From judgment dismissing the action, plaintiff appeals.

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

Crew and Moseley for defendant appellee.

SHARP, J. In insurance policies which provide for payment, not merely for death, but death by accident or by external, violent, and accidental means, the authorities support the general rule that the burden is on the plaintiff to show that the death of insured resulted from accident or accidental means within the terms of the policy. *Chesson v. Insurance Co.*, 268 N.C. 98, 150 S.E. 2d 40; *Horn v. Insurance Co.*, 265 N.C. 157, 143 S.E. 2d 70; 29A Am. Jur., Insurance §§ 1852, 1957 (1960); 46 C.J.S., Insurance § 1317(2) (1946); Annot., 12 A.L.R. 2d 1264, 1268-69 (1950); Annot., 144 A.L.R. 1416, 1422 (1943); Annot., 26 A.L.R. 2d 388, 436 (1952); see also *Warren v. Insurance Co.*, 215 N.C. 402, 2 S.E. 2d 17, and *Gorham v. Insurance Co.*, 214 N.C. 526, 200 S.E. 5. Suicide (at least, by a sane insured), or any other non-accidental act, even though not specifically excluded from the coverage of such policies, "is not in reality an exception to the general risk which is covered, but a definitive limitation of the covered risk itself." Annot., 142 A.L.R. 742, 743 (1943).

Notwithstanding, the great weight of authority supports the rule that where the beneficiary offers evidence tending to establish that the insured met his death by unexplained external violence, which is not wholly inconsistent with accident, the presumption arises that the means were accidental, "since the law will not presume that the

injuries were inflicted intentionally by the deceased or by some other person." 29A Am. Jur., Insurance § 1852 (1960). *Accord,* 46 C.J.S., Insurance § 1317(2) (1946); Annot., Proof of death or injury from external and violent means as supporting presumption or inference of death by accidental means within policy of insurance, 12 A.L.R. 2d 1264 (1950) (where the cases are collected).

The reason for the presumption was pointed out by Barnhill, J. (later C.J.), in *Warren v. Insurance Co.,* 217 N.C. 705, 706, 9 S.E. 2d 479, 480 (a case in which the question was whether a third person intentionally shot deceased):

> "In actions such as this upon the provision of a policy of insurance against death by accident or accidental means, where unexplained death by violence is shown, nothing else appearing, without the existence of some presumption, the cause of death might be left in the field of speculation. Was the death caused by accidental means, or was it a case of suicide, or was it an intentional and unlawful killing? Under these circumstances the law presumes the lawful rather than the unlawful. Thus the rule arises that where an unexplained death by violence is shown, nothing else appearing, it is presumed that the death resulted from accidental means."

Indisputably, the insured in this case met his death by unexplained, violent, and external means. From the evidence, we know that a train ran over him shortly after 11:00 p.m., but we do not know why he happened to be on the track at the time. *Inter alia,* the explanation could be suicide, murder, alcoholism, or a heart attack — any one of which would exclude coverage —, but there is no evidence to establish any of these; so the explanation could also be accident, which is within the policies' coverage.

In discussing the application of the presumption against suicide to suits on insurance policies, Stansbury, N. C. Evidence § 224 (2d Ed., 1963) states the rule applicable to the facts of this case:

> "(W)here the policy insures only against accident or provides double indemnity for accidental death . . . plaintiff beneficiary must prove the accidental character of the death by the greater weight of evidence, but when he shows the unexplained violent death of the insured he has at least made out a *prima facie* case of accident authorizing a finding in his favor on that issue. This does not shift the burden of the issue to the defendant."

Having "at least made out a *prima facie* case of accident," plaintiff was entitled to have the jury say whether insured's death was cov-

ered by the policies. In a suit such as this, it is only when the plaintiff's evidence negates the possibility of death by external, violent, and accidental means that nonsuit is proper at the close of plaintiff's evidence. *Slaughter v. Insurance Co.*, 250 N.C. 265, 108 S.E. 2d 438; *Goldberg v. Insurance Co.*, 248 N.C. 86, 102 S.E. 2d 521.

Reversed.

HELEN W. FURR, PLAINTIFF, v. JOHN EDGAR SIMPSON, JR., AND SNYDER PAPER COMPANY, A CORPORATION, ORIGINAL DEFENDANTS, AND RONALD P. BAIRD, ADDITIONAL DEFENDANT.

(Filed 24 July, 1967.)

1. Appeal and Error § 6—

Whether an appeal from the denial of a pretrial examination is subject to dismissal as premature *held* moot when *certiorari* bringing the entire case before the Supreme Court is allowed.

2. Bill of Discovery § 3—

Pretrial examination of the adverse party in proper instances within the purview of G.S. 1-568.11 is available to the applicant as a matter of right. G.S. 1-568.3(2).

3. Same—

In this personal injury action plaintiff contended that a breast tumor which she had suffered was aggravated by the accident. Defendant sought by pretrial examination of plaintiff, information as to the name and whereabouts of plaintiff's first husband, a doctor who had treated the tumor. *Held:* The information was pertinent and unavailable to defendant except by pretrial examination, and the court was in error in failing to require plaintiff to answer.

ON *certiorari*, granted on original defendants' petition, to review order entered by *Falls, J.*, at the 16 January 1967 Schedule "C" Non-Jury Session of MECKLENBURG.

Plaintiff instituted this action to recover for personal injuries allegedly sustained on 26 October 1965 when the automobile which she was driving was struck from the rear by a truck owned by the corporate defendant and operated by defendant Simpson. Original defendants made Ronald P. Baird an additional defendant for the purpose of contribution upon allegations that he negligently drove his vehicle into the rear of the truck which defendant Simpson was driving, thereby causing it to strike plaintiff's vehicle.

After the pleadings were filed, on 17 September 1966 the original defendants took the adverse examination of plaintiff "by consent of

the parties with all formalities waived." Counsel representing all parties were present. Plaintiff testified, *inter alia:* In addition to an injury to her cervical spine and other injuries sustained in the accident, her right breast was bruised when it hit the gearshift. For twenty years she had had a tumor in that breast, which had never bothered her prior to the collision in suit. Because of the bruise, however, the tumor was removed about a week after the accident. She said:

> "I am going to have to have some others removed simply because of the removal of the other one. It has been a benign thing that has been there for 20 years. My first husband was a doctor, and I was told 20 years ago that tumors should be left alone, that it would never give me any trouble unless it was hit. And it was, and then it grew and had to come out. I have been married before. . . . Before the accident of October 1965, and while I was married to my first husband who was a doctor, I had a small lump in the right breast removed."

Following this disclosure, counsel for defendants asked plaintiff for information which is summarized in the following questions: What was the name of your first husband? What was the name of the doctor to whom you were once married? How long were you married to the doctor? Is he living now? If so, where is he living? Did he ever treat you for a breast tumor? What names have you used other than Mrs. Helen W. Furr, the name you are using presently? Have you been known by any other name?

Upon the advice of her counsel, plaintiff declined to answer the questions. As a consequence, original defendants gave the notice required by G.S. 1-568.14(b) and (c) and moved the court under G.S. 1-568.18 that plaintiff be required to answer the above questions. Judge Falls, purporting to act in his "sound discretion," denied the motion. Defendants excepted and gave notice of appeal. At the time of docketing the appeal, appellants also filed a petition for *certiorari*, which was allowed on 8 March 1967.

Welling & Miller for plaintiff appellee.

Carpenter, Webb & Golding by Fred C. Meekins and William B. Webb for John Edgar Simpson, Jr., and Snyder Paper Company, a corporation, original defendants.

SHARP, J. The general rule seems to be that orders requiring, or refusing to require, a party to answer questions in a pretrial examination are not immediately appealable. Annot., Appealability of order pertaining to pretrial examination, discovery, interrogatories,

production of books and papers, or the like, 37 A.L.R. 2d 586 (1954); 4 Am. Jur., 2d, Appeal and Error § 79 (1962). Appellee's contention that this appeal should be dismissed as premature, however, is rendered feckless by our order allowing *certiorari*. When *certiorari* is granted, the case is before us in all respects as an appeal. *Williams v. Board of Education*, 266 N.C. 761, 147 S.E. 2d 381.

"After the 'examining party' and 'the party to be examined' have both filed their pleadings, 'an examination is a matter of right and may be had as provided by G.S. 1-568.11.'" *Aldridge v. Hasty*, 240 N.C. 353, 356, 82 S.E. 2d 331, 335. Defendants' sole purpose in examining plaintiff was to obtain evidence to be used at the trial. G.S. 1-568.3(2). The only way in which defendants can obtain the name under which plaintiff was first treated for a condition which she contends was aggravated by the accident in suit is to learn the name of the man to whom she was then married. Without it, as defendants point out, they can make no "exploration of previous accidents and injuries" to the portions of her body "which are the subject matter of the plaintiff's claim for damages." Patently, if their investigation is to be of any use to defendants, it must be made before trial, and, as a practical matter, the only way they can obtain the name of plaintiff's former husband is by a pretrial examination of plaintiff. She was born and educated in Illinois. She has lived in North Carolina only four years. She came to this State from Missouri, where she had lived for five years. Her first breast operation was performed in Salt Lake City, Utah.

There would appear to be no legitimate reason why plaintiff should not disclose the name of the doctor to whom she was married at the time she had her first breast operation and whether he treated her for it. If, however, the relation of doctor and patient existed between plaintiff and her former husband, any information which he acquired while attending her in his professional character is protected by G.S. 8-53 in the same manner as if they had not been married to each other. See *Lockwood v. McCaskill*, 261 N.C. 754, 136 S.E. 2d 67.

The order of Falls, J., is reversed, and the case remanded with directions that an order be entered requiring plaintiff to answer the questions set out in the transcript which, upon advice of counsel, she refused to answer. One who takes a case to court as a litigant must, upon the request of his adversary, fully disclose his identity.

Reversed and remanded.

MILNER HOTELS, INCORPORATED v. CITY OF RALEIGH, GATEWAY PLAZA, INCORPORATED, SEBY JONES AND ROBERT D. GORHAM.

(Filed 24 July, 1967.)

1. **Municipal Corporations § 15— Complaint held to state cause of action against city for negligence in maintaining drains.**

The complaint alleged that defendant municipality had adopted a natural stream as a part of its storm drainage system, and that the municipality was negligent in failing to keep the stream free of obstructions and debris and in causing large boulders to be placed in the stream, resulting in the overflow of the stream and damage to plaintiff's property. *Held:* The allegations were sufficient to state a cause of action against the municipality notwithstanding that it appeared from the complaint that some of the culverts were under streets constituting a part of the State highway system.

2. **Appeal and Error § 61—**

A petition to rehear is granted in this case to correct an inadvertence in the former opinion, but as modified the former opinion stands.

ON Rehearing.

This case was heard and decided at the Fall Term 1966. The opinion is to be found in 268 N.C. 535, 151 S.E. 2d 35.

The plaintiff alleged that as a result of a heavy rainstorm on 29 July 1965, its motel was flooded by the waters of Pigeon House Branch which ran through and over the plaintiff's property. Plaintiff sued the City of Raleigh and three others in connection with this damage. The City's demurrer was sustained, and the plaintiff appealed. The Court was of the opinion that the plaintiff had stated a cause of action against the City and reversed the action of the lower court. A petition to rehear was granted, and the matter has been further considered by the Court.

Paul F. Smith and Donald L. Smith, Attorneys for the City of Raleigh.

Young, Moore, Henderson & Adams by J. Allen Adams, Attorneys for plaintiff.

PLESS, J. The City demurred for that the complaint fails to state a cause of action against the City of Raleigh in that there are not sufficient allegations in the complaint to show that the City of Raleigh had any legal duty to perform any of the acts which the complaint alleges that the City failed to perform.

> "On a demurrer we consider only the sufficiency of the allegations set forth in the complaint. For the purpose of the de-

murrer the allegations are taken to be true. A demurrer cannot be sustained to a complaint if in any portion or to any extent it presents a cause of action, or if sufficient facts can be fairly gathered therefrom." *Munro v. Rubber Company,* 198 N.C. 808, 153 S.E. 412.

"If the complaint be wholly insufficient to state a cause of action, objection should be raised by demurrer; but when only a portion of the pleading or certain paragraphs are insufficient for the purpose for which they are inserted, relief may properly be had by motion to strike the objectionable paragraphs. *Thalhimer v. Abrams,* 232 N.C. 96, 59 S.E. 2d 358." *Miller v. Bank,* 234 N.C. 309, 321, 67 S.E. 2d 362.

The complaint alleges that the City had utilized and adopted Pigeon House Branch as a part of its storm drainage system and sewer and that, having done so, it was *negligent:* in permitting obstructions and debris to accumulate in the stream which blocked it and impeded its natural flow; that it took no action to keep the culvert free and clean of obstructions and failed to maintain the channel; failed to take action to correct the dangerous condition, after numerous requests; caused large boulders to be placed in the stream, thus narrowing it and impeding its natural flow and allowed them to remain therein which caused the stream to overflow and damage plaintiff's property. It thus alleges the negligence of the City in *omitting* to fulfill its duties and also positive and affirmative acts of negligence.

The City relies upon the case of *Taylor v. Hertford,* 253 N.C. 541, 117 S.E. 2d 469, as authority for its lack of responsibility to the plaintiff and suggests that the Court overlooked the holdings of that case in the opinion. In that case, plaintiff's intestate was killed while driving his bread truck on Edenton Road Street in the Town of Hertford when an elm tree fell on the cab of the truck. In affirming the action of the lower Court in nonsuiting the plaintiff's case, the opinion stated: "In sustaining the motion to nonsuit, the court apparently relied on G.S. 136-41.1; G.S. 136-93 and G.S. 160-54 . . . defendant contends, and we hold rightly so, that these statutes clearly demonstrate that the authority and control over the tree referred to in this action was that of the State Highway Commission . . . the Court holds, applying the statutes, that plaintiff fails to make out a case." However, that case relates to the statutory responsibility of the Highway Commission rather than a municipality for what occurs with reference to a city street that is part of the State Highway system. It is relevant to what constitutes the City's obligation as distinguished from the Highway Commission's obliga-

tion under statutes then under consideration, and which no longer appear in the General Statutes according to the numbering existent when *Taylor v. Hertford, supra,* was decided.

The facts in the *Hertford* case and the allegations here are easily distinguishable. In the previous opinion we did not overlook or fail to consider the *Hertford* case. The failure to refer to it was because we could see no relationship to the *facts* there and the ones *alleged* here. The citations quoted in the original opinion sustain the ruling that these allegations are sufficient to withstand a demurrer.

The plaintiff alleges also that the City had entered into a contract with the State Highway Commission to maintain, inspect and repair the streets and culverts within the corporate limits of the city and undertook from time to time to perform the promised maintenance under its contract. The last paragraph of the original opinion is:

> "The complaint brings this case within the above rule (referring to *Johnson v. Winston-Salem,* 239 N.C. 697, 81 S.E. 2d 153) when it alleges that the City 'entered into a contract and agreement with the State Highway Commission to maintain, inspect and repair the streets and culverts within the corporate limits of the City' * * * and 'undertook from time to time to perform the promised maintenance under its contract.'"

Upon further consideration of this paragraph, we are of the opinion that it should be withdrawn. G.S. 160-54, G.S. 136-66.1, and G.S. 136-93 indicate that the Highway Commission is under a statutory obligation with reference to the construction, maintenance and repair of all city streets, including culverts which support city streets, which constitute a part of the State Highway system. While the complaint alleges that the City had contracted with the Highway Commission to take over these responsibilities with regard to the place in question, we cannot interpret these statutes as authorizing a municipality to so contract in the absence of specific legislative authority.

Subject to the above withdrawal, we adhere to the original opinion and hold that the demurrer should have been overruled. The petition is denied.

Petition denied.

STATE HIGHWAY COMMISSION v. WILLIAM A. THORNTON AND WIFE, PAULINE COBLE THORNTON.

(Filed 25 August, 1967.)

1. Dedication § 1—

In order to constitute a dedication, a landowner must intend to dedicate property to the public, or commit acts fairly and reasonably leading a reasonably prudent man to infer an intent to dedicate, followed by acceptance of such offer by the public.

2. Same—

The fact that occupants of houses upon the owner's land and persons having business or social relations with such occupants use a roadway across the land as means of ingress and egress from a public road, is alone insufficient to establish a dedication by the owner of such road to the public.

3. Same—

The fact that the owner records a map showing a street or road across his land does not alone constitute an offer of dedication to the public, but it is required further that such owner sell a lot with reference to such map, and even then the offer of dedication must be accepted by the public.

4. Appeal and Error § 57—

The court's finding supported by competent evidence will not ordinarily be disturbed, even though some incompetent evidence was also heard, since it will be presumed that the court disregarded the incompetent evidence in making its finding.

5. Eminent Domain § 1; Injunctions § 1—

Landowners are not entitled to the issuance of an order restraining the Highway Commission from constructing a road across their lands when the construction of the road had been completed at the time of the hearing, no request for a temporary restraining order having been made, since if an act has been accomplished it cannot be restrained.

6. Injunctions § 14—

Injunction may not issue against persons or corporations who are not parties to the suit.

7. Eminent Domain § 7d—

If the Highway Commission institutes condemnation proceedings and, pursuant thereto, enters upon and constructs a road across private lands for a private purpose, the landowners are not entitled to injunctive relief but only to a dismissal of the condemnation proceedings since, in such instance, neither a judgment of condemnation nor an award for damages for trespass could be entered in the condemnation proceedings.

8. Same; Injunctions § 3—

Injunction will not lie to restrain the Highway Commission from maintaining condemnation proceedings on the ground that the Commission was without authority to condemn the land, since the ground of objection is one which the landowner may assert as a defense in the condemnation proceeding itself, and therefore the landowner has an adequate remedy at law.

9. Pleadings § 4—

Prayer for relief does not determine the relief to which the pleader is entitled.

10. Eminent Domain § 7d—

Respondents' allegations and contentions to the effect that the Highway Commission was without authority to maintain the condemnation proceeding because the proceeding was to condemn respondents' land for a private and not a public purpose raise an issue to be determined by the Superior Court under the provisions of G.S. 136-108, and therefore if respondents' premise is correct, the proceeding should be dismissed.

11. Same—

Where respondents within twelve months of the declaration of taking file answer setting up the defense that the condemnation was for a private and not a public purpose and therefore the Commission had no authority to maintain the condemnation proceeding, such defense is asserted within the time stipulated by the statute, G.S. 136-107, and the Commission may not assert that the respondents are barred from asserting such defense because the Commission had entered upon the land immediately after the filing of the declaration of taking and had practically completed construction of the road at the time respondents filed answer.

12. Estoppel § 4—

Respondents are not estopped from maintaining that the Highway Commission was seeking to condemn their land for a private and not a public purpose and therefore was without authority to maintain the condemnation proceeding when there is nothing in the record to show that respondents by act or statement or silence led anyone to suppose that they would not resist to their utmost the construction of the road, since it is essential to an estoppel that the person asserting the estoppel must have changed his position to his detriment in reliance upon statements or acts of the parties sought to be estopped.

13. Same; Eminent Domain § 1—

The doctrine that the silence of a landowner in the face of a long and continued use of an easement across his land by an agency having the power of eminent domain may constitute the basis for an implied grant has no application when the contention is that such power does not extend to the taking in question.

14. Eminent Domain § 3—

Private property may not be condemned for a private purpose notwithstanding the payment of full compensation, Constitution of North Carolina, Art. I, § 17; Fourteenth Amendment to the Federal Constitution.

15. Same—

What constitutes a public purpose is a judicial question to be determined in the light of the circumstances of the particular case and the then current opinion as to the proper function of government.

16. Same—

Economic benefits to the community, anticipated from the attraction to it of a large and wealthy prospective employer, are not determinative

of whether property taken in order to accomplish that purpose is taken for a "public use."

17. Same—

The fact that a road ends in a *cul de sac* does not prevent it from being a public road so as to support condemnation proceedings.

18. Same—

A road does not cease to be a public road so as to support condemnation proceedings merely by reason of the fact that one individual or corporation may derive more benefit from it than the public generally, or because a substantial part of the anticipated cost of the construction of the road is paid by a private corporation organized for the promotion of the industrial development of the community, and a road is a public road if it is used as a matter of right by the public on an equal, common basis, irrespective of how many people actually use it.

19. Same— Findings held to support conclusion that road to terminal of truck carrier was for use of public and therefore for public purpose.

The road in question was constructed for a distance of some 700 feet over the land of respondents, and ended in a *cul de sac* at the freight terminal of a truck carrier. *Held:* While a finding, supported by evidence, that the road was used by the truck carrier 24 hours a day in going to and from the public highway would not alone support the conclusion that the condemnation of the land for the road was for a public purpose, such finding with additional findings that some 700 employees of the carrier use the road for their own benefit in going to and from work, and that other members of the public used the road to transact business with the carrier, are together sufficient to support the conclusion that the road was for a public purpose.

SHARP, J., dissenting.

BOBBITT, J., concurring in the dissent.

APPEAL by plaintiff from *Hobgood, J.*, at the November 1966 Civil Session of ALAMANCE.

This is a proceeding to condemn a right of way for a road to run approximately 770 feet across a tract of land owned by the defendants from a junction with North Carolina Highway No. 62 to the property line between the defendants and Associated Transport, Inc. The purpose of the road is to provide access to the plant of Associated Transport, Inc., from Highway 62, which, in turn, connects nearby with Interstate Highway 85.

This proceeding was commenced 1 October 1965 by the issuance of a summons, the filing of a complaint, the filing of a declaration of taking, and the deposit with the Clerk of the estimated compensation due the defendants for the taking of their property. On 6 October 1965, the plaintiff began construction of the road.

The new road includes and runs upon a narrower roadway, previously opened and maintained by the defendants upon their own property. This older roadway gave access to Highway 62 from two tenant houses, owned by the defendants and occupied by their tenants, near the line of what is now the property of Associated Transport, Inc. The defendants contend that this former roadway was a private road only. The plaintiff contends that the defendants had offered to dedicate it to public use and that the act of the plaintiff in taking over its maintenance and improvement was an acceptance of such offer of dedication. Throughout the period of construction and improvement of the new road by the plaintiff, it was at all times kept open for use and was used by the tenants of the defendants and by Associated Transport, Inc., its employees, customers and other visitors.

On 22 July 1966, when the construction and improvement of the new road was 96% complete, approximately $10,000 having been expended by the plaintiff in such construction and improvement, the defendants filed their answer. In it they deny that the proposed taking of their property is for a public purpose. They allege that the road so constructed by the plaintiff does not benefit or serve any property owners other than Associated Transport, Inc., and, consequently, the condemnation of the defendants' property for this purpose is beyond the power of the plaintiff and unlawful. They pray that the plaintiff be permanently enjoined from condemning and appropriating their land and that this action be dismissed. Alternatively, they ask that just compensation for such taking be determined.

The plaintiff filed a reply alleging, as affirmative defenses to the prayer for injunctive relief, the dedication of the old, narrower roadway and laches.

By consent, all issues, other than the issue of just compensation if the taking be lawful, came on for hearing before the judge without a jury. Evidence was received and the judge made findings of fact. These include the following:

> "5. That Conger Realty Company, a subsidiary corporation of Associated Transport, Inc., purchased certain real properties situated west of and adjoining the property of the defendants consisting of approximately 35 acres of land; * * * that no right of ingress or egress to said real properties existed when said properties were purchased by Conger Realty Company, and that no official employed by Conger Realty Company or Associated Transport, Inc., contacted the defendants relative to purchasing any right of way across their property to the property owned by Conger Realty Company.

"6. That said real properties owned by Conger Realty Company and situated adjoining the defendants' westerly boundary are occupied by Associated Transport, Inc., the largest motor hauling freight carrier east of the Mississippi River, as a trucking terminal, with an annual payroll of from $5,000,000.00 to $6,000,000.00; and that construction of said trucking terminal began on said property hereinbefore designated on August 23, 1965, at which time no condemnation proceedings had been instituted by the State Highway Commission. The construction cost of said trucking terminal was approximately $1,750,000.00.

"7. That construction of the road by the State Highway Commission across the property of the defendants to the terminal of Associated Transport, Inc., was commenced on October 6, 1965, and completed on August 23, 1966, and that since the completion of said road on the above date the road has been used by approximately 700 employees of Associated Transport, Inc., going to and from work at the terminal, Associated Transport trucks and related equipment, suppliers who come to the Associated Transport terminal for the purpose of selling supplies to Associated Transport, Inc., and its subsidiary, Brown Equipment Company, which is located at the Associated Transport terminal, service representatives who come to service trucks and equipment owned by Associated Transport, Inc., and its subsidiary, customers of Associated Transport, Inc., those who deliver their products to the terminal for shipments, visitors to the Associated Transport terminal, and the tenants occupying the two tenant homes and such persons traveling to and from said tenant homes. * * *

"11. That Conger Realty Company, the subsidiary of Associated Transport, Inc., did not purchase the real property adjoining and lying west of defendants' property until they had been assured by the Burlington-Alamance County Chamber of Commerce that the State Highway Commission would build the access road across the defendants' property. * * *

"13. That the State Highway Commission required as a condition to maintaining said condemnation proceeding that a bond be given indemnifying the State Highway Commission for any damages that it might have to pay as a result of bringing such proceeding herein, and that on August 23, 1965, such bond * * * was executed by the Burlington Industrial Corporation * * *. That subsequently the sum of $7,500.00 was deposited by the Burlington Industrial Corporation under an escrow agreement with the State Highway Commission * * *.

"14. That the cost of construction of the road in dispute which ends in a *cul-de-sac*, was $9,984.48, and that on July 22, 1966, 96.6% of the road had been completed.

"15. That said road across the defendants' property and the place at which it terminates has no scenic value whatsoever.

"16. Rules and Regulations of the State Highway Commission * * * established uniform standards which must be met before new secondary roads are added to the Highway System for maintenance. Among these requirements * * * was the requirement that 'Roads less than one mile in length must have at least four occupied residences fronting the road or with direct entrance to the road. * * *' That the road in question is less than one mile in length and that there have never been more than two occupied residences fronting upon either the driveway which existed prior to October 1, 1965, or the disputed roadway constructed by the State Highway Commission after that date. * * *

"18. That a plat of a survey of part of the defendants' property was recorded on July 20, 1950, * * * and that said plat showed a division of part of said property into ten lots and an unlabeled driveway leading from the west side of N. C. Highway 62 in a westerly direction to the west boundary of defendants' property * * *

"20. That at the time of the recordation of said plat and at no time subsequent thereto did the defendants intend any dedication of said private road to any governmental agency or to the State Highway Commission, * * *"

Upon these findings, the court concluded that the construction of this road is for the substantial and dominant use of Associated Transport, Inc., that any use by the general public is only incidental and conjectural and that the taking of the defendants' property is not for a public use. The court further concluded that there had been no dedication by the defendants of any part of the property in question to the public use and the defendants were not guilty of laches. Accordingly, the court entered judgment permanently enjoining the plaintiff from proceeding with the condemnation and appropriation of the land of the defendants.

Among other things, Mr. Thornton testified:

"My home is about 200 feet from the north side of the road completed by the State Highway Commission that runs through my property. * * * Since the road was completed in August

of 1966, I have had occasion to observe vehicles traversing this 770 feet of road through my property. The types of vehicles I have seen traveling over this road are Associated Transport transfer trucks and cars. I have never counted the number of trucks traveling the road in a day, but it is a large number. Trucks use the road 24 hours a day. I have also observed cars going into this road from N. C. 62. After you sit there and look at them day in and day out, you see certain cars go in and they carry two people, maybe a woman and a man, the man drops out and the car comes out with one person in it, or maybe vice versa. * * * I observed the road in the process of construction. I observed traffic on the road prior to August 23, 1966, the date the road was completed. I could see the Associated Transport terminal under construction. * * * There is no question that I knew all this was going on during the time construction was going on."

Attorney General Bruton; Deputy Attorney General Lewis; Trial Attorney Costen; Trial Attorney Briley; and Associate Counsel Kenneth W. Young for plaintiff appellant.

Ross, Wood & Dodge for defendant appellees.

LAKE, J. The Highway Commission contends that its action in improving and enlarging the old roadway, 30 feet in width, was an acceptance of the defendants' dedication of this strip of their land to the use of the public as a road. If so, the defendants, as to this part of their land, would be entitled neither to injunctive relief nor to compensation. However, the superior court concluded that the defendants had made no such dedication. This conclusion is supported by the court's findings of fact, which, in turn, are supported by the evidence.

In *Nicholas v. Furniture Co.*, 248 N.C. 462, 103 S.E. 2d 837, Parker, J., now C.J., speaking for this Court, said:

> "Dedication is an exceptional and peculiar mode of passing title to an interest in land. The Supreme Court of California in *City and County of San Francisco v. Grote,* 120 Cal. 59, 52 P. 127, 128, 41 L.R.A. 335, 65 Am. St. Rep. 155, said: 'It is not a trivial thing to take another's land, and for this reason the courts will not lightly declare a dedication to public use.' "

In *Milliken v. Denny,* 141 N.C. 224, 53 S.E. 867, it is said, "The question whether one has dedicated his land to the use of the public is one of intention." It is not, however, required that there be actually an intent on the part of the landowner so to dedicate his land

to the public use, it being sufficient that there be acts by the landowner "such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate," followed by acceptance of such dedication by the public. *Tise v. Whitaker,* 146 N.C. 374, 59 S.E. 1012. However, where there is no showing of an actual intent to dedicate, the manifestation thereof must clearly appear by acts which, to a reasonable person, would appear "inconsistent and irreconcilable with any construction except the assent of the owner" to such public use of his property. *Milliken v. Denny, supra.* The mere fact that, with permission of the owner, occupants of houses upon his land, and persons having business or social relations with them, used the old roadway as a means of ingress to and egress from the public road is not sufficient to establish such dedication. *Nicholas v. Furniture Co., supra,* citing *Summerville v. Duke Power Co.,* 115 F. 2d 440.

It is well established that when the owner of a tract of land causes to be recorded a map thereof, showing it to be subdivided into lots, with streets, alleys or other roadways giving access from the public highway to such lots, and thereafter sells any such lot and conveys it with a reference in the deed to such map or plat, there is not only a conveyance to the purchaser of the lot of the right to use such streets and have them kept open for his use, but there is also an offer to the public which may be accepted by it. *Wofford v. Highway Commission,* 263 N.C. 677, 140 S.E. 2d 376, cert. den., 382 U.S. 822, 86 S. Ct. 50, 15 L. Ed. 2d 67; *Steadman v. Pinetops,* 251 N.C. 509, 112 S.E. 2d 102; *Blowing Rock v. Gregorie,* 243 N.C. 364, 90 S.E. 2d 898; *Rowe v. Durham,* 235 N.C. 158, 69 S.E. 2d 171; *Green v. Miller,* 161 N.C. 24, 76 S.E. 505. In *Green v. Miller, supra,* Walker, J., speaking for the Court, said:

> "The reason for the rule is that the grantor, *by making such a conveyance* of his property, induces the purchasers to believe that the streets and alleys * * * will be kept open for their use and benefit, and having acted upon the faith of his implied representations, based upon his conduct in platting the land *and* selling accordingly, he is equitably estopped, as well in reference to the public as to his grantees, from denying the existence of the easement thus created." (Emphasis supplied.)

The mere recording of a map is not an absolute, unconditional offer to the public to dedicate to its use the streets shown thereon. There must be a sale and conveyance of one or more of the lots shown upon the map by reference thereto, or some other manifestation of intent, to make the offer absolute. The recording of the map is a conditional offer, the condition being that one or more of the

lots shown upon the map be sold and conveyed. The public cannot accept that which has not been offered, nor accept that which has been offered conditionally without meeting the condition, so until there has been a conveyance of one of the lots by reference to the map, the public has no right to use the proposed roadway on the theory of dedication.

In the present case, it would be most unreasonable to suppose that the defendants, by recording their map of their land, intended, irrespective of whether they ever sold any part of their property, to give to the public the right to drive at will, in and out of their property over this "dead end" strip. The purchase of the adjoining property at the end of the "dead end" strip did not confer upon Associated Transport, Inc., any right to use this strip of the defendants' land for access to their property. *Janicki v. Lorek,* 255 N.C. 53, 120 S.E. 2d 413. None of the land shown on the defendants' map has been sold or conveyed by them. The condition attached to the defendants' offer of dedication not having been met, the act of the Highway Commission in improving the 30 foot strip did not constitute an acceptance of the offer so as to convert it into a public highway and, of itself, gave the Commission no right therein. Therefore, if this property has been properly taken by the Commission under its power of eminent domain, the defendants are entitled to fair compensation for such taking.

The plaintiff's assignments of error relating to the admission of evidence with reference to the defendants' intent to dedicate are without merit. The finding of the court was supported by competent evidence. If some incompetent evidence was also received, it is presumed that it was disregarded by the court and the error was harmless, there being nothing to show that the finding of the court was based in whole or in part upon such incompetent evidence. *Insurance Co. v. Shaffer,* 250 N.C. 45, 108 S.E. 2d 49; *Bizzell v. Bizzell,* 247 N.C. 590, 101 S.E. 2d 668.

The trial judge, apparently relying upon our statement in *Highway Commission v. Batts,* 265 N.C. 346, 361, 144 S.E. 2d 126, as to the form of judgment which ought to have been entered in that case, having concluded that in the present case the taking of the defendants' land was not for a public use and, therefore, was not within the power of eminent domain, adjudged that the Commission be "permanently restrained and enjoined from proceeding with said condemnation and appropriation of the defendants' lands." This was error, irrespective of the correctness or incorrectness of the conclusion upon which the court so decreed.

Upon this record, the defendants are not entitled to injunctive relief. The reply of the Commission and the testimony of the male

defendant establish that the road was entirely completed before the matter came on for hearing in the court below. The defendant did not apply for a temporary restraining order to halt construction. In this respect, the present case is clearly distinguishable from *Highway Commission v. Batts, supra.* As Allen, J., observed in *Yount v. Setzer,* 155 N.C. 213, 71 S.E. 209, "It requires no authority to sustain the proposition that if the act has been committed it cannot be restrained." Thus, the construction of the road being an accomplished fact, an injunction to prevent its construction could not properly be issued. No injunction could properly be entered in this action against Associated Transport, Inc., its employees, its customers, or others using this road, for none of these persons or corporations are parties hereto.

The defendants allege that the condemnation of their land sought in this proceeding "is for a private rather than a public use." From that premise, they proceed to the conclusion that the Commission has no authority to maintain these condemnation proceedings and they pray the court "that the plaintiff be permanently enjoined from condemning and appropriating defendants' lands as set forth in the complaint and that said action be dismissed." If the premise is sound, the conclusion is sound and the trial court should have entered a judgment dismissing the proceeding, but not an injunction. In *Highway Commission v. Batts, supra* at page 361, we held that an entry upon land by employees of the Commission to construct a private road was "merely an unauthorized trespass by employees of the Commission, for which no cause of action existed against the Commission" in favor of the owner of the land for damages. Certainly, damages for such a trespass cannot be awarded in a condemnation proceeding brought without authority for a purpose beyond the power of eminent domain. See 27 Am. Jur. 2d, Eminent Domain, § 478. Thus, if the premise of the defendants be sound, neither a judgment of condemnation nor an award for damages could be entered in this proceeding and it should have been dismissed.

An injunction against the institution or maintenance of condemnation proceedings, as distinguished from an injunction to restrain construction, is not properly issued, however, where the ground asserted therefor is one which the landowner may assert as a defense in the condemnation proceeding itself, for, in that event, the landowner has an adequate remedy at law. *Reidsville v. Slade,* 224 N.C. 48, 29 S.E. 2d 215. As this Court, speaking through the present Chief Justice, said in *Durham v. Public Service Co.,* 257 N.C. 546, 126 S.E. 2d 315, "Ordinarily, an injunction will not be granted where there is a full, adequate and complete remedy at law, which is as practical and efficient as is the equitable remedy." Here the defend-

ants can derive no benefit from the injunction entered below which they would not gain by a judgment dismissing the proceeding.

The holding that there was error in issuing the injunction does not dispose of the matter, however. The defendants' prayer for relief does not determine the relief to which they are entitled. Furthermore, the defendants also prayed that the proceeding "be dismissed." Their right to have such judgment entered was a matter before the trial judge, for, both by the stipulation of the parties set forth in the record and by the terms of the statute, G.S. 136-108, the hearing in the superior court was to "determine any and all issues raised by the pleadings other than the issue of damages". If the premise of the defendants' answer be correct and if they be not otherwise barred from raising the question, the defendants were entitled to dismissal of these proceedings. The trial judge concluded that their premise is correct; that is, the proceeding was instituted to condemn their land for a private, not a public purpose.

The contention of the Commission that the defendants cannot raise this question, because they did not file their answer raising it until some ten months after the summons and complaint were served on them, cannot be sustained. The defendants did not initiate this proceeding, nor did they establish the procedure to be followed therein. The State, whose agency the Commission is, and whose power it purports to exercise, established the procedure. The defendants have followed it to the letter. Even if the Commission now finds itself embarrassed by its having constructed the road prematurely, upon its own assumption that the defendants would not assert a defense which the statute authorizes (*i. e.*, the Commission's lack of power to condemn the land), the Commission may not assert such embarrassment as a bar to this right of the defendants. The Commission may not, by precipitate entry and construction, enlarge its own powers of condemnation or shorten the time allowed by the statute for the landowner to assert his defenses.

The statutory procedure, established by the State, for actions such as the present, includes these provisions:

> *G.S. 136-106:* "Any person whose property has been taken by the Highway Commission by the filing of a complaint and a declaration of taking, may within the time hereinafter set forth file an answer to the complaint only praying for a determination of just compensation. No answer shall be filed to the declaration of taking and notice of deposit. Said answer shall, in addition, contain the following:
>
> "(1) Such admissions or denials of the allegations of the complaint as are appropriate. * * *

"(3) Such affirmative defenses or matters as are pertinent to the action."

G.S. 136-107: "Any person named in and served with a complaint and declaration of taking shall have twelve (12) months from the date of service to file answer. * * *"

G.S. 136-108: "After the filing of the plat, the judge * * * shall, either in or out of term, hear and determine *any and all* issues *raised by the pleadings* other than the issue of damages, including, *but not limited to,* * * * questions of necessary and proper parties, title to the land, interest taken, and area taken." (Emphasis added.)

Obviously, the word "only" in G.S. 136-106 modifies "complaint," not "praying for a determination of just compensation". That is, the defendants were authorized by the statutory procedure, established by the State, to file an answer denying that the proposed condemnation is for a public use, and were authorized to do so at any time within twelve months after the summons and complaint were served upon them. If this procedure puts the Commission at a disadvantage in constructing highways to meet the public need, the remedy is in the Legislature, not the courts. The Commission caused to be served upon the defendants a summons notifying them to answer the complaint within twelve months after service. It may not now be heard to say that an answer filed within ten months may not include a defense consisting of the denial of an essential element of the right to condemn.

The defendants are not estopped to assert that the land in question still belongs to them, free of any right of way across it. They did nothing to induce the Commission to build the road or to lead the Commission to believe they would not contest its authority to do so. They did nothing to lead Associated Transport, Inc., or its subsidiary, or the Chamber of Commerce, so to believe, or to induce Associated Transport, Inc., or its subsidiary, to purchase the adjoining property or to build its plant thereon. The trial judge found as a fact, upon ample evidence to support it, that "no official employed by Conger Realty Company [the subsidiary] or Associated Transport, Inc., contacted the defendants relative to purchasing any right of way across their property". The learned judge likewise found that the plant site was purchased from persons other than the defendants in March and May 1965 and construction of the plant was begun 23 August 1965, "at which time no condemnation proceedings had been instituted". Again, he likewise found the condemnation proceedings were instituted 1 October 1965 and the Com-

mission began construction 6 October 1965, *the fourth day after service* of the papers on the defendants. The male defendant testified that no representative of the Commission ever communicated with him about its right to build the road. This is uncontradicted. The only representative of the Commission to testify concerning this point was its District Engineer, who said:

> "I did talk with Mrs. Thornton one day * * * Probably in November of 1965. I have never met Mr. Thornton. * * * When I talked with Mrs. Thornton, the only thing she said was that they did object to the road but she didn't state what they would do to recover damages or anything. * * * It was not our place for me or anyone under my supervision to talk with Mr. or Mrs. Thornton and attempt to negotiate with them about this right of way. We did not. We were notified it was all cleared up and we went ahead with the work. The Right of Way Department in Greensboro notified us that the Declaration of Taking had been filed and we could proceed with the construction".

It is abundantly clear that, as the trial court found, Associated Transport, Inc., relied upon assurances by the Chamber of Commerce, or a related organization, that the Commission would build the road, not upon anything the defendants did or did not do or say. The Commission relied upon its own opinion as to the effect of filing the summons, complaint and declaration of taking, not upon anything the defendants did or did not do or say. The record is clear, as the trial judge found, that the defendants rejected all overtures by the Chamber of Commerce. There is nothing in the record to show any act or statement, inaction or silence, by the defendants, or either of them, which led anyone whomsoever to suppose that the defendants would not resist to their utmost ability the construction of the road across their land.

As recently as *Bourne v. Lay & Co.,* 264 N.C. 33, 140 S.E. 2d 769, Denny, C.J., speaking for this Court, said:

> "It is essential to an equitable estoppel that the person asserting the estoppel shall have done or omitted some act or changed his position *in reliance upon* the representations or conduct of the person sought to be estopped." (Emphasis added.)

Again, in *Washington v. McLawhorn,* 237 N.C. 449, 75 S.E. 2d 402, Parker, J., now C.J., speaking for the Court, quoted with approval the following statement from *Bank v. Winder,* 198 N.C. 18, 150 S.E. 489:

> "Equitable estoppel is defined as 'the effect of the voluntary conduct of a party whereby he is absolutely precluded both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract or of remedy, as against another person who in good faith *relied upon* such conduct, *and* has been *led thereby* to change his position for the worse, and who on his part acquires some corresponding right either of contract or of remedy'." (Emphasis added.)

Earlier, Walker, J., speaking for the Court in *Boddie v. Bond,* 154 N.C. 359, 70 S.E. 824, discussed the doctrine of equitable estoppel at length saying:

> "This estoppel arises when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence *induces* another to believe certain facts exist, and such other rightfully *relies and acts on* such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts." (Emphasis added.)

To the same effect see: *Matthieu v. Gas Co.,* 269 N.C. 212, 216, 152 S.E. 2d 336; *Smith v. Smith,* 265 N.C. 18, 143 S.E. 2d 300; *Long v. Trantham,* 226 N.C. 510, 39 S.E. 2d 384; *Scott v. Bryan,* 210 N.C. 478, 187 S.E. 756.

There being nothing whatever to show any reliance placed by the Commission, or by any other person concerned, upon the silence of the defendants as indicating their consent to the construction of the road or their recognition of the right of the Commission to take their land in order to build it, there is no basis for holding the defendants are estopped to assert in their answer that these proceedings are unauthorized because the contemplated condemnation is for a non-public use. The Commission entered upon the land in reliance upon its own opinion as to its authority. If that opinion was correct, it entered lawfully and these proceedings cannot be dismissed, the defendants' only remedy being a determination of the reasonable compensation to be paid. If that opinion was erroneous, the defendants are entitled to have this proceeding dismissed, leaving them to whatever rights they may have against those who have trespassed upon their land and propose to continue to do so.

In *Railroad v. Manufacturing Co.,* 229 N.C. 695, 51 S.E. 2d 301, the railroad company, having the power of eminent domain, laid its track across land of the defendant without any proceeding to determine the compensation due the landowner for such taking. Many years later, it sued to compel the removal of a fence upon the right

of way which it would have acquired had it originally followed the prescribed procedure. This Court held the landowner's long continued silence was sufficient to confer upon the railroad a right of way by implied grant or by operation of law. See also, *Bruton v. Light Co.*, 217 N.C. 1, 6 S.E. 2d 822, where it was said that a lower riparian owner could recover damages only for alteration in the flow of a river by the construction of a dam by a company possessed of the power of eminent domain, and 27 Am. Jur. 2d, Eminent Domain, §§ 478 and 483, where the doctrine of "inverse condemnation" is discussed. These authorities have no application where, as here, the contention is that the power of eminent domain does not extend to the taking in question. Also distinguishable from the present case are *Lloyd v. Venable*, 168 N.C. 531, 84 S.E. 855, and *McDowell v. Asheville*, 112 N.C. 747, 17 S.E. 537, holding that where there is a taking not within the power of eminent domain the landowner may elect to claim damages as if the taking had been lawful. Here, the defendants deny the validity of the taking and ask for an award of damages only in the event their attack upon the validity of the taking is decided adversely to them.

It is, therefore, necessary for us to determine whether the power of eminent domain, conferred by statute upon the Commission, extends to the taking by it, against the owner's will, of a right of way for a road constructed for the purpose for which the Commission constructed the road here in question; that is, we must determine whether the trial court erred in its conclusion that the road in question was not constructed for a public use. If that conclusion was correct, the proceeding should have been dismissed. If that conclusion was error, the proceeding should be remanded for a further hearing to determine the compensation to be awarded the defendants for the taking of their land.

It is clear that private property can be taken by exercise of the power of eminent domain only where the taking is for a public use. *Highway Commission v. Batts, supra; Charlotte v. Heath*, 226 N.C. 750, 40 S.E. 2d 600. The difficulty lies in determining what is a "public use." Here also it is important to bear in mind the observation by the Supreme Court of California, above quoted, that "It is not a trivial thing to take another's land." It is not a sufficient answer that the landowner will be paid the full value of his land. It is his and he may not be compelled to accept its value in lieu of it unless it is taken from him for a public use. To take his property without his consent for a non-public use, even though he be paid its full value, is a violation of Article I, § 17, of the Constitution of this State and of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

In holding unconstitutional an act of the Legislature conferring upon private owners of timberland the right to condemn a right of way over the lands of another for a railway, which would be used exclusively to transport the timber of the owners of the railway, this Court, speaking through Connor, J., said in *Cozard v. Hardwood Co.*, 139 N.C. 283, 51 S.E. 932, "It has sometimes happened that a stubborn and possibly sentimental owner of land has stood in the way of the development of the country and of the impatient, strenuous promoter and industrial pioneer." The Constitution of our State protects him in that right, nothing else appearing. He may not, however, stand in the way of the sovereign state, which seeks to take his property for a public use in return for the fair value of the property so taken.

What is a "public use" justifying the exercise of the power of eminent domain cannot be stated with precision for all cases. Each case must be evaluated in the light of its peculiar circumstances and the then current opinion as to the proper function of government. *Highway Commission v. Batts, supra; Charlotte v. Heath, supra.* In 26 Am. Jur. 2d, Eminent Domain, § 27, it is said of the varying views expressed in the decisions of many jurisdictions:

> "One line of decisions holds that public use means *use by the public* — that is, public employment — and consequently that to make a use public, a duty must devolve on the person or corporation holding property appropriated by right of eminent domain to furnish the public with the use intended, and that there must be a *right* on the part of the public, or some portion of it, or some public or quasi-public agency on behalf of the public, to use the property after it is condemned. * * * The opposing doctrine is that public use means *public advantage, convenience, or benefit,* and that anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new resources for the employment of capital and labor, contributes to the general welfare and the prosperity of the whole community and, giving the Constitution a broad and comprehensive interpretation, constitutes a public use." (Emphasis added.)

The public benefit, through the bringing into the community, or the development therein, of a new source of wealth and employment, is, of course, a proper consideration for the legislative or the administrative agency in determining whether it is expedient to exercise the power of eminent domain. See *Reed v. Highway Commission,*

209 N.C. 648, 184 S.E. 513. With that the courts are not properly concerned. *Yarborough v. Park Commission,* 196 N.C. 284, 145 S.E. 563; *Jeffress v. Greenville,* 154 N.C. 490, 70 S.E. 919. Whether the purpose of the taking is one which brings the taking within the constitutional power of the legislative or administrative agency is, however, a judicial question. *Highway Commission v. Batts, supra; Redevelopment Commission v. Bank,* 252 N.C. 595, 114 S.E. 2d 688; *Jeffress v. Greenville, supra.* The economic benefits to the community, anticipated from the attraction to it of a large and wealthy prospective employer, are not determinative of whether property taken in order to accomplish that purpose is taken for a "public use". The home or other property of a poor man cannot be taken from him by eminent domain and turned over to the private use of a wealthy individual or corporation merely because the latter may be expected to spend more money in the community, even though he or it threatens to settle elsewhere if this is not done. This the Constitution forbids.

The right of the plaintiff to acquire the property of the defendants by eminent domain depends, therefore, upon whether the new road is a public road or is a road for the private benefit of Associated Transport, Inc., not upon the undoubted benefits to the community of having the plant of Associated Transport, Inc., located nearby.

The fact that the road ends in a cul-de-sac does not prevent it from being a public road. *Highway Commission v. Batts, supra;* 26 Am. Jur. 2d, Eminent Domain, § 46. It is also immaterial that a substantial part of the anticipated cost of acquisition and construction was paid by a private corporation organized for the promotion of the industrial development of the community. *Charlotte v. Heath, supra; Deese v. Lumberton,* 211 N.C. 31, 188 S.E. 857; *Stratford v. Greensboro,* 124 N.C. 127, 32 S.E. 394. A road does not cease to be a public road merely by reason of the fact that one individual or corporation derives more benefits from it than does anyone else. See *Stratford v. Greensboro, supra; Cobb v. Railroad,* 172 N.C. 58, 89 S.E. 807; 26 Am. Jur. 2d, Eminent Domain, § 32. On the other hand, the fact that the Highway Commission calls or designates the road a public road does not settle the matter. *Highway Commission v. Batts, supra;* 26 Am. Jur. 2d, Eminent Domain, § 46. This is so because the question of whether the taking of the defendants' property is a taking for a "public use" is to be determined ultimately by the courts, not by the administrative agency.

It is frequently stated that if the public generally may use the road, as a matter of right, on an equal, common basis, the road is a public road irrespective of how many people actually use it. 26

Am. Jur. 2d, Eminent Domain, §§ 31, 46. See also: *Charlotte v. Heath, supra; Cozard v. Hardwood Company, supra.* Nevertheless, though a road be called a public road by the governmental agency which builds it, if, in reality, it is by its very nature and location to be used only by one family or corporation, save for occasional incidental use by visitors, it is not a public road and the property of another person cannot be taken for its construction under the power of eminent domain. *Highway Commission v. Batts, supra.* In the *Batts* case, we said, "[T]he State Highway Commission has no power to condemn private property to construct a road for the private use of any person or group of persons, and if it does so, it is an arbitrary act and an abuse of the discretion vested in it." In that case, anyone who wanted to use the road could have done so, but its location and nature were such as to lead this Court to the conclusion that it was built for the use of but one family. Consequently, we held that the taking of the property of their neighbor for its construction was not a permissible use of the power of eminent domain.

Thus, if the road here in question led to a mere parking or storage facility of Associated Transport, Inc., so that, in reality, its only use would be by the trucks of that company, traveling on its business, the road would be, in fact, a private road and the taking of the defendants' land for its construction, contrary to the will of the defendants, would be beyond the power of the Highway Commission. That, however, is not what the superior court found to be the fact. Its finding, supported by the evidence, shows that some 700 employees report for work at this plant of Associated Transport, Inc. To get to their work they drive in their own vehicles along the road in question. In so doing, they are not acting for Associated Transport, Inc., but are using the road for their own benefit and purpose. The superior court found also that customers of Associated Transport, Inc., use the road to deliver to it and receive from it freight, and suppliers of Associated Transport, Inc., use the road for the sale and delivery of their products and services. A road used by large numbers of people to reach their place of employment and by many others to reach the place at which they will transact business cannot be said to be a private road for the sole benefit of the proprietor whose plant is located at its terminus.

This is not a proceeding to condemn land for use as a site upon which to build a private business establishment. It is a proceeding to condemn a right of way for a road. The facts found by the trial judge concerning the use of this road, all of which findings are supported by the evidence, are a far cry from the contemplated use of

the proposed road in *Highway Commission v. Batts, supra.* It is not necessary to determine how many people must use a road, or how often it must be used, in order to make it a public road. It is enough to say that habitual use, day after day, by 700 people to go to and from their place of employment, by an undisclosed number of shippers and consignees to take their freight to and receive it from the terminal of a major common carrier, by the suppliers of services and commodities to the operator of that terminal and by the trucks of that carrier in the transportation of freight is a use by the public of the road. The fact that all users of the road travel to or from that terminal does not make the road one for the private use of the owner of the terminal. Nichols, Eminent Domain, 3d ed., § 7.512(1); 39 C.J.S., Highways, § 27.

Consequently, the facts found by the superior court do not support its conclusion that the defendants' land was taken for a nonpublic use. On the contrary, the facts so found establish the ultimate fact that the road is a public road and the taking of the defendants' property for its construction was a taking for a public use and, therefore, within the power of eminent domain conferred by the Legislature upon the plaintiff. For this reason, this proceeding should not be dismissed but must be remanded to the superior court for the determination of the issue as to the compensation to be awarded the defendants for the taking of their property.

Reversed and remanded.

SHARP, J., dissenting: Associated Transport, Inc., although subject to regulation by the North Carolina Utilities Commission, has no right of eminent domain. This decision, however, establishes the power of the State Highway Commission to condemn a right-of-way for a road to the plant of any private industry with a payroll which the Chamber of Commerce, or some other group able to influence the Highway Commission, decides is large enough to benefit the economy of the community. It is a decision which will rise to haunt not only this Court but also the Highway Commission, for any private corporation can now say to it, "Condemn us a road and we will employ enough people, so that you can justify it as a public road." But how many employees are enough to make "a public?" And surely the applicant for a "public road" must be a business big enough and so well established as to justify confidence in its continuing payroll. But what of the rights of the entrepreneur in this land of equal opportunity? Is only Big Business to be thus "encouraged to locate" here?

In this case, the State Highway Commission has built a road to give 700 employees of Associated Transport, Inc., access to its plant.

Despite that number, however, the fact remains that the road was not constructed for the use by the public as that term is generally understood. It is pointed out that, because the State Highway Commission has condemned it, the public generally will have the *right* to use the road. That right does not make a road which ends at a private plant, with no scenic appeal, serve a public purpose. Of the general body of the community, only those citizens who are employed by Associated or who have business with that trucking company will ever use the road.

In *Highway Commission v. Batts*, 265 N.C. 346, 144 S.E. 2d 126, in striking down a finding of the Superior Court judge that the Highway Commission's appropriation of a landowner's property was for the purpose of a public road, this Court, speaking through Parker, C.J., said:

> "(H)e should have found as facts and concluded as a matter of law and adjudged that the condemnation and appropriation of a right of way across lands of defendants . . ., ending in a *cul de sac* on the lands of J. M. Batts, was not for a public use, but was for the substantial and dominant use and benefit of W. M. Batts and wife, and a few of their relatives, and that any use by, or benefit to, the public would be merely incidental and entirely conjectural, and that the building of the proposed road by plaintiff will be an abuse of the discretion vested in it to establish, construct, and maintain highways, . . . and he should have issued an injunction permanently restraining plaintiff from proceeding with the condemnation and appropriation of their lands." *Id.* at 361, 144 S.E. 2d at 137.

The difference between this case and *Batts* is one of degree only; the principle is the same. Patently, Judge Hobgood acted in reliance upon the *Batts* case when he enjoined the Highway Commission in this case.

In *Batts,* the court hewed closely to the line that private property can be taken only for a public use. In this case, while protesting to the contrary, the court discards the criterion of public use for the "public benefit" theory. The difference between the two is well stated in *Smith v. Cameron,* 106 Ore. 1, 210 P. 716, 27 A.L.R. 510:

> "There are two main lines of judicial decisions — one holding that the word 'use' is to be taken in its primary sense, and that when so taken it means, stated briefly, 'employment;' the other holding that the word should be given its secondary meaning, and that, when so applied, it means, stated briefly, 'advantage.' 1 Lewis, Em. Dom. 3rd ed., sec. 252; 20 C.J. 552;

* * * Under the authority of that line of decisions which gives the word 'use' its secondary meaning, some courts have gone to the extent of holding that 'public use' is synonymous with 'public benefit,' 'public utility,' or 'public advantage.' * * *

"The courts, including this Court, which takes the opposing view, asserts that there is a distinction between a public use and a benefit to the public, and that private enterprises that give employment to many people and produce large quantities of commodities of various kinds are not necessarily public uses, and that the term 'public use' as used in constitutions is not synonymous with the term 'public benefit.' * * * The idea emphasized by this main line of decisions is expressed by Judge Cooley thus: 'The public use implies a possession, occupation, and enjoyment of the land' by the public or public agencies, and it is not enough 'that the public would receive incidental benefits, such as usually spring from the improvement of lands or the establishment of prosperous private enterprises.'" Cooley, Const. Lim. 7th ed. 766.

In *Cozard v. Hardwood Co.*, 139 N.C. 283, 51 S.E. 932, a case cited in the majority opinion, the Court enjoined defendant from constructing a railroad. (This was not a railroad established under G.S. 136-69, then § 2023 of the N. C. Code of 1883.) Defendant had obtained from the Valleytown Township Highway Commission an order for a right-of-way over plaintiff's property for a railway to transport timber to market.

In answering the argument of defendant's counsel that the timber which the railroad would haul from the mountains would establish tanneries and factories, open land for cultivation, develop natural resources, increase immigration, and bring wealth to the State, the Court said, "They invite courts to find in the term 'public use' a broader and larger meaning. . . ." but "great and dangerous monopolies have been fostered by the liberal construction put upon the term 'public use'." Connor, J., who wrote the opinion quotes from *Bloodgood v. R. R.*, 18 Wend. 9, 31 Am. Dec. 311, in which it is said:

" 'When we depart from the natural import of the term "public use" and substitute for the simple idea of a public possession and occupation that of public utility, public interest, common benefit, general advantage or convenience, or that still more indefinite term, public improvement, is there any limitation which can be set to the exertion of legislative will in the appropriation of private property? The moment the mode of its

use is disregarded and we permit ourselves to be governed by speculations upon the benefits which may result to localities from the use which a man or set of men propose to make of the property of another, we are afloat without any certain principle to guide.' Judge Cooley says: 'It seems not to be allowable, therefore, to authorize private roads to be laid out across the lands of unwilling parties by an exercise of this right. The easement in such case would be the property of him for whom it was established.' Const. Lim., 652." *Id.* at 245, 246, 51 S.E. at 936.

The authorities which support the two doctrines of public use are collected in 26 Am. Jur. 2d, Eminent Domain §§ 27 and 28 (1966). With reference to the public benefit doctrine, it is said:

"Many courts have pointed out that almost any legitimate business enterprise, indirectly to some extent, may be regarded as a benefit to the public, and that an indefinite field is opened up when the doctrine is accepted that public benefit alone is sufficient to make the use a public one, warranting the exercise of the power of eminent domain. The apparent conflict among the authorities may be accounted for in the different conditions that exist in different states. The trend of authority seems to be away from any general definition of the term 'public use' as synonymous with public benefit, and toward the restriction thereof, except in certain rather well-defined fields, to the meaning of use by the public.

"The doctrine that public benefit and utility are a justification for the exercise of the power of eminent domain has been associated especially with four classes of cases: (1) those relating to the development of water power for mills under general or special mill or flowage acts; (2) those arising under drainage acts for the reclamation of wet and marshy land; (3) those relating to the irrigation of arid land; and (4) those relating to the promotion of mining. In some of the states further uses have been recognized by special constitutional provisions. In other words, the doctrine has been applied where location of the private enterprise in question was not a matter of the owner's choice or convenience, but was absolutely or practically fixed, and necessity seemed, therefore, to the court to call for a more liberal interpretation of the term 'public use' than in ordinary cases. The tendency has been to place the decisions, even in those classes of cases in which the exception is recognized by some courts, on other grounds than the law of eminent domain to refuse to extend the public benefit doctrine, and to take the

> position that under present conditions, if the question were a new one, a different conclusion would be reached. The public benefit doctrine has no application if the undertaking for which the land is to be condemned is not confined by its inherent nature to a fixed location." *Id.* § 28.

Associated Transport's road runs 770 feet across defendants' land from Highway No. 62, to Associated's plant, where it dead-ends. Associated Transport trucks and cars of its employees use the road, which is about 200 feet from defendants' residence. "Trucks use the road 24 hours a day."

A subsidiary corporation of Associated bought the land on which it erected its plant *knowing at the time* of the purchase that it had no right of ingress to or egress from its property. Furthermore, neither Associated nor its subsidiary has ever attempted to buy a right-of-way from defendants across their property! Ordinarily no private business, firm, or corporation would do such a thing — and certainly Associated could have found other land — but it bought with confidence for "they had been assured by the Burlington-Alamance Chamber of Commerce that the State Highway Commission would build the access road across the defendants' property." Prior to this decision, the right of private property has not been subject to such invasion. *Highway Commission v. Batts, supra.* Heretofore, when a landlocked industrial or manufacturing plant has been unable to purchase a right-of-way or to acquire an easement of access, it has proceeded under G.S. 136-69 to have a cartway laid off and paid the damages which the jury of view assessed.

Defendants will no doubt be startled to read in the majority opinion that "the home or other property of a poor man cannot be taken from him by eminent domain and turned over to the private use of a wealthy individual or corporation merely because the latter may be expected to spend more money in the community, even though he or it threatens to settle elsewhere if this is not done. This the Constitution forbids." It does indeed!

My vote is to affirm the judgment of the court below, which permanently enjoined plaintiff from proceeding with the condemnation and appropriation of the land of defendants.

BOBBITT, J., concurring in dissent. The judgment is reversed on the ground the court's factual findings establish the Highway Commission's legal right to condemn a right-of-way over defendants' land. As to this, I dissent, being in accord with the views expressed in the dissenting opinion of Justice Sharp.

Of course, if the Highway Commission is permitted to condemn

the right of way, thereafter the road will be available for use by the public generally as a part of the highway system. The question is whether it is being condemned for use by the public generally or for use exclusively in connection with Associated Transport's premises and business. The road does not extend *through* Associated Transport's premises but stops at its property line. All anticipated use thereof, however extensive, will be by persons employed by or having business with Associated Transport.

General economic benefit to the community of a private business or industry, old or new, is not sufficient to justify the exercise of the power of eminent domain in its behalf. Otherwise, the State could exercise its power of eminent domain to condemn land for use as a site for such business or industry.

Neither Associated Transport nor Burlington Industrial Corporation has the power of eminent domain, an attribute of sovereignty. Here, the Highway Commission is attempting to exercise its right of eminent domain to do for the Associated Transport what it would do if it had such right. The Burlington Industrial Corporation is obligated to save harmless the Highway Commission in respect of the amount it is required to pay defendants as compensation.

It would be difficult to distinguish the present case from any factual situation where a new restaurant, department store, or other private enterprise, reasonably calculated to attract large numbers of employees, suppliers and customers, would seek to make use of the Highway Commission's power of eminent domain to provide an *access* road to such establishment.

STATE v. LIVINGSTON BROWN.

(Filed 25 August, 1967.)

1. Grand Jury § 1; Constitutional Law § 30—

A Negro defendant has no right to be indicted or tried by a jury composed of persons of his race or to have a person of his race on the jury, but does have a constitutional right to be indicted and tried by a jury from which persons of his race have not been systematically excluded.

2. Same—

A defendant asserting discrimination in the selection of the jury has the burden of proving such discrimination, but upon a *prima facie* showing the burden is upon the solicitor to go forward with the evidence to rebut such *prima facie* case.

3. Same—

The granting of a new trial for discrimination in the selection of jurors has no relevancy to the subsequent trial in which the former errors and practices of the court in the selection of juries had been supplanted by unexceptional procedure.

4. Same—

The findings of the trial court in regard to racial discrimination in the selection of the grand and petit juries will not be disturbed when such findings are supported by competent evidence and there is nothing in the record to indicate any ill consideration of the evidence or infraction of defendant's constitutional rights.

5. Same—

While the fact that a disproportionately small number of Negroes had been selected to serve on the grand and petit juries in the county for a considerable period of time may be sufficient to raise a *prima facie* showing of racial discrimination in the selection of the juries, the absence of Negroes from a particular grand or petit jury is insufficient, in and of itself, to raise any presumption of discrimination.

6. Same—

Even though defendant's showing of a small disparity in the number of Negroes on the jury list for two consecutive panels be considered sufficient to make out a *prima facie* case of discrimination, evidence to the effect that the jury lists included, without indication or regard to race, the names of all persons on the tax books and the voter registration books, without duplication, is sufficient to rebut such *prima facie* showing of discrimination, and the fact that persons whose names appear on the welfare rolls who were not listed on the tax or voter registration books were not included, does not alter this result.

7. Criminal Law § 15—

A motion for change of venue on the ground of unfavorable publicity in the county is addressed to the sound discretion of the trial court, and where the court's interrogation of those selected for jury duty fails to disclose prejudice, the denial of the motion for change of venue will not be disturbed.

8. Homicide § 15—

Testimony of decedent's dying declarations *held* properly admitted in evidence upon a showing that at the time of making the declarations deceased was in actual danger of impending death and had full apprehension thereof, and that death ensued some 24 hours after the assault.

9. Searches and Seizures § 1—

Where defendant consents to a search of his car, he waives his constitutional rights in regard to a search without a warrant, and such consent will render competent incriminating evidence obtained by such search.

10. Criminal Law § 169—

Where the record does not show what the answer of the witness would have been had he been permitted to testify, appellant has failed to carry the burden of showing prejudicial error.

11. Criminal Law § 167—

The burden is upon appellant not only to show error but to show that such error was prejudicial to him.

12. Criminal Law § 161—

An exception and an assignment of error should show within itself the question sought to be presented, and a mere reference in the assignment of error to the page of the record where the asserted error may be discovered is not sufficient.

13. Criminal Law § 138—

The fact that defendant was given increased punishment upon his second conviction after a new trial obtained by him, *held* not ground for objection.

PLESS, J., concurring.

APPEAL by defendant from *Johnston, J.*, 28 November 1966 Criminal Session of RANDOLPH.

Criminal prosecution on an indictment charging murder in the first degree of Lucille Currie. Plea: Not guilty. Verdict: Guilty of murder in the second degree.

From a judgment of imprisonment, defendant appeals.

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

John Randolph Ingram for defendant appellant.

PARKER, C.J. This is the second time that this case has been on appeal before this Court. In the former trial, defendant Brown, after a plea of not guilty, was found guilty of murder in the second degree. From a sentence of imprisonment, he appealed to this Court. The opinion in the first appeal was filed 15 January 1965, and is reported in 263 N.C. 327. According to the record in the first appeal, he did not challenge the validity of the grand jury that found the indictment, either in the trial court or in this Court. On 26 July 1966, the Honorable Eugene A. Gordon, United States District Judge, handed down a memorandum opinion, which is not reported but is set forth verbatim in the case on appeal, in which he recites that petitioner has filed with his court a petition for writ of *habeas corpus,* accompanied by an affidavit of poverty. He further recites in his memorandum opinion: "The evidence of the petitioner tended to show that the 1960 census indicates that the white population was 56,369 and the Negro population was 5,105 in Randolph County. A compilation of the jury lists covering the period from February 1, 1960, to September 1, 1964, from the County Commissioners and the Clerk of the Superior Court of Randolph County reflect that

white persons numbered approximately 1,587 and Negroes numbered approximately 33. Further evidence reflects that Negroes on the jury lists were designated by 'c' or 'col.' Also, the grand jury which indicted petitioner and the petit jury which convicted him were 'all white.' The fact that the Negro population of Randolph County represents approximately nine per cent of the entire population and that only thirty-three Negroes have been placed on the jury lists in a 3½ year period established a *prima facie* case that there was systematic exclusion of Negroes from grand juries and petit juries because of race. [Citing authority.] The fact that the designations of 'c' or 'col.' were used on the jury lists to indicate Negroes also presents a *prima facie* case of systematic exclusion. [Citing authority.] The law of North Carolina is in accord. [Citing authority.] Since the petitioner established a *prima facie* case, the burden of going forward with the evidence is upon the respondent. [Citing authority.] The respondent offered no evidence on the issue of systematic exclusion of Negroes. . . ." Whereupon, he decreed and adjudicated as follows: "As petitioner has established a *prima facie* case of systematic exclusion of Negroes from the grand jury and petit jury due to race and the respondent has not shown by competent evidence that the institution and management of the jury system of the county was not in fact discriminatory, the indictment upon which he was tried and his conviction and judgment pronounced thereon should be vacated and set aside. The respondent, if it so elects, may reindict and retry the petitioner, provided such action is taken within the next six months. Otherwise, the petitioner will be discharged."

The practice in a *habeas corpus* hearing by District Courts of the United States of vacating months or years later indictments upon a point which should have been raised and decided in the trial court or in the Supreme Court of the state does not tend to inculcate respect for law and order or the reasonably prompt administration of justice. It seems that with countless petitions by defendants to review their trials upon a point that they had an opportunity to raise and did not in the trial court means that there is no end to criminal litigation. This is an utter negation of the legal principle *interest reipublicæ ut sit finis litium.*

The indictment vacated and set aside by Judge Gordon was found at the 22 June 1964 Session of Randolph County Superior Court. The indictment in the present case was found at the 28 November 1966 Session of Randolph County Superior Court. Before pleading to the bill of indictment, the defendant moved to quash the second indictment because Negroes were systematically excluded from service on juries in Randolph County because of their race, and assigns the following reasons for his motion: (1) At the No-

vember 1966 Criminal Session of the Superior Court of Randolph County the solicitor presented a bill to the grand jury that was all white, selected from a panel that had only one Negro on it. This was the grand jury that found the bill in the present case. (2) According to the 1960 Census for Randolph County, North Carolina, the Negro population of Randolph County was 5,106 and the white population was 56,360. (3) Since Judge Gordon's order, no effort has been made by the County Commissioners of Randolph County to correct this disparity between the number of Negro citizens in Randolph County and the disproportionate few in number selected to serve on juries, and the same token selection of Negroes has prevailed since Judge Gordon's order as proved by the September 1966 Criminal Session jury panel.

The defendant introduced in evidence the memorandum opinion of Judge Gordon, and affidavits showing that there was only one Negro on the jury panel at the September 1966 Criminal Session of Randolph and two on the jury panel at the November 1966 Session, and affidavits showing the racial balance in Randolph County establishing that Negroes number about nine per cent of the population of that County.

When the defendant rested, the solicitor for the State offered the evidence of Ira L. DeDowell, who testified as follows:

> "As chairman of the Board of Commissioners of Randolph County I did supervise the compiling of the jury list that is now in effect in Randolph County. The grand jury for the 1966 terms of the Criminal Court of Randolph — the names were taken from this present jury list.
>
> "The exact procedure that was used, and where the information was obtained, in making up the jury list that is now in effect in this county is as follows: The information was obtained from the books in the Board of Elections office — the registration books. And every person who had registered in Randolph County's *(sic)* name was copied. Then, when that was done, the list was taken to the tax office, and compared with the ones in the tax office, and the ones that didn't appear on this first list was taken then and put in the box.
>
> "The jury list that is now in effect is a list taken from the registration lists and the tax records of Randolph County. Every name that appeared on either of these two lists was placed in the box. In preparing this list, there was not any designation on any of the jury lists as to race, creed or color. We copied the names and address and township. This is all that appears on the cards.

"You can not tell, when you're drawing a jury list from Randolph County, from this list, the race or color of the individual's name you draw from the box. The jury list for the December — or for the November 28th Criminal Term of Randolph County, 1966 was drawn from this list. This list was put into effect April 20th, 1965. All of the jurors for the Superior Court of Randolph County since that date have been drawn from this list."

He testified on cross-examination:

"No effort has been made to include on this jury list such people as those who are on the welfare, welfare recipients, or people who have utilities, use public utilities, in Asheboro and Randolph County. I have not checked to see if there are people using public utilities, such as Carolina Power and Light or telephone service, whose names are not on the voter registration list. And, specifically since July 26th, 1966, the date of Judge Gordon, United States District Court Judge *(sic)* I have done nothing to correct the disparity in the number of Negro names in this jury list and bring it more into proportion with the number of Negro citizens in Randolph County."

At this point, counsel for defendant and the solicitor for the State said that was all the evidence they had. The court said: "I will deny your motion to quash the bill." In denying the motion, Judge Johnston entered an order in which he finds the following pertinent facts:

"2. The court has heard the evidence offered by the defendant and the arguments of counsel.

"3. That the Grand Jury who returned the bill of indictment a true bill was drawn from the jury box of Randolph County in the manner provided by law.

"4. That the jury box was prepared on July 1, 1965, with names taken from the tax records and voter registration records of Randolph County of July 1, 1965, and that each name that appeared on either of these records was placed in the jury box, but without duplication, at that time.

"5. That the names were on separate paper slips and that there was nothing on any of the names or paper slips that were placed in this box to indicate the person's race, creed, or color.

"6. That there is no sufficient evidence before this court to indicate in what proportion members of the white and Negro races' names appeared in the jury box.

> "7. That the Grand Jury who returned the bill of indictment a true bill was all white.
>
> "8. That there is no sufficient information before the court as to the number of Negroes on the panel from which the Grand Jury was drawn, but that there was at least one Negro on the panel."

Based upon his findings of fact, he made this conclusion:

> "The Court is of opinion that there was no systematic exclusion of Negroes from the Grand Jury of Randolph County that returned this bill of indictment a true bill and that no person was excluded because of race, color or creed."

Whereupon, he ordered that the motion to quash the indictment be and it hereby is denied. Defendant excepted and assigns that as error. After that was done, counsel for the defendant moved to quash the whole jury panel. The court denied the motion to quash the entire jury panel. After the denial of his motion to quash the indictment and the jury panel, the defendant entered a plea of not guilty. The defendant assigns as error the denial of his motion to quash the indictment and the denial of his motion to quash the panel of jurors.

Defendant is a Negro. As a Negro defendant he has no right to insist that he be indicted or tried by juries composed of persons of his race, nor to have a person of his race on the juries which indicted and tried him. But he has a constitutional right to be indicted and tried by juries from which persons of his race have not been systematically excluded — juries selected from qualified persons regardless of race. *S. v. Wilson,* 262 N.C. 419, 137 S.E. 2d 109; *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513; *S. v. Brown,* 233 N.C. 202, 63 S.E. 2d 99; *S. v. Koritz,* 227 N.C. 552, 43 S.E. 2d 77; *Hernandez v. Texas,* 347 U.S. 475, 98 L. Ed. 866; *Brown v. Allen,* 344 U.S. 443, 97 L. Ed. 469. The burden of proving discriminatory jury practice is upon defendant. *S. v. Wilson, supra; S. v. Covington,* 258 N.C. 495, 128 S.E. 2d 822; *Miller v. State, supra; Akins v. Texas,* 325 U.S. 398, 89 L. Ed. 1692. But this does not relieve the prosecuting attorney of the duty of going forward with the evidence when the defendant has made out a *prima facie* case.

In *S. v. Wilson, supra,* Judge Moore, speaking for the Court, said:

> "When, at a hearing upon a motion to quash the bill of indictment, there is a showing that a substantial percentage of the population of the county from which the grand jury that returned the

bill was drawn is of the Negro race and that no Negroes, or only a token number, have served on the grand juries of the county over a long period of time, such showing makes out a *prima facie* case of systematic exclusion of Negroes from service on the grand jury because of race. *Arnold v. North Carolina,* 12 L. Ed. 2d 77; *Eubanks v. Louisiana,* 356 U.S. 584; *Norris v. Alabama,* 294 U.S. 587. The mere denial by the officials charged with the duty of listing, selecting and summoning jurors that there was any intentional, arbitrary or systematic discrimination because of race, is not sufficient to overcome such *prima facie* case. *Hernandez v. Texas,* 347 U.S. 475; *Smith v. Texas,* 311 U.S. 128; *Norris v. Alabama, supra.* To overcome such *prima facie* case, there must be a showing by competent evidence that the institution and management of the jury system of the county is not in fact discriminatory. And if there is contradictory and conflicting evidence, the trial judge must make findings as to all material facts."

Judge Gordon's memorandum opinion dealt with the composition of the grand jury that found the bill of indictment at the 22 June 1964 Session of Randolph County Superior Court. A new jury list was put into effect 20 April 1965 for Randolph County, as set forth above, and from this jury list were selected the grand jury that found the bill of indictment in the instant case and the petit jury that tried defendant. "Former errors cannot invalidate future trials." *Brown v. Allen, supra.* If racial discrimination in Randolph County was formerly practiced, as found by Judge Gordon in his memorandum opinion, but the jury list was thereafter properly revised and the law administered without discrimination, the former errors and practices would not affect the validity of an indictment returned after proper revisal of the jury system. Judge Johnston's findings of fact on the motion to quash are supported by ample competent evidence and are conclusive on appeal, "in the absence of some pronounced ill consideration" of the evidence by Judge Johnston. *S. v. Wilson, supra; S. v. Perry,* 250 N.C. 119, 108 S.E. 2d 447; *S. v. Speller,* 229 N.C. 67, 47 S.E. 2d 537, cert. den. 340 U.S. 835, 95 L. Ed. 613; *S. v. Kirksey,* 227 N.C. 445, 42 S.E. 2d 613; *S. v. Henderson,* 216 N.C. 99, 3 S.E. 2d 357; *S. v. Bell,* 212 N.C. 20, 192 S.E. 852; *Akins v. Texas, supra; Thomas v. Texas,* 212 U.S. 278, 53 L. Ed. 512. In other words, the findings of a trial judge will not be disturbed unless so grossly wrong as to amount to an infraction of the Constitution of the United States. *S. v. Wilson, supra; S. v. Cooper,* 205 N.C. 657, 172 S.E. 199.

In *Akins v. Texas, supra,* it is said:

"While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance and effect, *Norris v. Alabama,* 294 U.S. 587, 589, 590, 79 L. ed. 1074, 1076, 1077, 55 S. Ct. 579; *Smith v. Texas,* 311 U.S. 128, 130, 85 L. ed. 84, 86, 61 S. Ct. 164, we accord in that examination great respect to the conclusions of the State judiciary, *Pierre v. Louisiana,* 306 U.S. 354, 358, 83 L. ed. 757, 760, 59 S. Ct. 536. That respect leads us to accept the conclusion of the trier on disputed issues 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.' *Lisenba v. California,* 314 U.S. 219, 238, 86 L. ed. 166, 182, 62 S. Ct. 280, or equal protection."

The record shows that Mr. Ingram showed by affidavit a list of jurors that served at the September 1966 Session of Randolph County Superior Court and at the November 1966 Session of Randolph County Superior Court, and that out of the fifty on the September panel one was a Negro, and that out of the thirty-six on the November panel two were Negroes. That is all the information in the record in respect to panels of jurors drawn from the jury boxes since the new list was prepared on 20 April 1965. This is said in Anno. 1 A.L.R. 2d 1291, at 1314: "There is abundant authority that the mere absence from a particular grand or petit jury, or from a particular jury panel, of members of the defendant's class or race is insufficient, in and of itself, to show discrimination against the defendant in the selection of the jury." In support of this statement, many cases are cited from the Supreme Court of the United States and from 15 state courts. Defendant's proof falls far short of showing that there has been any discrimination against the defendant because of his color or race, and does not show any exclusion of Negroes from serving on the grand jury of Randolph County or a trial jury of Randolph County *for some considerable period of time,* after a new jury list was put into effect on 20 April 1965. The tax list is perhaps the most comprehensive list available for the names of citizens, because in this day and time women as well as men are substantial taxpayers in this Nation. *S. v. Wilson, supra.* In this case the jury boxes, after the revision of the same on 20 April 1965, contained the names of all people on the tax list and on the voters' list. The fact that the chairman of the Board of County Commissioners testified that "no effort has been made to include on this

jury list such people as those who are on the welfare, welfare recipients, or people who have utilities, use public utilities, in Asheboro and Randolph County" means merely that if they were not included in the jury list, they were not on the tax list and not on the registration list of voters. The positive testimony of the chairman of the Board of County Commissioners is that if those receiving welfare were on the tax list or on the registration list for voters, that they were included in the jury list. Considering the racial composition of Randolph County, it is reasonable to infer that more white people were receiving welfare payments than Negroes. If any were excluded because they were not on the tax list or not on the registration list for voters, it is apparent that more white people were excluded than Negroes. The fact that the chairman of the Board of County Commissioners said "and, specifically since July 26th, 1966, the date of Judge Gordon, United States District Court Judge *(sic)* I have done nothing to correct the disparity in the number of Negro names in this jury list and bring it more into proportion with the number of Negro citizens in Randolph County," does not mean that he did not correct the disparity when he revised the jury list on 20 April 1965 when he placed in the jury boxes all people who had listed property for taxation and all people who had registered to vote. There is some very slight disparity in the number of Negro residents of Randolph County and the number of white residents of Randolph County as set forth in defendant's motion to quash the indictment and Judge Gordon's memorandum opinion, but only to the extent of a very, very few, and as such it is not material. Even if we should concede, which we do not, that the defendant made out a *prima facie* case showing racial discrimination in the jury list because only three Negroes were summoned to appear at the September 1966 and November 1966 Sessions of the Superior Court of Randolph County, it is our opinion, and we so hold, that the State's evidence is sufficient in purport and content to overcome defendant's *prima facie* showing of racial discrimination; and Judge Johnston's findings of fact and conclusion that there was no systematic exclusion of jurors from the grand jury of Randolph County that returned the bill of indictment a true bill and that no person was excluded because of race, color or creed are amply supported by competent evidence, and are conclusive on appeal because the competent evidence supporting Judge Johnston's findings of fact and conclusion and adjudication are not so lacking in support that to give them effect would work "that fundamental unfairness which is at war with due process." See *S. v. Perry, supra,* for an analysis of our statute law in respect to the preparation of the jury list and the

drawing of the original panel, and the drawing of the grand jury from the original panel. Consequently, the court properly denied defendant's motion to quash the bill of indictment, and correctly denied the motion to quash the panel of jurors.

In *Arnold v. N. C.*, 376 U.S. 773, 12 L. Ed. 2d 77, and in *Eubanks v. Louisiana,* 356 U.S. 584, 2 L. Ed. 991, the Court found that there had been a systematic exclusion of Negroes from the jury service *for a considerable period of time.* Such is not the case here.

Defendant assigns as error the court's denial of his motion for a change of venue because of newspaper publicity of such nature that he would be unable to have a fair trial in Randolph County. The record shows that before the jury was impanelled several jurors stated that they had read articles in the Courier-Tribune about this case, whereupon the court made the following statement:

> "COURT: Now, members of the jury, as has already been suggested, the purpose of these questions that have been propounded to you by counsel in the case has been to obtain an entirely fair jury. Is there any member of this jury as it is presently constituted that knows of any reason — whether you have been asked about it or not — why you feel that you couldn't render to the State of North Carolina, and to this defendant, a completely fair and impartial verdict? If so, the court would like for you to indicate by raising your hand."

There was no response. Whereupon, the jury was impanelled. Defendant's motion for a change of venue was addressed to the sound legal discretion of Judge Johnston, and in the light of what Judge Johnston said to the jury before they were impanelled and the fact that no juror raised his hand in respect to the question does not show any abuse of discretion. This assignment of error is overruled. *S. v. Porth,* 269 N.C. 329, 153 S.E. 2d 10; *S. v. Scales,* 242 N.C. 400, 87 S.E. 2d 916.

The evidence for the State in the present record is substantially similar to the evidence in the record as set forth in the opinion in this case on the first appeal. *S. v. Brown, supra.* For that reason it would serve no useful purpose to set it forth in detail again in this case. The State's evidence in brief summary is that Lucille Currie was admitted about 2:15 a.m. on 16 March 1964 in the emergency room of Randolph Hospital in Asheboro with severe burns over about 70% of her body, from which she died some 25 hours thereafter. While in the hospital she made dying declarations to the effect that defendant poured gasoline on her, struck a match, and set her on fire.

Defendant assigns as error the admission in evidence of statements of dying declarations. These assignments of error are overruled. The State's evidence on this appeal and on the former appeal showed that at the time the declarations were made by Lucille Currie that she must have been in actual danger of death, that she must have had full apprehension of a *speedy and inevitable death,* because all men are mortal and know it, and death ensued about 24 hours after she was burned. *S. v. Brown, supra.*

Defendant assigns as error the admission of evidence in respect to a search of defendant's automobile after he was arrested and placed in jail, and to the testimony of an officer that they opened the doors of the automobile and looked inside and there was a strong odor of gasoline in the car. The officer testified that the defendant gave permission for the search. This assignment of error is overruled. 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.

The record contains 104 assignments of error and more than 104 exceptions. A number of these assignments of error are that the court sustained an objection to a question asked the witness by defendant's counsel, but the record does not disclose what the reply of the witness would have been if he 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 him. All assignments of error of this nature are overruled. *S. v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342.

The record contains many assignments of error of which these are typical:

> "75. The court erred in overruling defendant's objection. EXCEPTION No. 75 (R. p. 187).
>
> "76. The court erred in overruling defendant's objection. EXCEPTION No. 76 (R. p. 191).
>
> "77. The court erred in overruling defendant's objection. EXCEPTION No. 77 (R. p. 191).
>
> "78. The court erred in overruling defendant's objection. EXCEPTION No. 78 (R. p. 196).
>
> "79. The court erred in overruling defendant's objection. EXCEPTION No. 79 (R. p. 201).

"While the form of the assignments of error must depend largely upon the circumstances of each case, they should clearly present the error relied upon without the necessity of going beyond the assignment itself to learn what the question is. Thus, they must specifically show within themselves the questions sought to be presented, and a mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient." 1 Strong's N. C. Index 2d, Appeal and Error, § 24. All assignments of error of this character are overruled.

The defendant in his brief cites very meager authority in support of his contentions. All defendant's assignments of error have been carefully examined and all are overruled.

The judgment of the court in the first case was that defendant should be confined in the State's prison for a period of 20 to 25 years. This is the judgment in the instant case: "It is the judgment of this court that the defendant be confined in State's Prison for a term of twenty-five (25) years. It appearing to the court that upon a previous conviction that the defendant has served a period of time between January 25, 1965, and July 26, 1966, which conviction was set aside July 26, 1966 by the Federal Court. It is the intention of the court for the Prison Department to give the defendant credit for time served under the previous sentence which was vacated by the Federal Court on July 26, 1966." It is the order of this Court that the prison Department shall give the defendant credit for time served under the previous sentence which was vacated by the Federal Court on 26 July 1966. *S. v. Weaver*, 264 N.C. 681, 142 S.E. 2d 633.

In respect to the increased sentence on the second trial, this is

to be noted: In the first trial defendant did not testify in his own behalf. In the second trial defendant did testify in his own behalf wherein he admitted that he had been convicted in the State court and served a prison term for the possession for the purpose of sale of intoxicating liquor and had been convicted once in the Federal court for whiskey, in response to numerous questions asked him by the prosecuting officer if he had not been convicted many times for the possession for sale of whiskey and other offenses, he said he could not deny it but he could not remember. See: *U. S. ex rel. Starner v. Russell* (3rd Circuit — 25 May 1967), 35 U.S.L.W. 2706.

Defendant has shown no error by his 104 assignments of error that would justify a new trial.

In the trial below we find

No error.

PLESS, J., concurring:

Here we have another example of the right of unbridled, unrestricted and unlimited appeal.

The facts set forth in the previous appeal by our able Chief Justice Parker show that the defendant suspected his girl friend of two-timing him. Without proof, he condemns her to die. He forces her into his car, telling her he is going to kill her. Having procured a half gallon of gasoline for his savage purpose two hours earlier, he deliberately throws it on her clothes and strikes a match to ignite them. She dies in agony a day later, after telling the above story several times. The defendant has yet to deny its truth except by his formal plea of not guilty.

Upon the first trial his life was saved when the State did not seek the death penalty. Upon conviction of second degree murder the court imposed less than the maximum penalty for that offense. With that, the defendant should have been content — if not exuberant.

But no! With the tendencies of some courts (not this one) to protect the "rights" of criminals — and, by corollary — to overlook and ignore the rights of the public, and the victims, he seeks and obtains a new trial. He has nothing to lose, and all to gain. He can never be tried again for more than second degree murder; his appeal is at the public expense for the cost of the record and a State-paid lawyer to represent him. Why should he not pursue, and continue to pursue, even after this, his all-to-gain and nothing-to-lose, opportunities?

His complaint at this time (he will have others on his later, all-expense-paid motions and appeals) is that he was discriminated against because the grand jury and trial jury contained too few

Negroes. After thirty-two years on the Superior Court bench, I can say that he is most fortunate that he was not tried upon a first degree murder charge before an all-Negro jury. It would have promptly returned a verdict that invoked the death penalty. One of the major complaints of the responsible Negroes is that the courts do not impose sufficient penalties when one Negro kills another. They insist that the death of a Negro, even though caused by another, deserves more punishment than is usually imposed.

No one would deny that a person charged with crime should have his rights fully protected. But neither can it be denied that the object of government and law is primarily to protect the public from murder, burglary, rape and other offenses. From my viewpoint, it would seem that the latter has been relegated to an unrealistic and impractical position and that the criminals are given more than their "rights" while the safety and security of our good citizens are, to an alarming degree, diminished.

I fully concur with the opinion.

ERNEST C. LONG AND WIFE, MARY BECKER LONG; JOHN M. RIGDON AND WIFE, PAULINE C. RIGDON; JOHN A. GOREE AND WIFE, BILLYE R. GOREE; ALLAN JOHN PETCH AND WIFE, ELSA M. PETCH; JACK GUYES ROBBINS AND WIFE, CATHERINE M. ROBBINS, AND PAUL P. PROUD, v. THOMAS B. BRANHAM.

(Filed 25 August, 1967.)

1. Deeds § 19—

While restrictive covenants must be strictly construed, restrictions must be interpreted to preclude any uses contrary to the intent of the parties as expressed in the instrument or instruments creating the restrictions considered in the light of the circumstances existing at the time of the creation of the restrictions.

2. Same—

Nothing else appearing, restrictions imposed upon a particular subdivision are for the benefit of that particular development and no other.

3. Same—

A modification of a restrictive covenant by the parties to permit a semi-private driveway between two lots discloses that, without such modification, the restrictions precluded the use of any part of the lots for the purpose of an additional street.

4. Same—

The owner of a lot in a subdivision is bound by any restrictions which an examination of the instruments in his chain of title would have disclosed.

3. Same— Under facts of this case, residential restrictions precluded construction of road connecting subdivision with adjacent development.

The subdivision in question had a single road meandering through it, and each lot therein was subject to restrictive covenants limiting use to residential purposes only, with provision against further subdivision. An amendment was thereafter recorded between the developer and the purchasers of certain lots permitting a semi-private driveway between two of the lots. *Held:* The restrictive covenants preclude defendant lot owner from constructing across a part of his lot a roadway connecting the single street in the subdivision with the street in an adjoining subdivision, which subdivision adjoined unrestricted property, even though lots in such adjoining subdivision were restricted to residential purposes, the intent of the parties to keep the subdivision in question a quiet, residential area without the noise and hazards of increased vehicular traffic being apparent from the language of the instruments construed in the light of the then existing circumstances.

APPEAL by defendant from *McKinnon, J.*, 20 March 1967 Session of ORANGE.

Action to restrain defendant from constructing a street within a subdivision. The following facts are admitted or stipulated in the pleadings, and the parties waived a jury trial.

Plaintiffs are the owners of 9 lots in Timbercrest, a subdivision containing 14 lots in Chapel Hill Township, Orange County. Defendant owns 2 lots, Nos. 6 and 7. All the lots front on the one street in the subdivision, Timberly Drive, which winds through it somewhat in the shape of a broad-based "U". A plat of the subdivision is duly recorded in the office of the Register of Deeds of Orange County. All the parties to this action acquired their lots from a common source, James M. Field, the developer. By an instrument recorded on 27 March 1958, he bound all the lots by restrictive covenants, the pertinent portions of which are as follows:

"1. No lot shall be used except for residential purposes.

"2. Not more than one main family home structure shall be built on each lot and no subdivision of any lot shall be permitted, provided, however, this clause shall not be interpreted as denying contiguous property owners to exchange or to sell to each other small areas of their land for the purpose of improving the shape or dimension or providing a better building site on their lot. . . . (1,000 square feet were required for the ground floor of the main structure of a two-story house and 1,250 square feet for all others, which shall not be more than 2½ stories in height.)

"2½. Lots 5 and 6 may be subdivided by the present owners into not more than two lots each and the building restrictions

shall apply to the divided lots provided, however, that should the present owners sell the said lots or either of them without subdivision thereof, then no further subdivision shall be made.

"6. Term. These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of twenty-five (25) years from the date these covenants are recorded, after which time said covenants shall be automatically extended for successive periods of ten years unless an instrument signed by a majority of the then owners of the lots has been recorded, agreeing to change said covenants in whole or in part.

"7. Enforcement. Enforcement shall be by proceedings at law or in equity against any person or persons violating or attempting to violate any covenant either to restrain violation or to recover damage."

On 10 July 1958, James M. Field still owned all lots in Timbercrest except Nos. 10 and 11, which had been sold to plaintiffs Petch. On that day, Field and wife and plaintiffs Petch varied the restrictive covenants by an amendment, recorded 21 July 1958, as follows:

"1. A strip of land not more than 35 feet in width may be cut from the Eastern part of Lot No. 12 from the North side of Timberly Drive and along the line of Lot No. 11 to the L. T. Brame property for the purpose of providing a semi-private driveway from the said Drive to the Brame property.

"2. In addition to and not excluding any other protective covenants and restrictions the plans of each family home structure, prior to any construction thereof, shall be submitted to and approved by each adjoining property owner in the Timbercrest Development and where two property owners are involved and they are unable to agree, then a third property owner in the Development acceptable to each of the other property owners, shall be appointed and the majority vote of the three shall control; should three or more property owners be involved, then a majority vote shall control."

Lots 5 and 6 are not now owned by the same parties who owned them in March 1958. Lot No. 5 is owned by plaintiffs Goree; defendant owns lot No. 6, the north line of which has been realigned. Defendant is also the owner of a 79.8-acre tract of land adjoining the west boundary line of lots 6, 7, and 8 of Timbercrest. This tract is not subject to the restrictive covenants which bind Timbercrest.

On or about 13 October 1966, defendant and his wife entered into a contract with a realtor, D. D. Branch, who undertook to subdivide and sell the 79.8-acre tract for defendant. Branch denominated this tract Oak Hills and divided it into lots containing at least 2 acres each. He prepared and recorded a map which shows defendant's lots 6 and 7 of Timbercrest as lot 9 of Oak Hills, except that a 60-foot strip along the south line of lot 6 is shown as a street, Forestwood Lane. This street connects Timberly Drive with Chesidy Circle in Oak Hills, a larger subdivision than Timbercrest. The south line of lot No. 6 is also a portion of the south boundary of Timbercrest. The property south of the proposed street (Forestwood Lane) is not subject to the restrictive covenants which bind Timbercrest. Timberly Drive has been maintained by the State Highway Commission for about 3 years, and it extends approximately 300 yards beyond the south line of the Timbercrest Subdivision.

On 15 February 1967, defendant and his wife recorded a declaration of restrictions for Oak Hills, which required each lot to be used only for residential purposes and one detached, single-family dwelling not to exceed 2½ stories in height. Floorspace for a two-story house was required to be not less than 1,000 square feet exclusive of garages, porches, and terraces; other dwellings must have at least 1,500 square feet of contiguous enclosed living area.

Alleging that the construction of a street along the southernmost portion of lot No. 6 of Timbercrest violated the restrictive covenants binding the subdivision, on 30 January 1967, plaintiffs instituted this action to restrain such construction.

Pending trial, Judge Leo Carr restrained defendant from constructing the street. At the trial, defendant stipulated that Oak Hills should be maintained as "a highly desirable residential subdivision" and assented that any judgment entered should "require him to maintain said subdivision for residential purposes only."

Upon the facts set out above, Judge McKinnon concluded as a matter of law that the proposed construction of Forestwood Lane across the southern portion of lot No. 6 would violate the restrictive covenants protecting the Timbercrest Subdivision. From the judgment permanently restraining defendant from constructing a street over or through any lot or parcel of land in the Timbercrest Subdivision, defendant appealed.

Spears, Spears & Barnes by Marshall T. Spears, Jr., for plaintiff appellees.

Hofler, Mount & White by Charles W. White and Richard M. Hutson, II, for defendant appellant.

SHARP, J. The question posed is this: Do the restrictions which provide that no lot in Timbercrest Subdivision "shall be used except for residential purposes" prevent an owner from constructing across a part of his lot within the subdivision a roadway connecting a street in Timbercrest with one in the adjoining subdivision of Oak Hill, which is protected by restrictions substantially similar to those of Timbercrest? "Whether or not the maintenance, use, or grant of a right-of-way over restricted property is a violation of the restriction depends largely upon the language of the restriction, the objects sought to be obtained, and the conditions and circumstances surrounding the premises involved." 20 Am. Jur. 2d, Covenants, Conditions and Restrictions § 232 (1965).

In construing restrictive covenants, the fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions. *Callaham v. Arenson,* 239 N.C. 619, 80 S.E. 2d 619. The rules of construction are fully set out in Annot., Construction and application of covenant restricting use of property to "residential" or "residential purposes," 175 A.L.R. 1191, 1193 (1948), and they are succinctly stated in 20 Am. Jur., *Id.* § 187 as follows:

> "Covenants and agreements restricting the free use of property are strictly construed against limitations upon such use. Such restrictions will not be aided or extended by implication or enlarged by construction to affect lands not specifically described, or to grant rights to persons in whose favor it is not clearly shown such restrictions are to apply. Doubt will be resolved in favor of the unrestricted use of property, so that where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted, and that construction should be embraced which least restricts the free use of the land.
>
> "Such construction in favor of the unrestricted use, however, must be reasonable. The strict rule of construction as to restrictions should not be applied in such a way as to defeat the plain and obvious purposes of a restriction."

Where the meaning of restrictive covenants is doubtful "the surrounding circumstances existing at the time of the creation of the restriction are taken into consideration in determining the intention." Annot., Maintenance, use, or grant of right of way over restricted property as violation of restrictive covenant, 25 A.L.R. 2d 904, 905 (1952).

It is quite clear that the use or grant of a right-of-way across property restricted to residential use to reach property used for business, commercial, or other forbidden enterprises violates the restrictive covenants. Restricted property cannot be made to serve a forbidden use even though the enterprise is situated on adjacent or restricted land. *Starmount Co. v. Memorial Park,* 233 N.C. 613, 65 S.E. 2d 134; Annot., 25 A.L.R. 2d 904, 911 (1952); 20 Am. Jur. 2d *Id.* § 232; *McInerney v. Sturgis,* 37 Misc. 2d 302, 234 N.Y.S. 2d 965; *Laughlin v. Wagner,* 146 Tenn. 647, 244 S.W. 475, 478; *Wallace v. Clifton Land Co.,* 92 Ohio St. 349, 110 N.E. 940. In *Starmount Co. v. Memorial Park, supra,* this Court upheld an injunction against the use of a driveway across restricted property to a commercial cemetery. The proposed use, we said, would be tantamount to dedicating the lot to a prohibited business, or commercial, use.

As pointed out in Annot., Grant of right of way over restricted property as a violation of restriction, 39 A.L.R. 1083 (1925), differences in the wording of restrictions and in the conditions and circumstances surrounding the premises involved have caused courts to reach varying conclusions upon the question presented here.

> "In general, it may be said that if the granting of the right of way seems to be inconsistent with the intention of the parties in creating or agreeing to the restriction and with the result sought to be accomplished thereby, the courts incline to hold such a grant to be a violation of the restriction, while if the granting of the right of way does not interfere with the carrying out of intention of the parties and the purpose of the restrictions, it will not be held to be a violation." *Id.* at 1083.

In the following five cases, courts refused to enjoin the use of a roadway over property restricted to residential use only:

Bove v. Giebel, 169 Ohio St. 325, 159 N.E. 2d 425, is the case most often cited in behalf of the contention that a road across restricted residential property in one subdivision to another similarly restricted development does not violate the restriction. In *Bove,* defendant purchased from the owner of lot No. 29 in Crestwood Subdivision a 6-acre tract adjoining it on the west. At the same time, he purchased a strip of land 25 feet wide across lot No. 29 as a means of ingress to and egress from the acreage outside the subdivision. This strip was his only means of access to the 6-acre lot upon which he proposed to impose the same restrictions applicable to Crestwood, *i. e.,* that it be used for residential purposes only, and upon which he intended to erect two private dwellings. Plaintiff, who owned lot No. 28 in the subdivision, sought to enjoin the use

of any part of lot No. 29 as a right-of-way. The Supreme Court of Ohio denied the injunction, stating:

> "(I)t is apparent that, in order to conclude that the use of lot No. 29 proposed by defendants is forbidden, it would be necessary to revise the words of restriction No. 1 so that they will require not merely a use 'for residence purposes only' but 'for residence purposes *in the subdivision* only.'
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> * * *
>
> "(W)e have found no cases involving a situation such as presented by the instant case where the property outside the subdivision will be restricted by its owners to the same extent as that within the subdivision. Hence, our conclusion is that the owners of a lot in a subdivision, which lot is restricted to use 'for residence purposes only,' may use such lot as a means of ingress to and egress from adjoining land that they own outside the subdivision if they impose upon such outside land the same restrictions that are applicable to lots within the subdivision." *Id.* at 329, 330, 159 N.E. 2d at 428, 429.

In *R. R. Improvement Ass'n v. Thomas,* 374 Mich. 175, 131 N.W. 2d 920, the defendant owned the west 70 feet of lot No. 15 in Brookside Hills, a highly restricted residential subdivision. Defendants also owned a much larger tract (parcel 3), adjoining lot No. 15 to the south but outside the subdivision. Defendants desired to use parcel 3 for residential purposes and proposed to grade a roadway over the 70-foot strip to provide access to and from parcel 3 to South Hills Road, upon which lot 15 fronted. Defendants agreed to impose upon parcel 3 the same residential restrictions applicable to Brookside. At plaintiff's instance, the lower court enjoined the construction of the road as a violation of the restriction against any use other than residential purposes. Defendant relied upon *Bove v. Giebel, supra.* The Supreme Court of Michigan stated that it agreed with *Bove* "but with reservations." It remanded the case to the trial court with instruction to make the following findings:

> "(W)hether and how, if at all, the present residential advantages enjoyed by Brookside lot owners will or might be adversely affected by appellant's proposal; whether a new traffic burden or maintenance problem will thereby be cast on dead end South Hills road, or for that matter, upon any other part of the subdivision's roadways; whether the private roads of the subdivision as dedicated have since become public roads; whether appellant's intended specifications for grading of the west 70 feet of Lot 15 and of location on parcel 3 of the two

proposed homes will in any way, aesthetically or otherwise, impair the restriction-assured enjoyment of home ownership in the subdivision; whether strict conformity with the restrictions has been waived (as claimed by appellant in her vain motion to set aside summary judgment) and, in general, whether there are fair, distinguished from carping or trifling, reasons for denial to appellant of that which is sought by her." *Id.* at 183-84, 131 N.W. 2d at 924-25.

In *Baxendale v. Property Owners Association, Etc.,* 285 App. Div. 1148, 140 N.Y.S. 2d 176, the plaintiff sought a declaratory judgment establishing his right to construct a public road over a lot in a subdivision restricted as follows: "All plots be known and described as residential plots. . . . No buildings of any kind shall be hereafter erected upon premises except one detached single dwelling. . . . Nothing shall be done therein which may be or become an annoyance or nuisance of the neighborhood." The court, noting that a road was not a building, held that nothing in these covenants prevented the construction on plaintiff's property of a public road for ingress to and egress from adjoining property. Such a road, it held, did not violate the restrictions against offensive trades and it was not *per se* an annoyance or a nuisance. *Accord, Mairs et al v. Stevens et al,* 268 App. Div. 922, 51 N.Y.S. 2d 286. Upon the same reasoning, in *Vinyard v. St. Louis County,* 399 S.W. 2d 99 (Mo. 1966), the Supreme Court of Missouri held that the use of a platted driveway on a portion of a lot in a residentially restricted subdivision for access to apartments on adjacent land was not prohibited. The applicable covenants (substantially those of *Baxendale, supra)* prohibited all structures except single-family dwellings and provided that none should be used for business purposes.

In the five next succeeding cases, the courts *did* enjoin the use of a roadway over property restricted to residential use only.

In *Duklauer v. Weiss,* 18 Misc. 2d 747, 182 N.Y.S. 2d 193, the plaintiffs were lot owners in the high-class subdivision of Westerleigh. They successfully sought to enjoin the construction of a road through two lots owned by defendants Weiss and Marx. The lots in Westerleigh could be "utilized only for a private residence for one family," and every plot had to be "not less than 3 acres." Defendant Kaufman, who owned 53 acres of unrestricted land south of the subdivision, had been granted two easements over the lands of his neighbors, Weiss and Marx, for the benefit of his 53 acres. In upholding plaintiffs' right to the injunction, the court said:

"A reading of the subject covenants individually or collectively leads this court to the inescapable conclusion that they were

> enacted for the sole purpose of maintaining and preserving the highly residential character of all the properties located in the Westerleigh development even to the extent of forbidding the construction of the roads now contemplated by Kaufman. . . ."

Although Kaufman denied that he intended to subdivide the 53-acre parcel, the court noted that if he were allowed to construct the road, such a development was possible. It said: "Certainly, it could not then realistically be said that such roads were incidental, or an adjunct to, or served for the better enjoyment by Weiss and Marx of their respective residential homes."

The court found its previous decision in *Baxendale v. Property Owners Association, Etc., supra,* no obstacle to this decision. That case, it said, "is clearly distinguishable," for there "the courts were concerned with the type and character of building, *if erected,* rather than the use to be made of the property. The Appellate Division by a divided court held that a road was not a building within the meaning of the language employed in the restriction and that in the absence of a clear restriction against such use, the plaintiffs in that action were free to use a certain restricted lot as a means of ingress and egress to their adjoining land."

In *Donald E. Baltz, Inc., v. R. V. Chandler & Co.,* 151 S.E. 2d 441 (S.C. 1966), the developer sought to enjoin a purchaser from using a lot as a street in a subdivision restricted by covenants which provided: "1. No lot shall be used except for residential purposes. (This restriction is identical to the restriction in the case now before us.) * * * 3. No trailer . . . shall at any time be used as a residence. * * * 8. This property shall be used for single-family residences only. . . ." The defendant, who owned an unrestricted 40-acre tract adjoining the subdivision, purchased lot 18 therein for the purpose of opening a street connecting his 40-acre tract with a street wholly within the subdivision. The lower court enjoined the use of the street across lot No. 18. The Supreme Court affirmed, saying:

> "Chandler urges that *Bove* is a 'compelling precedent' for the conclusion that the use of lot 18 as a private driveway to a single family residence situated on adjoining property is not a violation of the restrictions on the lot. We do not so regard it.
>
> "When covenants 1 and 8, *supra,* are read together, as they must be, we find that the permitted residential use to which the property *shall* be put is as the site of a single family residence, and, of course, such other use as may be incidental to the occupation of the residence as a habitation. The covenants in *Bove*

> simply did not require that the lot *shall* be used for a single family residence as the only permitted residential use." *Id.* at 444.

In *Klapproth v. Grininger,* 162 Minn. 488, 203 N.W. 418, 39 A.L.R. 1080, the plaintiff and the defendant Grininger owned adjoining lots fronting on Bear Lake. These lots were restricted "for residential purposes only." The defendant Grininger granted to the other defendants, who owned lots to the rear of the lake-front lots and across the highway from the plaintiff and defendant Grininger's property, a perpetual right-of-way (10 feet in width) across the eastern side of his lot adjoining the plaintiff's property. This right-of-way gave the other defendants, their families, and invited guests access to the lake. The defendants then constructed a dock, which projected 75 feet out into the lake at the end of the right-of-way. The plaintiff brought the action to enjoin the defendants from using the strip of land as a right-of-way. The court, without mentioning the construction of the dock, stated the question involved as follows: "The question here is whether the easement granted by Grininger infringes the restriction that the land 'shall be used for residential purposes only'." The answer was YES. "Such use of the land is not within any definition of a residential purpose; and devoting it to the purpose of a passageway for the occupants of other lands necessarily precludes using it for residence purposes, save, perhaps as a means of ingress and egress. We think that the use made of this strip of land is inhibited by the covenant, and that the learned trial judge reached the correct conclusion." *Accord, Edgewood Park Association v. Pernar,* 350 Mich. 204, 86 N.W. 2d 269.

In *Thompson v. Squibb,* 183 So. 2d 30 (Fla. D. C. App. 2d 1966), the plaintiff sought to enjoin the defendant from constructing and using a roadway over lot 88 in Mobile Homes Estates for the purpose of connecting that subdivision with defendant's subdivision of Thompson Estates, which adjoined Mobile Homes on the south. The use of land in Mobile Homes was restricted to "residential purposes only." The opinion does not disclose what restrictions, if any, protected Thompson Estates. In sustaining injunctive relief, the Florida court said:

> "In construing restrictive covenants the question is primarily one of intention, and the fundamental rule is that the intention of the parties as shown by the agreement governs, being determined by a fair interpretation of the entire text of the covenant. . . .
>
> "There is no ambiguity in the expression 'shall be used for resi-

> dential purposes only.' As employed in this covenant, the word 'only' is synonymous with the word 'solely' and is the equivalent of the phrase 'and nothing else.' . . .
>
> "It is obvious that the use of defendant's lot as a connecting street so that there would be access from the streets of the adjoining subdivision to those of the subdivision for whose benefit the restrictive covenants were made is not in any sense a residential use or a use incidental thereto.
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> * * *
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> ". . . The defendant's roadway or drive across the property in no way facilitates the permitted residential use to which the property is restricted." *Id.* at 32-33.

The foregoing decisions illustrate the varying conclusions which different courts have reached. Each case must be determined on its own particular facts. *Edgewood Park Association v. Pernar, supra.* It is our opinion, however, that, nothing else appearing, restrictions imposed upon a particular subdivision are for the benefit of that particular development and no other. Therefore, if its lots are restricted to residential use only, that is tantamount to saying that they are restricted solely to residential use in that subdivision. We hold that the restrictive covenants in the Timbercrest Subdivision preclude the road proposed by defendant.

That the developer and purchasers of lots in Timbercrest understood that any use of a lot in the subdivision for a road or right-of-way would violate the restrictions against nonresidential use is clearly shown by the amendment to the restrictions which Field and the first purchasers, plaintiffs Petch, executed and recorded on 21 July 1958. This amendment then became a part of the contract imposing the restrictions, and it must be considered in determining the effect of the whole. *Callaham v. Arenson, supra.* The amendment was recorded at the time defendant purchased lots 6 and 7, presumably for the purpose of integrating his Oak Hills Subdivision with Timbercrest. An examination of the adverse conveyances of the grantors in his chain of title would have disclosed the amendment. Defendant was, therefore, chargeable with notice of it. See *Reed v. Elmore,* 246 N.C. 221, 98 S.E. 2d 360. If, without an amendment, "a semi-private driveway" between lots 11 and 12 of Timbercrest to the Brame property would have violated the restrictions against nonresidential use, *a fortiori,* the construction of a road to link Timbercrest with Oak Hill, a considerably larger subdivision, would violate the restrictions.

The map of Timbercrest reveals a small, tight subdivision through

which only one street, Timberly Drive, meanders. It is quite obvious that its developer and those who purchased lots therein did not contemplate that Timberly Drive should ever become a thoroughfare which would carry traffic from another subdivision. Their objective was a quiet, residential area in which the noise and hazards of vehicular traffic would be kept at a minimum and in which children could play with relative safety. It is likewise noted that the property immediately south of that portion of Forestwood Lane which is within lot 6 is outside both Timbercrest and Oak Hills subdivisions. The stipulations reveal that the property immediately to the south of the proposed road is not subject to the restrictions applicable to Timbercrest. If it is subject to any restrictions, the record does not so disclose.

The decision in *Callaham v. Arenson, supra,* relied upon by defendant, does not impinge upon the conclusion we reach here. In *Callaham,* the Boldridge Subdivision was originally composed of 11 lots. All but lot 5, which had a frontage of 245 feet, fronted 100 feet on Selwyn Avenue in the City of Charlotte. The side lines of each lot went back for 340 to 740 feet to Sugar Creek. The restrictions were that "all lots in the tract shall be known and described as residential lots." Each was required to have at least 20,000 square feet with a width of not less than 100 feet. Only one detached, single-family dwelling not in excess of 2½ stories, a private garage for not more than 3 cars, and outbuildings incidental to the residential use of the plot were allowed on any lot. Building lines, cost, and floorspace were also specified for the dwellings. There was no prohibition against the subdivision of the lots. Plaintiffs owned adjoining lots 6, 7, 8 and 9; defendants owned the remaining lots. Plaintiffs proposed to locate a 50-foot street, or roadway, along the line between lots 7 and 8 and to resubdivide their 4 lots from a point not less than 150 feet back from Selwyn Avenue, so as to establish two rows of new lots to front on the 50-foot street, with each lot having an area of not less than 20,000 square feet and a width of not less than 100 feet at the front building set-back line. After the proposed subdivision, each of the lots fronting on Selwyn Avenue would also have an area of not less than 20,000 square feet and a width at the front building set-back line of not less than 100 feet. The same restrictions would be inserted in the deeds to the new lots as were contained in the deeds to the original lots. When the defendants threatened to restrain the plaintiffs from carrying out their proposed resubdivision on the ground that it would violate the restrictive covenants protecting the property, the plaintiffs brought the action "to remove alleged cloud upon title to real estate." This Court, speaking through Johnson, J., found nothing in the restrictions which

would prohibit the resubdivision of the property and the opening up of the new street. It was noted that all the lots from 1 to 10, inclusive, shown on the map of the original subdivision contained areas largely in excess of 20,000 square feet, yet none of these lots was less than the minimum width of 100 feet.

> "Necessarily, then, the covenant fixing minimum standards as to width and area authorizes resubdivision of the original lots into units as small as 200 feet in depth. . . . In short, the plaintiffs' plan conforms with all requirements set out in the Boldridge restrictive covenant contract. * * * The three controlling paragraphs of the contract, when considered each in its proper relation to the others, harmonize and reflect an overall meaning which is free of inconsistency or repugnancy." *Id.* at 626, 80 S.E. 2d at 624, 625.

Callaham is clearly distinguishable from this case in that the streets which were the subject of controversy in the Boldridge Subdivision were all within the original subdivision itself. There was no plan to connect the new streets with those of any adjoining development. Here, the size and shape of the lots and the restrictions which contain limitations on resubdivision differentiate Timbercrest from Boldridge and disclose the different purposes and objectives of the parties involved in the two cases. The opening of additional streets within the Boldridge property was within the contemplation of the parties. In this case, it obviously was not. "The fundamental rule in construing restrictive covenants is that the intention of the parties as shown by the covenant governs." 20 Am. Jur. 2d, Covenants, Conditions, and Restrictions § 186 (1965).

The judgment of the lower court is

Affirmed.

J. ZEB INGLE v. ROY STONE TRANSFER CORPORATION AND BILLY JACK HARBOUR.

(Filed 25 August, 1967.)

1. Evidence § 56—

Cross-examination of a witness for the purpose of impeachment is not limited to inquiry as to the witness' prior convictions of offenses involving moral turpitude, but the witness may be asked on cross-examination as to any prior convictions of crime.

2. Automobiles § 118—

While the violation of either section of G.S. 20-140 constitutes culpable negligence, the violation must be either intentional or must be accompanied by such recklessness or carelessness as to import a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others, and result in injury or death, but the unintentional violation of a safety statute which is not accompanied by recklessness or probable consequences of a dangerous nature when tested by the rule of reasonable provision, is not culpable negligence.

3. Automobiles §§ 73, 90—

An instruction on the issue of contributory negligence which incorporates the provisions of G.S. 20-140 and charges that if plaintiff was guilty of reckless driving as defined in the statute plaintiff would be guilty of contributory negligence if such violation was a proximate cause of the injury, *held* erroneous, it being required that the court apply the law relating to reckless driving to the particular facts presented by defendant's evidence in regard to plaintiff's contributory negligence. G.S. 1-180.

APPEAL by plaintiff from *Hobgood, J.*, 14 November 1966 Civil Session of ALAMANCE.

Action to recover damages for personal injuries. About 1:00 p.m. on 20 September 1963, a fair, clear day, plaintiff, a route salesman for Melville Dairy, was operating one of its milk delivery trucks in a northerly direction on N. C. Highway No. 87, approximately 10 miles north of Burlington. At that point, No. 87 is a level, 2-lane highway with pavement about 19 feet wide and with 5-foot shoulders. As plaintiff made a left turn into the driveway of Lacy Smith, whose residence is on the west side of the road, the milk truck was struck on its left side by a tractor-trailer owned by the corporate defendant and operated by its employee, defendant Billy Jack Harbour. The tractor-trailer, also traveling north, was attempting to pass the milk truck at the time of the collision. In the collision, plaintiff received multiple injuries and was rendered unconscious. A head injury left him with a permanent speech impairment.

The investigating officer, Trooper James C. Pierce, Jr., gave testimony which tended to show: The driveway into the Smith home is 800 feet north of Rural Paved Road 1578, which intersects No. 87 from the west. Between this intersection and the Smith drive, No. 87 curves slightly. A yellow line in the northbound lane extends from the intersection to a point 213 feet south of the Lacy Smith driveway. Visibility between the rural paved road and the Smith driveway is uninterrupted in both directions. The speed limit for the area is 55 MPH for automobiles and 45 MPH for trucks. Pierce found debris in the northbound lane directly in front of the Smith driveway. It was about in line with the drive axle in the middle set of wheels on the rig of the tractor-trailer, the back end of which

was in the southbound lane and the front end of which was off the highway on the north side of the Smith driveway. The milk truck was on the east shoulder 145 feet northeast of the tractor-trailer. Its left-turn signal was pulled down.

Plaintiff's testimony tended to show: He had entered No. 87 from Rural Paved Road 1578 and had driven northwardly behind a farm truck at 10-15 MPH toward the home of Lacy Smith, where he intended to make a delivery. When he was 150-200 feet from the driveway, he turned on his left-turn signal. Just before turning, he looked for traffic approaching from the rear and saw none. At 5-10 MPH, he then began to turn into the drive at an angle. Because of small bushes and shrubs in the curve on the east side of the highway, he could not see more than 500 feet to the south. After his front wheels were over the center line, he saw the tractor-trailer for the first time. It was 75-150 feet away and traveling at a speed of 55-60 MPH. At no time did he hear a horn. At the time of the impact, his left-turn signal was still on.

Plaintiff's witness, Robert Lee Carter, who was riding in the back of the farm truck and facing south, testified in substance as follows: He saw the accident. The milk truck's signal light began flashing for a left turn 100 feet before it reached the Smith driveway. At the time plaintiff started his turn to the left, defendants' tractor-trailer was still on its right side of the road, 150-200 feet behind the milk truck and traveling between 55-60 MPH. When it was 60-75 feet behind it, the tractor-trailer pulled out to pass the milk truck. Carter heard no horn blow. The driver of the truck transporting Carter also testified that he heard no horn sound; the first thing he heard was "the terrific noise of metal hitting together."

Defendants' evidence tended to show: The length of the tractor-trailer unit which Harbour was driving was 50 feet; the tractor was 9 feet high and the trailer 12 feet, 4 inches high. Harbour first saw the milk truck when it was about 100 feet north of the rural paved road and he was 400-500 feet behind it, traveling between 40-45 MPH. As he approached the milk truck, it was moving at 20-25 MPH. When he was about 125 feet from the truck, he pulled into the left lane and blew his air horn to go around. At no time did he see any signal from the milk truck. When he was about 45 feet from it, and the truck was 5-10 feet from the Smith driveway, it turned "practically straight across from the driveway" in front of him. He applied brakes as hard as he could but hit the milk truck, which rolled to its right, then straightened up and went into the ditch. He immediately went to the truck, where he found plaintiff unconscious.

The case was submitted to the jury upon the issues of negligence, contributory negligence, and damages. The jury answered the first two issues YES, and the court entered judgment dismissing the action. Plaintiff appealed.

Smith, Leach, Anderson & Dorsett by C. K. Brown, Jr.; H. Clay Hemric for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter by Stephen Millikin for defendant appellees.

SHARP, J. For the purpose of impeaching plaintiff's witness Carter, counsel for defendant asked him if he had not "been convicted of several criminal charges." Over plaintiff's objection, counsel elicited from Carter that he had been convicted of the following offenses: Speeding 65 MPH in a 55 MPH zone; exceeding a safe speed; drunken driving; operating a motor vehicle while his license was suspended; disregarding a stop sign; public drunkenness; and allowing an unlicensed minor to operate a motor vehicle. Plaintiff's assignments of error 1 and 4 are based upon the admission of this evidence.

Plaintiff argues that convictions for violations of the motor vehicle laws have no direct bearing upon veracity and indicate no moral turpitude. He contends that cross-examination for the purpose of impeaching a witness should be confined to such offenses as false pretense, fraud, cheating, and other crimes indicating a disposition to falsify. He cites the following comment of Seawell, J., made by way of *dicta*, in *State v. King*, 224 N.C. 329, 333, 30 S.E. 2d 230, 232: "It would be a barbarous rule which called in question a man's veracity because of the violation of a petty traffic law of which he may not have any knowledge." The decision in *State v. King* was that record evidence showing the criminal convictions of a State's witness was not competent for the purpose of impeaching him.

In this State, a witness may be impeached by evidence that his general character is bad or it may be corroborated by evidence that it is good. *State v. Troutman*, 249 N.C. 395, 106 S.E. 2d 569; *State v. Ellis*, 243 N.C. 142, 90 S.E. 2d 225; *State v. Nance*, 195 N.C. 47, 141 S.E. 468; *In re McKay*, 183 N.C. 226, 111 S.E. 5; *Lumber Co. v. Atkinson*, 162 N.C. 298, 78 S.E. 212; *State v. Bullard*, 100 N.C. 486, 6 S.E. 191; see *State v. King, supra;* Stansbury, North Carolina Evidence § 107 (2d Ed., 1963). For the purpose of impeachment, the witness himself is subject to cross-examination as to his convictions of crime. *State v. Norkett*, 269 N.C. 679, 153 S.E. 2d 362 (defendant admitted convictions of assault with a deadly weapon, store breaking, and larceny); *State v. Sheffield*, 251 N.C. 309, 111 S.E. 2d 195

(defendant admitted conviction of robbery); *Nichols v. Bradshaw,* 195 N.C. 763, 143 S.E. 469 (witness convicted of "blockading"); *State v. Colson,* 194 N.C. 206, 139 S.E. 230 (witness cross-examined with reference to violations of the prohibition law and failure to support his wife); *Coleman v. R. R.,* 138 N.C. 351, 50 S.E. 690 (The court said, "It was competent, to impeach the plaintiff, to show by him that he had been convicted of forcible trespass.").

In *State v. Sims,* 213 N.C. 590, 197 S.E. 176, defendant, indicted for murder, testified as a witness in his own behalf. On cross-examination, the State drew from him admissions that he had been convicted of "beating a ride on a freight train" and that he had six times been "up for gambling" and sentenced therefor. With reference to this evidence, the Court said:

> "It is not the practice in this jurisdiction to limit the cross-examination for the purpose of impeachment to felonies, or to crimes involving moral turpitude. In fact, cross-examination for the purpose of impeachment is not limited to conviction of crimes. Any act of the witness which tends to impeach his character may be inquired about or proven by cross-examination." *Id.* at 593, 197 S.E. at 178.

These cases, *inter alia,* clearly justify the statement in Stansbury, North Carolina Evidence § 112 (2d Ed., 1963) that, for the purpose of impeaching a witness, "apparently any sort of criminal offense may be inquired about. . . ." In discussing what crimes are relevant to indicate bad character as to credibility, Wigmore says: "If in a given jurisdiction general bad character is allowable for impeachment, then *any offense* will serve to indicate such bad character." Wigmore, Evidence § 980, p. 538 (3d Ed., 1940).

Plaintiff would have us change this rule, but, as pointed out by McCormick in his discussion of conviction of crime as a ground of impeachment, much confusion has resulted in those jurisdictions which, by statute, have limited the impeaching effect of convictions to "infamous crimes" and to those involving "moral turpitude." He says:

> "The California Code and codes modeled upon it, adopt the limitation to 'felonies,' which is at least simple to apply. Similarly easy of administration is the English description 'any felony or misdemeanor.' This last seems to be the construction which some of the courts place upon the statutes worded in terms of 'crime' or 'any crime.' But most courts, oversensitive perhaps to the feelings of witnesses, have been unwilling to accept such simple mechanical tests, and have read into such general statutes the requirement that as to misdemeanors at

least, the offense must be one involving 'moral turpitude.' Thus does the serpent of uncertainty crawl into the Eden of trial administration. Still more uncertain is the situation in the states which leave to the trial judge's discretion whether the particular conviction substantially affects the credibility of the witness. It seems questionable whether the creation of a detailed catalog of crimes involving 'moral turpitude' and its application at the trial and on appeal is not a waste of judicial energy in view of the size of the problem. Moreover, it seems that shifting the burden to the judge's discretion is inexpedient, since only in a minority of cases will the judge have adequate information upon which to exercise such discretion. A clear certain rule like the English one is preferable, despite its somewhat arbitrary cast. Perhaps better still is the proposal of the Uniform Rules to limit impeachment to conviction of crimes 'involving dishonesty or false statement,' a fairly definite, but not arbitrary criterion." McCormick, Evidence § 43, pp. 90-91 (1954).

In 98 C.J.S., Witnesses § 507, p. 407-8 (1957) (cited by plaintiff as 70 C.J. § 1052 at p. 851) as bearing upon a witness' credibility, we find this statement: "(I)t is usually held improper to show the conviction of a mere misdemeanor or minor offense which does not involve moral turpitude, or an offense which is not regarded as being infamous or *crimen falsi* in its nature." The footnotes to the above quotation disclose that in other jurisdictions the following convictions have been held inadmissible for the purpose of impeachment; adultery, burglary in the second degree with sentence to the county jail for six months, disorderly conduct, vagrancy, first conviction for drunken driving of automobile, petit larceny, violation of liquor laws; assault with a deadly weapon where imprisonment was in the county jail; carrying concealed weapons; drunkenness and possession of intoxicating liquor; obtaining money under false pretenses, assault, drunkenness and disorderly conduct, fighting and shooting craps, gaming, operating a motor vehicle while intoxicated, violations of Dyer Act relating to transportation of stolen property, making false tax schedule, prostitution, throwing stones at a railroad train, deserting wife and children, operation of still. These examples, from many states, illustrate the problem posed and point up the diversity of opinion as to what crimes cast doubt upon an individual's credibility and adversely affect his general character. Certainly, a conviction for violating a city ordinance against spitting on the sidewalk would not cast doubt on a person's credibility; neither, ordinarily, will a conviction of speeding 45 MPH in a 35 MPH zone — certainly not if he pled guilty! We are not prepared

to say, however, that a conviction of any one of the majority of the crimes listed in the above C.J.S. footnote would not thereafter cast some doubt upon the credibility of the person convicted, nor do we think that a person who has been guilty of drunken driving, or who consistently violates motor vehicle laws designed to protect life and property on the highway, can claim an unblemished general character.

In *McMullen v. Cannon,* 129 Ind. App. 11, 150 N.E. 2d 765, the plaintiff, who testified in his own behalf, was asked on cross-examination whether he had been convicted of operating a motor vehicle under the influence of intoxicating liquor. The objection of his counsel was sustained upon the ground that the conviction had no bearing on the witness' credibility. In ordering a new trial because of the exclusion of the evidence, the Appellate Court of Indiana said:

> "In this state the rule is deeply entrenched in the case law that a witness, including a party to the action who takes the stand as a witness in his own behalf, may be required on cross-examination, as affecting his credibility, to answer as to previous convictions, whether such convictions were of felonies or misdemeanors.
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> "A reference to the latest annotation on the question, found in 20 A.L.R. 2d 1217, section 3 on page 1218, indicates that the courts which have passed on the question are, as usual, divided. It is interesting to note, however, that in New York, under a statute providing that a conviction for traffic infraction may not be introduced to impeach the credibility of a witness, such statute was construed so as not to include a conviction for drunken driving and the cross-examination of the defendant driver as to whether he had been convicted of driving while intoxicated was held permissible. See *Geiger v. Weiss,* 1935, 245 App. Div. 817, 281 N.Y.S. 154."

Accord, Black v. State, 215 Ark. 701, 222 S.W. 2d 816; *State v. McKissic,* 358 S.W. 2d 1 (Mo. Sup. Ct. 1962); *Monaghan v. Keith Oil Corporation,* 281 Mass. 129, 183 N.E. 252.

We also adhere to our rule, which has the virtue of certainty. Responsible counsel will not abuse it. Jurors are intelligent people; most are also motorists, and, should abuse occur, they can be counted on to evaluate the situation properly. Furthermore, the judge is in charge of the trial, and he has plenary power to protect a witness from harassment and to keep cross-examination within the bounds of reason.

Plaintiff's assignments of error 6, 7, 10, and 11 relate to the court's charge upon reckless driving as it relates to the issue of contributory negligence. Plaintiff and defendant each alleged that the other was guilty of reckless driving. In charging upon the first issue, the judge read G.S. 20-140 to the jury and then said:

> "The Court instructs you that, under this section, a person is guilty of reckless driving if (1) he drives an automobile or motor vehicle on a public highway in this State carelessly and heedlessly in a willful or wanton disregard of the rights and safety of others, or (2) if he drives an automobile on a public highway in this State or a motor vehicle on a public highway of this State without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property."

Before giving the preceding instruction, the judge told the jury to bear the definition of reckless driving in mind so that he would not have to repeat it in charging upon the issue of contributory negligence. On the second issue, he charged as follows:

> "Now, on this issue, the defendant says that the plaintiff was guilty of specific acts of contributory negligence. One, that the plaintiff was guilty of reckless driving, and the Court has explained that term to you. If you find the plaintiff, on said date and occasion and in the manner he drove the milk truck, was guilty of reckless driving in either of the two particulars set forth in the explanation by the Court, then that would be negligence on his part, and if you find that was a proximate cause of the injury he suffered, then you would answer the second issue YES."

Plaintiff contends (1) that there was no evidence tending to show that he was guilty of reckless driving and (2) that, if there was, the judge's instruction failed to comply with G.S. 1-180 in that he failed utterly to tell the jury what facts they must find in order to adjudge plaintiff guilty of culpable negligence.

A violation of G.S. 20-140 is negligence *per se* and gives rise to both civil and criminal liability. *Dunlap v. Lee,* 257 N.C. 447, 126 S.E. 2d 62; *Carswell v. Lackey,* 253 N.C. 387, 117 S.E. 2d 51; but allegations as to reckless driving in the words of G.S. 20-140 without specifying wherein the party was reckless amount to no more than an allegation that the party charged was negligent. They are but conclusions of law which are not admitted by demurrer. *Troxler v. Motor Lines,* 240 N.C. 420, 82 S.E. 2d 342. They do not justify a charge on reckless driving. *Dunlap v. Lee, supra; Fleming v. Drye,*

253 N.C. 545, 117 S.E. 2d 416. Reckless driving is made up of continuing acts, or a series of acts, which, in themselves, constitute negligence. To plead reckless driving effectively, the pleader must particularize with reference to the the specific rules of the road which the motorist was violating and his manner of doing so. Usually, in doing this he will merely repeat previous or subsequent allegations with reference to negligence or contributory negligence, and nothing but excess verbiage has been added to the case. Civilly, a person is equally liable for injuries resulting from his ordinary negligence and from culpable negligence in the form of reckless driving where no intentional injury is involved. Similarly, when the judge has correctly instructed the jury upon the law applicable to the various acts of negligence upon which the pleadings and evidence require a charge, there is no need to reassemble the parts and present them to the jury in a packaged proposition labeled reckless driving, for the whole is equal to the sum of its parts. If, however, he undertakes to do so, G.S. 1-180 requires him to tell the jury what facts, which they might find from the evidence, would constitute reckless driving. It is not sufficient for the judge to read the statute and leave it to the jury — as he did here — to apply the law to the facts and to decide for themselves what plaintiff did, if anything, which constituted reckless driving. *Sugg v. Baker,* 258 N.C. 333, 128 S.E. 2d 595; *Dunlap v. Lee, supra.* Such an instruction abdicates the judicial function and permits the jury "to roam at large in an unfenced field."

The language in each section of the reckless driving statute, G.S. 20-140, defines culpable negligence. *Dunlap v. Lee, supra.* "Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *State v. Cope,* 204 N.C. 28, 30, 167 S.E. 456, 458. The intentional, wilful or wanton violation of a safety statute or ordinance which proximately results in injury is culpable negligence; an unintentional violation, unaccompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, is not. *State v. Cope, supra.*

Here, the evidence discloses that plaintiff was not traveling at a dangerous speed. "Mere failure to keep a reasonable lookout does not constitute reckless driving. To this must be added dangerous speed or perilous operation." *State v. Dupree,* 264 N.C. 463, 142 S.E. 2d 5. Neither the intentional nor the unintentional violation of a traffic law *without more* constitutes reckless driving. *State v. Gurley,* 253 N.C. 55, 116 S.E. 2d 143; *State v. Sutton,* 244 N.C. 679, 94 S.E. 2d 797. To suggest that plaintiff intentionally violated G.S. 20-154(a) when he turned across the road to enter the Smith driveway is to

attribute to him suicidal motives. Taking the evidence in the light most favorable to defendants, however, and applying the law relating to reckless driving to it, the judge could have correctly charged the jury as follows: If you should find that defendant Harbour gave an audible warning with his horn of his intention to pass the milk truck; that he gave it in adequate time for plaintiff to have avoided injury which would probably result from a left turn; that plaintiff heard the horn; that notwithstanding, he heedlessly turned to his left across the highway without first looking to see that the turn could be made in safety and without making any effort to ascertain the whereabouts of the vehicle from whence came the signal he had heard — such conduct would constitute reckless driving and negligence on the part of plaintiff. If you should further find that such negligence on the part of plaintiff contributed to his injury as a proximate cause or one of the proximate causes thereof, you would answer the second issue YES.

The issue of contributory negligence was properly submitted to the jury, but, for the failure to charge correctly on reckless driving, there must be a

New trial.

MARION RUTH PEARCE v. BEULAH P. BARHAM, ADMINISTRATRIX OF CALVIN W. BARHAM, DECEASED, AND DOLLY BARHAM.

(Filed 25 August, 1967.)

1. Negligence § 11—

Where plaintiff's injury is the result of wilful and wanton conduct on the part of defendant, plaintiff's contributory negligence will not bar recovery.

2. Automobiles §§ 73, 91—

Where plaintiff alleges and offers evidence tending to show that wilful and wanton conduct on the part of defendant proximately caused plaintiff's injury, it is error for the court to refuse to submit plaintiff's tendered issue as to the wilful and wanton negligence of defendant, and such failure must be deemed prejudicial when the action is dismissed on the ground of plaintiff's contributory negligence and the issues submitted do not make certain whether the jury's affirmative finding on the issue of negligence was based upon ordinary negligence or wilful and wanton conduct on the part of defendant.

3. Bill of Discovery § 4—

Where plaintiff examines a person at a time when such person is a party to the action, defendant is entitled to introduce such examination at

the trial, G.S. 1-568.4, notwithstanding that the person examined is not a party at the time of the trial, subject to the limitation that the deposition may not be used in evidence against a party not notified of the taking thereof, and the rules relating to the deposition of a witness are not pertinent.

APPEAL by plaintiff from *Braswell, J.*, November 28, 1966 Regular Civil Session of WAKE.

The first trial of this action was at the December 1965 Regular Civil Session. Involuntary nonsuit was entered at the conclusion of the plaintiff's evidence as to defendant Dolly Barham. Issues of negligence and contributory negligence, arising on the pleadings of plaintiff and of defendant administratrix, were answered, "Yes." On plaintiff's appeal from judgment dismissing the action as to defendant administratrix, this Court awarded a new trial. See *Pearce v. Barham,* 267 N.C. 707, 149 S.E. 2d 22, where the pleadings and evidence before the court at said first trial are summarized.

Thereafter, by leave of court, plaintiff amended paragraph 12 of her (amended) complaint by adding to the specifications of negligence theretofore alleged (subparagraphs (a) through (g)) the following:

"(h) The deceased, Calvin W. Barham, was operating his car with wilful and wanton negligence, purposely and deliberately in violation of the motor vehicle laws of North Carolina, and with the deliberate purpose not to discharge the duty necessary to the safety of his passengers, and with a wicked purpose to endanger his passengers, needlessly and with a reckless indifference to the rights of his passengers.

"(i) The deceased, Calvin W. Barham, was wantonly and wilfully negligent with respect to plaintiff's safety and with a reckless indifference to her rights, by driving his car in the middle of a narrow rural paved road, with one hand on the steering wheel, at a speed in excess of ninety miles an hour, into an intersection."

Defendant administratrix filed no additional pleading.

When the case came on for (second) trial at said November 28, 1966 Regular Civil Session, evidence was offered by both plaintiff and defendant administratrix.

In addition to issues of negligence, contributory negligence, and damages, which were submitted by the court, plaintiff tendered the following issue: "Was the negligence of the deceased wilful or wanton as alleged in the complaint?" Plaintiff's exception No. 14 is to the court's refusal to submit this issue.

The jury answered the negligence and contributory negligence issues, "Yes," and the court entered judgment dismissing the action. Plaintiff excepted and appealed.

Everett & Creech for plaintiff appellant.
Dupree, Weaver, Horton, Cockman & Alvis for defendant appellees.

BOBBITT, J. There was evidence which, when considered in the light most favorable to plaintiff, tends to show: On February 19, 1964, near midnight, Calvin W. Barham (Calvin), was driving his Ford car in a northeasterly direction along Rural Paved Road No. 2224. Plaintiff, seated to Calvin's right, and Dolly Barham (Dolly), seated to plaintiff's right, were passengers. As he approached Fowler's Crossroads, the intersection of No. 2224 with Rural Paved Road No. 2308, Calvin was driving in a drizzling rain, with slick tires, upgrade, at a speed of ninety miles an hour "or better," moving back and forth across the road; and, although confronted by the stop sign at that intersection, failed to stop or slow down, crossed the intersection at such speed and lost control. As a result, his car left the road and overturned in a field some 288 feet from where it left the road, killing the driver and injuring the passengers. There was evidence sufficient to support a finding that Calvin's conduct was both wilful and wanton.

In charging the jury with reference to the first (negligence) issue, the court referred to plaintiff's original specifications of Calvin's negligence and then to her later allegation that she was injured by his wilful and wanton negligence. The court then defined "wilful negligence" and "wanton negligence." (Technically, wilful and wanton "conduct" rather than "negligence" would seem correct.) Thereupon the court charged as follows:

If the plaintiff has satisfied you from the evidence and by its greater weight that Calvin Barham "was negligent *either* in that he failed to use due care by failing to maintain a proper lookout in the operation of the Ford, for the safety of his passenger, the plaintiff, *or* that he failed to keep his Ford under proper control, *or* that he operated the Ford with improper equipment in that his tires were slick and without tread on a rainy, drizzly road at night, *or* that he operated the Ford at a speed in excess of fifty-five miles per hour in a fifty-five mile per hour zone, *or* that he operated the Ford wilfully and wantonly, purposely and deliberately at an excessive rate of speed, to wit, ninety miles per hour in a fifty-five mile per hour zone, and with a deliberate and wicked purpose to endanger the safety of his passenger, the plaintiff; I say if the plaintiff has proven *either or any* of those things, and proven it by the greater weight of the evidence; and has further proven by the greater weight of the evidence the negligence of the defendant in *any one or more* of these regards not only exists, but that such negligence was one of the

proximate causes of the injury complained of, that is that it was one of the causes without which it never would have occurred; then it would be your duty to answer this first issue in the plaintiff's favor, that is, 'Yes.'" (Our italics.)

In view of the wording of the first issue and the court's instruction with reference thereto, the jury's answer, "Yes," provides no answer to the issue as to whether plaintiff was injured by the wilful or wanton conduct of Calvin. Had the additional issue tendered by plaintiff been submitted, the jury's answer thereto would have eliminated the present uncertainty as to the significance of the jury's answer to the first submitted issue. The court erred in refusing to submit this additional issue, and the failure to submit it caused or contributed to the present uncertainty as to the meaning of the jury's answer to the first issue. Under these circumstances, we deem it proper to assume, for present purposes, that the jury did in fact find from the evidence and by its greater weight that plaintiff's injuries were proximately caused by the wilful or wanton conduct of Calvin. We consider portions of the charge relating to the second (contributory negligence) issue in the light of this assumption.

Defendant administratrix, in pleading contributory negligence, alleged the ability of each of the three occupants of the car was appreciably affected on account of drinking some intoxicating beverage; that if Calvin was the driver, which she denied, plaintiff was negligent (1) in that she continued to ride in the car without protest or remonstrance in respect of the manner in which it was being operated and made no request that she be permitted to get out of the car, and (2) in that plaintiff "engaged in a fight with defendant's intestate while he was trying to operate the automobile (if he was driving at the time) by grabbing, jerking and pulling at him and slapping him in the face while in a drunken rage, all of which was done in a manner which was calculated to and which in fact did cause the loss of control of the automobile and its consequent wrecking."

With reference to the second (contributory negligence) issue, the court instructed the jury as follows: "If the plaintiff, as a guest passenger, in the exercise of due and ordinary care, such as would be exercised by a reasonably prudent and cautious person, saw or should have seen that the driver, Calvin Barham, was conducting himself in a negligent manner, that is, that he was driving at an excessive and unlawful rate of speed and in excess of fifty-five miles per hour in a fifty-five mile per hour zone, or that he operated the Ford wilfully and wantonly, in excess of ninety miles per hour, or that he failed to keep his vehicle under proper control, or that he failed to keep a proper lookout for the safety of his passenger, and that she saw and observed these things, and that she then failed under the circum-

stances to do what a reasonably prudent and cautious passenger would have done, and that you find that a reasonably prudent and cautious passenger would have warned or cautioned or protested or attempted to persuade the driver from his negligent conduct and encouraged him to drive the vehicle in a careful and prudent manner, or that she failed to protest and had reasonable grounds and opportunity to protest and ask the driver to stop the vehicle to let her dismount and cease to be a passenger; and if you should find from the evidence and by its greater weight that the plaintiff failed to so warn or caution or persuade the defendant driver, and that such failure caused or contributed to the accident and the upset and collision in the field by the side of Rural Public Road 2224, and that it resulted in injury to the plaintiff, passenger, that then under those circumstances the plaintiff would be guilty of contributory negligence, which would bar her recovery from this defendant." Plaintiff's exception No. 16 is directed to the foregoing instruction.

"Ordinarily, where willful or wanton conduct for which defendant is responsible is a proximate cause of the injuries complained of, contributory negligence does not bar recovery." 65A C.J.S., Negligence § 131(a), p. 110. *Accord,* 38 Am. Jur., Negligence § 178, p. 854; *Blevins v. France,* 244 N.C. 334, 93 S.E. 2d 549; *Fry v. Utilities Co.,* 183 N.C. 281, 111 S.E. 354; *Brendle v. R. R.,* 125 N.C. 474, 34 S.E. 634. In *Brendle,* Douglas, J., for the Court states: "It is well settled that contributory negligence, even if admitted by the plaintiff, is no defense to willful or wanton injury."

"While there is some authority to the contrary, it has been held that no recovery can be had for an injury willfully and wantonly inflicted, where willful or wanton conduct for which plaintiff is responsible contributed as a proximate cause thereof." 65A C.J.S., Negligence § 131(a), p. 113. *Accord,* 38 Am. Jur., Negligence § 178, p. 856; 2 Restatement 2d, Torts § 503; *Gulf Mobile & Ohio R. Co. v. Freund,* 183 F. 2d 1005 (8th Cir., 1950), 21 A.L.R. 2d 729. In this connection, these facts are noted: Defendant administratrix, in pleading the contributory negligence of plaintiff, did not characterize her conduct as willful or wanton. The only alleged conduct of plaintiff that might be so characterized relates to *active* interference by plaintiff with Calvin and with his operation of the car.

The error in the quoted instruction relating to the contributory negligence issue is that the court instructed the jury the mere failure of plaintiff to protest and remonstrate and ask the driver to stop and let her get out of the car would be such contributory negligence as would bar recovery. Such conduct on the part of plaintiff would be no more than ordinary negligence and would not be a bar to recovery if plaintiff were injured as a result of Calvin's wilful or

wanton conduct. For the errors indicated, plaintiff is entitled to a new trial.

It is noted that the court's final instruction on the contributory negligence issue was that the jury should answer the issue, "Yes," if they found from the evidence and by its greater weight that plaintiff was negligent "*either* in that she rode and continued to ride in the Ford automobile while it was being negligently operated without protest or remonstrance, when she had opportunity to make requests to be let out and made no request, *or* that she engaged in a fight with Calvin Barham by slapping at him with her hands, he being the driver," etc. (Our italics.) Again, under this instruction, the jury was told that the first alternative finding, namely, a finding as to ordinary negligence, would be a bar to plaintiff's right to recover notwithstanding she was injured by Calvin's wilful or wanton conduct.

In view of its probable recurrence at the next trial, we deem it appropriate to consider another question presented by plaintiff. Defendants offered and the court admitted, over plaintiff's objection, the transcript of the testimony of Dolly Barham taken at Henderson, North Carolina, before a commissioner, on April 17, 1965. Plaintiff challenges its admissibility on the ground that, since Dolly Barham was not a party to this action when this transcript was offered, its status was that of a deposition of *a witness,* under G.S. Chapter 8, Article 10, and defendant had failed to establish that Dolly Barham could not be located and required to testify at trial.

Plaintiff, as "(e)xamining party," procured the examination of Dolly Barham, then a party defendant herein. G.S. 1-568.1. In applying for such examination, plaintiff invoked specifically the provisions of G.S. Chapter 1, Article 46, to wit, G.S. 1-568.1 through G.S. 1-568.22. G.S. 1-568.4 provides, in part, that "*(a)ny* party to an action may examine before trial *any other party* to the action." (Our italics.) The pleadings having been filed, plaintiff was entitled to and obtained an order for the examination of Dolly Barham as a matter of right. G.S. 1-568.9(c); G.S. 1-568.11; *Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331; Stansbury, N. C. Evidence, Second Edition, § 19.

These facts are noted: (1) Dolly Barham, in his answer to plaintiff's (amended) complaint, denied ownership of and responsibility for the operation of the car and denied Calvin was his agent, but admitted categorically all of plaintiff's allegations as to the negligence of Calvin; and (2) on April 17, 1965, when he was examined, there was pending in Wake Superior Court an action instituted by Dolly Barham against the administratrix of Calvin in which Dolly sought to recover damages for injuries received on account of the

alleged negligence of Calvin with reference to the wreck of his car on February 19, 1964. It is noted further that, shortly after said examination by Dolly, to wit, on April 30, 1965, a consent judgment was entered in Dolly's separate action which, after reciting that all matters had been compromised and settled, dismissed the action.

The record shows all parties had notice of said examination of Dolly on April 17, 1965. Counsel for all parties were present. Dolly was examined *in extenso* by Mr. Everett, of counsel for plaintiff, and also by Mr. Dupree, of counsel for defendant.

We need not consider the evidence and Judge Braswell's findings to the effect Dolly, notwithstanding he had been served with subpœnas, was not present at the trial at November 28, 1966 Regular Civil Session and his "whereabouts" were unknown. In our view, the admissibility of the examination of Dolly, taken pursuant to the provisions of G.S. Chapter 1, Article 46, when he was a party, must be determined by these statutory provisions relating to the examination of parties, and not by the provisions of G.S. Chapter 8, Article 10, relating to depositions of witnesses.

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.)

If and when the examination of a person *then a party* is properly taken in accordance with the provisions of G.S. Chapter 1, Article 46, we are of opinion, and so decide, that the transcript of the evidence so taken may be offered at trial *by any party* to the action, regardless of whether the person whose examination was taken was a party at the time of trial, subject to one limitation, namely, "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."

It is noted that "(a) party by examining a person pursuant to the provisions of this article does not make such person his witness; but the party who introduces the deposition in evidence, or who first introduces any part thereof in evidence, does make such person his witness." G.S. 1-568.25.

While not applicable to the present case, attention is called to Civil Procedure Rule 26 as set forth in Chapter 954, Session Laws of 1967, to become effective July 1, 1969, which, to the extent of conflict, repeals and supersedes G.S. Chapter 1, Article 46, and G.S. Chapter 8, Article 10. Nothing stated herein bears upon the construction or significance of said 1967 Act.

For the reasons stated, the transcript of the testimony of Dolly

was not inadmissible on the grounds asserted by plaintiff. We perceive no error in its admission.

The transcript of Dolly's testimony includes evidence favorable to defendant administratrix, particularly with reference to the contributory negligence issue. After defendant had offered this transcript, plaintiff was recalled and gave testimony as to what occurred in the car during the period preceding the wreck. Defendant administratrix asserts this testimony was incompetent. However, on this appeal, no question is presented as to the competency of any portion of plaintiff's said testimony. It is noted that one feature of this question was considered and decided on former appeal.

Since a new trial is awarded, it is unnecessary and inappropriate to discuss plaintiff's other assignments of error in the context of the evidence in the present record. What the evidence will be at the next trial cannot be foreseen. Indeed, differences between the evidence at the first trial and at the second trial have been detected. One such difference is in the reported testimony of plaintiff's witness Albert Lee Jeans. According to the record on former appeal, Jeans testified at the first trial to an incident where Calvin, shortly before the wreck, remarked to Jeans he was having "female trouble," and, with a pistol in one hand, was trying to force plaintiff into his car. According to the record now before us, Jeans did not give this testimony at the second trial. In view of plaintiff's allegations as to Calvin's wilful and wanton negligence, it seems remarkable that such graphic testimony of an unusual incident should have been overlooked.

On the ground indicated above, plaintiff is entitled to and is awarded a

New trial.

LANDON ROBERTS, EXECUTOR OF THE ESTATE OF EMORIE D. EDWARDS, DECEASED. ELEANOR EDWARDS COLBY AND ROBERT DOUGHTON EDWARDS, v. NORTHWESTERN BANK, TRUSTEE UNDER THE WILL OF ROBERT L. DOUGHTON, DECEASED.

(Filed 25 August, 1967.)

1. Wills § 34—

The law favors the early vesting of estates, and, in the absence of an intent plainly inferable from the terms of the will, courts will construe a devise as vesting upon the death of the testator rather than at the termination of the particular estate.

2. Same—

Testator devised his property in trust for his daughter for life with provision that upon her death the property should go "in equal shares, *per stirpes*," to other children and the stepdaughter of testator, named in the will. *Held:* The term "*per stirpes*" denotes the inheritable quantity of the estate in remainder and does not annex time to the substance of the gift, and therefore the remainder vests as of the time of testator's death.

3. Wills § 27—

Each will must be construed to effectuate the intent of testator as expressed in the particular language used, and since the language of no two wills is identical, each will must be construed as a thing of itself.

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

APPEAL by defendant from *Gambill, J.*, 28 January 1967 Session of WILKES.

Action for declaratory judgment.

Plaintiffs seek a declaration of their rights and status in the trust created by the will of Robert L. Doughton (testator), who died a resident of Alleghany County on 1 October 1954. Plaintiffs are the executor and children of a deceased daughter of testator, Mrs. Emorie Doughton Edwards, who died 3 March 1964; defendant is the trustee under the will. The parties waived a jury trial and, *inter alia,* stipulated the following facts:

Testator, a widower, was survived by two sons, Claude T. Doughton and J. Horton Doughton; by two daughters, Emorie Doughton Edwards and Reba Doughton; and by a stepdaughter, Mabel H. Stevens. Of these five, only Reba Doughton now survives; the other four have died, each leaving descendants surviving. Mrs. Emorie Doughton Edwards was survived by a son and a daughter, plaintiffs Eleanor Edwards Colby and Robert Doughton Edwards, to whom she willed all of her property in equal shares. Both are married, and each has living children.

The trust in suit is a spendthrift trust which testator established for the benefit of his daughter, Reba Doughton. During her lifetime, he directed that the income from the trust be used for her support. At her death, the will provides that "the principal and any accumulated income of this trust shall be paid over, in fee simple absolutely, in equal shares, PER STIRPES, to my other children and my stepdaughter, Mabel Hicks Stevens." Testator also devised his homeplace to defendant trustee to be maintained as a residence for Reba Doughton during her lifetime. "Upon the death" of Reba, he devised the remainder in the property to his children and stepdaughter "in equal shares PER STIRPES as tenants in common in fee simple." In addition to the above provisions, testator made outright gifts of stock to Emorie Doughton Edwards and Mabel Hicks Stevens. He

also devised a farm in fee simple to J. Horton Doughton. To his other son, Claude T. Doughton, he devised a tract of land for life with remainder "unto the children of my son, Claude T. Doughton, in equal shares PER STIRPES as tenants in common." The residuary clause of testator's will is as follows:

> "All the rest, residue, and remainder of my estate, of whatsoever type or property, and wheresoever situate, shall be divided unto four equal shares, and I will, devise, and bequeath one of such equal shares to my son Claude, one such equal share to my son Horton, one such equal share to my daughter, Emorie, and one such equal share to my stepdaughter Mabel Hicks Stevens, all such shares to my said four children (including my stepdaughter Mabel) to pass in fee simple PER STIRPES.
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> "My daughter, Reba, being otherwise provided for, is not given a share of my residuary estate.
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> "The furniture in my residence at Laurel Springs is deemed by me a part of my residual estate."

Plaintiffs allege that, before the administration of the estate of Mrs. Emorie Doughton Edwards can be terminated, they must know whether any part of the trust held by defendant constitutes an asset of said estate.

Upon the foregoing facts, Judge Gambill adjudged:

(1) Emorie Doughton Edwards' interest in the trust held by defendant was contingent and, it having failed to vest during her lifetime, her death extinguished her interest, which was not an asset she could dispose of by will.

(2) At the present time, her children, plaintiffs Eleanor Edwards Colby and Robert Doughton Edwards have no vested interest in the trust; each has a contingent interest therein.

(3) The ultimate takers of the remainder interest in the trust cannot be ascertained until the death of Reba Doughton, when the roll will be called.

From the judgment entered, defendant appeals.

Meekins and Roberts for plaintiff appellees.
Whicker, Whicker & Vannoy for defendant appellant.

SHARP, J. The question presented is whether the remainder which testator gave his daughter, Emorie, in the Reba Doughton trust estate and in his homeplace vested in her absolutely at his death or was contingent upon her surviving her sister, Reba, the life tenant. Decision turns upon the proper construction of the following provisions of Articles III and VI of the will:

> "Upon the death of my daughter, Reba, the principal and any accumulated income of this trust shall be paid over, in fee simple absolutely, in equal shares, PER STIRPES, to my other children and my stepdaughter, Mabel Hicks Stevens * * * and upon the death of my said daughter, Reba, I give and devise the remainder of the trust property (the principal) under this Article VI [testator's homeplace] to my children and my stepdaughter, Mabel Hicks Stevens, in equal shares PER STIRPES as tenants in common in fee simple."

If testator's direction that, at the death of Reba, the principal and accumulated income of the trust estate be paid over to his other children (three in number, who are named elsewhere in his will), and his stepdaughter (whom he obviously regarded as one of his children) "in fee simple absolutely in equal shares, PER STIRPES" referred merely to the time the four might enjoy the estate in possession, the remainder was vested. If, however, the quoted provision means that a child had to survive the life tenant in order to acquire an interest in the property, Emorie's interest was contingent. If her remainder was contingent, since Reba survives and Emorie is dead, no interest ever vested in her.

The trial judge concluded that testator's three children (Emorie, Claude, and Horton) and his stepdaughter (Mabel) were contingent remaindermen and that their children (or other lineal descendants) who could answer the roll call at the death of Reba Doughton would take by purchase from testator and not by inheritance or under the will of the parent. We take a different view.

Except for the indiscriminate use of the term *per stirpes* by the draftsman of testator's will, we apprehend that there would be no question but that the four children took vested remainders. *Mason v. White,* 53 N.C. 421.

> "A remainder is vested when it is limited to an ascertained person or persons with no further condition imposed upon the taking effect in possession than the determination of the precedent estate. * * * A remainder is contingent if the taking in effect in possession is subject to a condition precedent either as to the persons who are to take or as to the event upon which the preceding particular estate is to terminate." 33 Am. Jur., Life Estates, Remainders, etc. §§ 66, 68 (1941).

Accord, Parker v. Parker, 252 N.C. 399, 113 S.E. 2d 899; *Power Co. v. Haywood,* 186 N.C. 313, 119 S.E. 500; 1 Simes and Smith, Future Interests § 138 (2d Ed., 1956). "The uncertainty which distinguishes a contingent remainder is not the uncertainty whether the remainderman will ever enjoy it, but the uncertainty whether there will be

a *right* to such enjoyment." Tiffany, Real Property § 323 (3d Ed., 1939). (Emphasis added); *accord, Power Co. v. Haywood, supra.*

"A gift or grant of a life estate with remainder to a named person (or persons) on the death of the life tenant creates a vested remainder on the death of the testator." 33 Am. Jur., Life Estates, Remainders, etc. § 115 (1941). "A remainder limited without words of condition to a class of persons, one or more of whom is in existence and ascertained, is vested, though subject to be divested in part by the coming into existence or ascertainment of other members of the class." 1 Simes and Smith, Future Interests § 165(2) (2d Ed., 1956). "When a limitation of a remainder is in terms to a class, but really describes the persons who are to take as definitely as though they were named, and there is no indication of an intention that they shall take only in case they survive the termination of the particular estate, the remainder vests in them immediately upon its creation." 33 Am. Jur., Life Estates, Remainders, etc. § 117 (1941). It is immaterial, therefore, whether the devise in question be considered one to testator's children as a class or one to named individuals.

The law favors the early vesting of estates, and, in the absence of an intent plainly inferable from the terms of the will, courts will construe a devise as vested at the death of the testator rather than at the termination of the particular estate. *Little v. Trust Co.,* 252 N.C. 229, 113 S.E. 2d 689; *Elmore v. Austin,* 232 N.C. 13, 59 S.E. 2d 205; *Priddy & Co. v. Sanderford,* 221 N.C. 422, 20 S.E. 2d 341; *Coddington v. Stone,* 217 N.C. 714, 9 S.E. 2d 420; *Yarn v. Dewstoe,* 192 N.C. 121, 133 S.E. 407; *Witty v. Witty,* 184 N.C. 375, 114 S.E. 482. Conditions of survival are not implied unless it is clear that the testator so intended. 2 Simes and Smith, Future Interests § 576 (2d Ed,. 1956).

> "(T)he cases in which the courts imply a condition to the time of distribution actually expressed in the will, if taken literally, cannot be carried out unless the legatee or devisee survived. This is obviously true where the gift is to A 'on his marriage.' Though not so obvious, it is believed to be equally true of a gift 'to A at his age of twenty-one,' if the language is taken literally. Indeed a literal interpretation of a gift 'to A to be paid at the age of twenty-one' would seem to require that A survive to that age, since no payment can be made to A unless he is alive. Thus, a requirement of survival is never implied in the absence of specific language giving rise to the implication; and the presumption in favor of a vested construction will often cause the court to call the condition a condition subsequent rather than a condition precedent. In those cases where a con-

dition precedent of survival is found to exist, there is a literal basis for such implication because the direction in the will cannot be effectively carried out unless the devisee or legatee survives." *Ibid.*

See *Anderson v. Felton,* 36 N.C. 55.

In *Witty v. Witty, supra,* the devise was to the testator's wife for life, and, at her death or remarriage, he directed that the land be sold and divided among his "lawful heirs." At the time of the testator's death, he was survived by his wife and five children. At her death, all five children were dead. None left children. The only one who married was the last to die, and he devised the property to his wife and adopted son. The court held that the original testator's five children took a vested remainder immediately upon his death and that the surviving son inherited the interests of the four who predeceased him. The entire property, therefore, passed by the fifth son's will. Stacy, J., (later C.J.), speaking for the Court said:

> "'As a general rule, the death of the testator is the time at which the members of a class are to be ascertained in case of a gift to the testator's heirs, next of kin, or other relatives, unless the context of the will indicates a clear intention that the property shall go to the heirs, next of kin, or other relatives at a different time, such as at the time of distribution, or at the death of the first taker, or at the date of the execution of the will. . . . Where the gift is to the heirs or next of kin of another than the testator, it ordinarily refers to the death of such other, unless the context of the will manifests that the class shall be determined at a different time, such as at the time of distribution.'
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> * * *
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> "Again, the fact that the direction is to sell the realty at the expiration of the preceding particular estate and to divide the proceeds derived therefrom ordinarily will not affect the general rule as to when the remainder is to vest." *Id.* at 379, 114 S.E. at 484-85.

As pointed out in 2 Simes and Smith, Future Interests § 585 (2d Ed., 1956), where a testator devises property to a life tenant and the remainder over is given with some such language as "after the death of the life tenant," it is sometimes urged that such language requires the remainderman to be living at the end of a particular estate and thus creates a remainder contingent upon survivorship. "The American courts, however tend strongly to disregard

such language as mere surplusage, and hold that the interest of the remainderman is vested and transmissible." See *Trust Co. v. Bass,* 265 N.C. 218, 238-39, 143 S.E. 2d 689, 703-04, and 33 Am. Jur., Life Estates, Remainders, etc. §§ 112-114 (1941).

In *Pridgen v. Tyson,* 234 N.C. 199, 66 S.E. 2d 682, the testator devised land to his grandson for life and after his death to testator's male children and their bodily heirs. In answer to the contention that the roll call of sons should be made at the death of the life tenant, the Court said:

> "It is the general rule that remainders vest at the death of the testator, unless some later time for the vesting is clearly expressed in the will, or is necessarily implied therefrom, *Priddy & Co. v. Sanderford, supra. Weill v. Weill,* 212 N.C. 764, 194 S.E. 462; *Witty v. Witty,* 184 N.C. 375, 114 S.E. 482; *Baugham v. Trust Co.,* 181 N.C. 406, 107 S.E. 431. And it is a prevailing rule of construction with us that adverbs of time and adverbial clauses designating time, do not create a contingency but merely indicate the time when enjoyment of the estate shall begin. *Priddy & Co. v. Sanderford, supra; Carolina Power Co. v. Haywood,* 186 N.C. 313, 119 S.E. 500." *Id.* at 201, 66 S.E. 2d at 684.

The devise in *Priddy & Co. v. Sanderford, supra* at 423, 20 S.E. 2d at 342, was to H for life "and at her death I want this land to go to my children or their representatives." In construing this devise, Barnhill, J. (later C.J.), said:

> "(T)here is no language used which indicates an intention that the devise is to become effective at any time other than the effective date of the will. The only circumstance which prevents the immediate enjoyment of the estate is the existence of the life estate.
>
> "The term 'or their representatives' is a term of inheritance synonymous with 'heirs' which guards against any lapse of legacy, 23 R.C.L., 538-39, and gives assurance that either the children or those who represent them shall have the enjoyment of the estate devised. It creates neither a contingency nor a limitation over, but denotes that inheritable quality of the estate in remainder." *Id.* at 425-26, 20 S.E. 2d at 344.

With what intent did testator devise to his stepdaughter Mabel and his three children "in equal shares *per stirpes?*" Did he think of the gift to his other three children and stepdaughter as being effective at his death with enjoyment postponed until the death of Reba, or did he think of the gift as being made in the future? Did the in-

clusion of the term *per stirpes* in the direction that at the death of the life tenant the trust estate be paid over to them in fee simple absolutely, in equal shares, and the inclusion of a similar provision in the devise of the homeplace, annex time to the substance of their gift and make Emorie's survival of the life tenant a condition precedent to the vesting of any estate in her? The term *per stirpes* denotes the division of an estate by representation, a class taking the share to which the deceased whom they represent would have been entitled had he been living. *Trust Co. v. Bryant,* 258 N.C. 482, 128 S.E. 2d 758.

Johnson v. Washington Loan & T. Co., 224 U.S. 224, 32 Sup. Ct. 421, 56 L. Ed. 741, was an appeal to the Supreme Court of the United States from the Court of Appeals for the District of Columbia in a suit to quiet title. For the stated purpose of providing a home for his daughters as long as they remained unmarried, the testator devised his homeplace to his single daughters "and to the survivor and survivors of them so long as they shall be and remain single and unmarried, and on the death or marriage of the last of them, then I direct that the said estate shall be sold by my executors, and the proceeds thereof be distributed by my said executors among my daughters living at my death, and their children and descendants (*per stirpes*). . . ." With reference to the use of the term *per stirpes,* Mr. Justice Hughes (later Chief Justice), said:

> "The clause is obviously elliptical, and the provision for representation is not fully expressed. Taking the context and the entire plan of the will into consideration, we believe that what the testator had in mind was to establish the right of his daughters, who survived him, as of the time of his death, and to provide for the representation of any of his daughters, who might previously die, by her children and descendants." *Id.* at 240.

The court held that the devise vested a remainder in fee simple in all the daughters who were living at the time of the testator's death, and the fact that the property was directed to be sold and the proceeds to be divided at a later time did not postpone the vesting of the interest.

We think the reasoning of Mr. Justice Hughes is equally applicable to the use of the term *per stirpes* in the will of R. L. Doughton and also that the term was used with the same purpose as was "or their representatives" in *Priddy & Co. v. Sanderford, supra, i. e.,* "to denote the inheritable quality of the estate in remainder." We hold, therefore, that the inclusion of the words *per stirpes* did not annex time to the substance of the gift to Emorie D. Edwards and that it

created neither a contingent remainder nor a vested remainder defeasible on condition subsequent. Emorie D. Edwards took a vested remainder in the property in question at the time of the death of testator.

Plaintiffs relied upon the case of *Bowen v. Hackney*, 136 N.C. 187, 48 S.E. 633, in which the devise was, "(A)t the expiration of the life estate of my wife, that which is given to her for life shall be equally divided between all my children, share and share alike, the representatives of such as may have died to stand in the place of their ancestors." *Id.* at 188, 48 S.E. at 633. Looking at the will as a whole, the Court was of the opinion that a condition precedent had been annexed to the gift which would prevent any child from taking unless he should survive the life tenant. It said that the devise should be construed as if it read: "So that at the expiration of the life estate of my wife, that which is given to her for life shall be equally divided between all my children, then living, and the representatives of such as may have died, the latter to stand in the place of their ancestors." *Id.* at 191, 48 S.E. at 634. As Parker, J. (now C.J.), said in *Gatling v. Gatling,* 239 N.C. 215, 221, 79 S.E. 2d 466, 471:

> "The epigram of Sir William Jones over 250 years ago 'no will has a brother' has been often quoted by the courts. . . . Two wills rarely use exactly the same language. Every will is so much a thing of itself, and generally so unlike other wills, that it must be construed by itself as containing its own law, and upon considerations pertaining to its own peculiar terms."

Our efforts to divine the intent of the testator in this case — the goal of all testamentary construction — have led us to conclude that he intended his devise to Emorie to vest in her absolutely at the time of his death.

The judgment of the court below is reversed and the cause remanded to the Superior Court for entry of judgment in accordance with this opinion.

Reversed.

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

JAMES R. BRINKLEY v. NATIONWIDE MUTUAL INSURANCE COMPANY
AND
WILSON TRANSPORT LEASE, INC., v. NATIONWIDE MUTUAL INSURANCE COMPANY.

(Filed 25 August, 1967.)

1. **Trial § 21—**

On motion to nonsuit, plaintiff's evidence is to be taken as true, and all the evidence considered in the light most favorable to plaintiff, and defendant's evidence which tends to impeach or contradict plaintiff's evidence must be disregarded.

2. **Trial § 18—**

The functions of the judge and the jury are separate and distinct; the weight and credibility of the evidence is within the sole province of the jury and they may believe any part or none of it.

3. **Trial § 22—**

In order to overrule a motion to nonsuit there must be legal evidence of every material fact necessary to support a verdict, and if the material facts are in dispute and the evidence in regard thereto is such that conflicting conclusions may reasonably be reached, nonsuit is not proper.

4. **Insurance § 48c—**

In this action upon a policy of garage liability insurance, plaintiff's evidence disclosed that the insured, a used-car dealer, gave a named person a written 96-hour permit for the use of a car, as provided by G.S. 20-79(b), and that the accident in question occurred within the 96-hour period. The defendant insurer offered evidence that the driver had permission to use the car only until a Monday morning and that the accident occurred on a Tuesday afternoon. *Held:* The conflicting evidence as to whether the driver was operating the automobile with the permission of the owner-insured at the time of the accident was properly submitted to the jury.

5. **Trial § 31—**

A request by defendant for a directed verdict or for a peremptory instruction is properly denied when the evidence of plaintiff is sufficient to carry the case to the jury.

APPEAL by defendant from *Cohoon, J.*, September-October 1966 Civil Session of WILSON.

Plaintiffs, in separate actions, seek to fix liability upon defendant insurance company under a garage liability insurance policy issued by it to James E. Allen, hereinafter called J. E. Allen, the operator of a used-car business in Smithfield, North Carolina. The actions were consolidated for trial. Plaintiff, J. R. Brinkley, instituted a civil action to recover the sum of $4,000, the amount fixed by judgment due for bodily injuries he sustained in an accident as the result of the negligent operation of a 1954 Cadillac automobile owned by J. E. Allen, and operated by Hayman Casper Allen, here-

inafter called H. C. Allen. Plaintiff Wilson Transport Lease, Inc., instituted a civil action to recover the sum of $1,078, the amount fixed by judgment due for damage to its truck sustained while being driven by James R. Brinkley, its co-plaintiff, in an accident as the result of the negligent operation of the 1954 Cadillac automobile owned by J. E. Allen and operated by H. C. Allen. The accident occurred on 3 November 1964.

At the time of the accident J. E. Allen, a dealer in second-hand automobiles in Smithfield, held a policy of garage automobile liability insurance issued to it by the defendant, which was in full force and effect at the time of the accident. A clause of the policy provided coverage for the 1954 Cadillac automobile owned by J. E. Allen when operated by J. E. Allen or with his permission. Plaintiffs' evidence tended to show these facts: They introduced into evidence the following document:

"Plaintiffs' Exhibit #1

"96-HOUR PERMIT FOR USE OF DEALER PLATE

"SECTION 1. TO BE COMPLETED BY SELLING DEALER WITH PEN AND INK. VOID IF ALTERED.

"I/we the undersigned, a licensed dealer in the State of North Carolina, do hereby state that the vehicle described is the property of the undersigned and that it and the dealer plate designated are loaned to the person indicated below for a period of 96 hours from the time indicated. It is further stated that no compensation has or will be received for the use of this vehicle.

"Vehicle and plate loaned to Hayman Allen

"Address P. O. Box 52, Smithfield, N. C.

"Make of Vehicle 1954 Cat Motor No.

"Serial No. 546250297 Dealer Plate No. 70250

"Date of issuance of this permit 10-31 Hour A.M. 9:30 P.M.

" Smithfield Used Cars Smithfield, N. C.

(Dealer) (Address)

"By James E. Allen

(Authorized Representative)

"SECTION 2. TO BE COMPLETED BY PERSON RECEIVING VEHICLE WITH PEN AND INK. VOID IF ALTERED.

" Hayman Allen

Signature of Person Receiving Vehicle

"

"Notice to Dealer and Operator: Vehicles owned by dealers and displaying dealer demonstration plates may be loaned for personal use of persons other than those employed in the dealer's business for a period of not more than 96 hours. The 96-Hour Permit must be in possession of operator at time of operation. THIS PERMIT CANNOT BE RENEWED. ONE PERMIT ONLY PERMISSIBLE.

North Carolina Department of Motor Vehicles"

"Form 37
(Rev. 9/59)

Plaintiff James R. Brinkley testified in substance: He secured a judgment at the November Session against H. C. Allen. He is the same person that was involved in the collision that gave rise to the judgment referred to in the complaint. H. C. Allen has died since he obtained the judgment. Whereupon, plaintiffs rested. Defendant moved for a judgment of compulsory nonsuit, which the court denied, and defendant excepted.

Defendant's evidence tends to show these facts: J. E. Allen is in the used-car business under the name of Smithfield Used Cars, in Smithfield, North Carolina. He is a licensed dealer. On Saturday, 31 October 1964, he saw H. C. Allen, who is not related to him, at his place of business. He had a conversation with him relative to a 1954 Cadillac automobile which belonged to J. E. Allen. About 9:30 p.m. on that day he gave H. C. Allen permission to use the 1954 Cadillac automobile. H. C. Allen said he was going down to Benson to spend the night with one of his sisters. He had a sister also at Four Oaks. His sisters were going to help him a little in buying the automobile. He said he would like to drive it down, spend the night with them and have dinner with them in Benson on Sunday, and he would like for them to see the car. He told him he would let him have the car provided that he would meet him at his place of business at 8 o'clock on Monday morning. He gave him a 96-hour permit to drive the car. As an automobile dealer he is required to give such permits to people that he lends an automobile to. He has never seen any other form issued by the Department of Motor Vehicles except the form that he gave to H. C. Allen. The car was not returned Monday morning, and J. E. Allen began a search for it and for H. C. Allen. He did not give H. C. Allen permission to keep the car after Monday morning. When he was talking to H. C. Allen, there was nothing said about his having the car for 96 hours. He discovered that the Cadillac automobile had been involved in a wreck during the afternoon of Tuesday, 3 November 1964.

Leroy Allen, a son of H. C. Allen, testified that his father told him he had promised to return the car on Monday morning. Thomas S. Faison, a casualty claims adjuster for defendant, testified that H. C. Allen told him he had agreed to bring the car back Monday morning.

At the close of all the evidence, defendant moved for a judgment of compulsory nonsuit, which the court denied, and the defendant excepted. Defendant also moved the court for a directed verdict in its favor which the court denied, and the defendant excepted. Defendant further moved the court that the jury be given a peremptory instruction to answer the only issue, No, which the court denied and defendant excepted.

The court submitted to the jury one issue: "Was Haymon Casper Allen, at the time of the collision, driving the Cadillac automobile with the express permission of the owner, James E. Allen, as alleged in the Complaint?" The jury answered the issue, Yes.

From a judgment that the individual plaintiff should recover from the defendant $4,000 with legal interest from 23 November 1965 until paid, and that the defendant pay the costs as taxed by the clerk as provided by the judgment in the action entitled *"James R. Brinkley v. Hayman Casper Allen,"* dated 23 November 1965, as duly recorded, and from a judgment that the corporate plaintiff should recover from the defendant the sum of $1,078 with legal interest thereon from 23 November 1965, and that the defendant pay the costs as taxed by the clerk as provided by the judgment in the action entitled *"Wilson Transport Lease, Inc., v. Hayman Casper Allen,"* dated 23 November 1965, as duly recorded, defendant appeals.

Lucas, Rand, Rose, Morris & Meyer for defendant appellant.
Gardner, Connor & Lee by J. M. Reece for plaintiff appellees.

PARKER, C.J. It is hornbook law that on a motion to nonsuit plaintiff's evidence is to be taken as true, and all the evidence must be considered in the light most favorable to plaintiff, giving him the benefit of every fact and inference of fact pertaining to the issues which may be reasonably deduced from the evidence. Defendant's evidence which tends to impeach or contradict plaintiff's evidence is not to be considered, but defendant's evidence may be considered to the extent that it is not in conflict with plaintiff's evidence and tends to make clear or explain plaintiff's evidence. 4 Strong's N. C. Index, Trial, § 21. "Discrepancies and contradictions, even in plaintiff's evidence, are for the twelve and not for the court," *Brafford v. Cook,* 232 N.C. 699, 62 S.E. 2d 327, and do not justify a nonsuit.

Keaton v. Taxi Co., 241 N.C. 589, 86 S.E. 2d 93. Plaintiffs' evidence discloses that J. E. Allen gave H. C. Allen a written 96-hour permit for the use of his 1954 Cadillac. In the body of this instrument this language is used: "I/we the undersigned, a licensed dealer in the State of North Carolina, do hereby state that the vehicle described is the property of the undersigned and that it and the dealer plate designated are loaned to the person indicated below for a period of 96 hours from the time indicated." The body of this instrument shows that the date of the permit was October 31, and the time was 9:30 p.m. The accident, which is the basis of this action, occurred within the 96-hour period after his receipt of the possession of the 1954 Cadillac automobile. It is true that the defendant offered evidence that he gave him permisson to use the automobile only until Monday morning, and that the accident occurred after then. It is also true that H. C. Allen's son and defendant's claims adjuster testified that H. C. Allen promised to return the automobile on Monday morning.

G.S. 20-79(b) is concerned in part with a dealer in motor vehicles in respect to a person operating a car belonging to a dealer in automobiles, and provides in relevant part: "Provided further, that said persons shall, at all times while operating a motor vehicle under the provisions of this section, have in their possession a certificate on such form as approved by the Commissioner from the dealer, which shall be valid for not more than ninety-six hours."

The functions of the jury and the judge are separate and distinct, and neither may invade the province of the other. It is also hornbook law that the weight and credibility of the evidence remains in the province of the jury. *Campbell v. Trust Co.,* 214 N.C. 680, 200 S.E. 392; *Bank v. Stone,* 213 N.C. 598, 197 S.E. 132. In weighing the credibility of the testimony, the jury has the right to believe any part or none of it. *Brown v. Brown,* 264 N.C. 485, 141 S.E. 2d 875. For us to say as a matter of law that H. C. Allen was not given express written permission by J. E. Allen to drive this car for 96 hours is for us to consider the evidence not in the light most favorable to plaintiffs. It is manifest from the evidence in this case the jury chose, as it had an inherent right to do, to believe that J. E. Allen gave H. C. Allen permission to drive this automobile for 96 hours as appears in the written document signed by J. E. Allen, and introduced in evidence by the plaintiffs, and did not choose to believe the oral part of J. E. Allen's testimony that permission was granted merely until Monday morning. There is legal evidence of every material fact necessary to support the verdict. This is said in 4 Strong's N. C. Index, Trial, § 22, p. 321: "Nonsuit may not be properly entered if the material facts are in dispute and the evidence in regard to the

facts is such that conflicting conclusions may reasonably be reached thereon. If upon the whole evidence there are inferences tending to support plaintiff's case, or if there is more than a scintilla of evidence in support of plaintiff's claim, or there is any substantial evidence supporting the essential elements of the cause of action, nonsuit is properly denied."

This is stated in *Gales v. Smith,* 249 N.C. 263, 106 S.E. 2d 164: "It is noted that discrepancies and contradictions in the evidence, even though such occur in the evidence offered in behalf of plaintiff, are to be resolved by the jury, not by the court."

This is said in Supplement to 4 Strong's N. C. Index, Trial, § 18:

> "Upon motion to nonsuit, the function of the court is to determine only whether the facts and circumstances in evidence, considered in the light most favorable to the plaintiff, tend to make out and sustain the cause of action alleged in the complaint. And it is the function of the jury alone to weigh the evidence, determine the credibility of the witnesses and the probative force to be given their testimony, and determine what the evidence proves or fails to prove. In weighing the credibility of the testimony, the jury has the right to believe any part or none of it."

In *Keith v. Gas Co.,* 266 N.C. 119, 146 S.E. 2d 7, it is said:

> "Upon the defendants' motions for judgment of nonsuit, the plaintiff's evidence is to be interpreted in the light most favorable to her, all reasonable inferences favorable to her must be drawn therefrom, conflicts therein are to be resolved in her favor and evidence of the defendant establishing a different factual situation must be disregarded."

The court properly denied the defendant's motion for judgment of compulsory nonsuit. The court correctly denied the motion for a directed verdict for the simple reason that plaintiffs' evidence is sufficient to carry the case to the jury, and "an instruction to answer an issue in a specified way is a directed verdict and is never proper when the question is for the determination of a jury." 4 Strong's N. C. Index, Trial, § 31. The court correctly denied defendant's motion for a peremptory instruction for the evidence is conflicting upon the issues submitted to the jury. 4 Strong's N. C. Index, Trial, § 31.

Defendant in its brief makes no reference to the form of the judgments entered in this consolidated case.

In the trial below we find

No error.

IN THE MATTER OF THE WILL OF BRUCE COBB, DECEASED.

(Filed 25 August, 1967.)

1. Wills § 45—

Unless the will or deed expresses a contrary intent, the words "next of kin" will be construed to mean "nearest of kin," and nothing else appearing, the words do not permit a distribution under the principle of representation.

2. Wills § 18—

Deeds executed after the testator's death whereby the propounders and the caveators had conveyed two tracts of the testator's lands are incompetent in evidence on the question of testator's intent in using words having a well defined meaning, since in such instance testator's intent must be gathered from the language of the will itself.

3. Same—

Testator bequeathed property "to my next of kin as provided by the General Statutes of North Carolina." The draftsman of the will, an attorney, sought to testify that he erroneously omitted the words "as if I had died intestate" from the language of the bequest, but that the testator had intended and had understood that his property would devolve under the intestacy laws. *Held:* The testimony was properly excluded, since, in the absence of evidence of fraud, duress, or mistake as to the identity of the instrument executed, the mistake of the draftsman in expressing the intent will be regarded as the mistake of the testator and binding upon him.

APPEAL by caveators from *Cowper, J.*, 19 September 1966 Session of BERTIE.

Caveat to Item 3 of the Will of Bruce Cobb, who died 29 June 1965, a resident of Bertie County. On 1 July 1965, the following paper writing was probated in common form as his will (attestation clause omitted):

"I, Bruce Cobb, of Bertie County, North Carolina, being of sound mind and memory, but considering the uncertainty of my earthly existence do hereby make, publish and declare this to be my last Will and Testament as follows:

"1. I direct my Executor hereinafter named to see that my body is given a suitable burial and my debts and funeral expenses paid from my estate.

"2. I give and bequeath to Joel Asher the sum of $500.00.

"3. All other property of every kind and description and wheresoever situate I give, devise and bequeath to my next of kin as provided by the General Statutes of North Carolina.

"4. I hereby appoint J. A. Pritchett as my Executor to this my last Will and Testament and do revoke all other wills by me heretofore made.

"In witness whereof, I, Bruce Cobb, have hereunto set my hand and seal to this my last will and testament, this the 28 day of May, 1965.

BRUCE COBB (SEAL)"

Deceased was survived by a brother, A. J. Cobb, a niece, and three nephews. On 6 June 1966, the niece and nephews filed a caveat seeking to have the probate of the third item set aside upon the ground that, by reason of the mistake of the draftsman, this item did not express the true intent of the testator.

Answering, the propounders, the brother and the executor named in the instrument, admitted all the allegations of the caveat except the averment that Item 3 was not the will of testator. They alleged that Item 3 "and every part thereof are in truth and in fact the last will and testament of Bruce Cobb."

Upon the trial, after establishing the due execution of the instrument in accordance with the requirements of G.S. 31-3.3, propounders rested. As a witness for caveators, W. L. Cooke, attorney-at-law, testified that he had prepared the instrument in question. In the absence of the jury, he gave the following testimony: Bruce Cobb came to his office and instructed him to prepare a will for him which would give Joel Asher $500.00 and dispose of the rest of his property "as the statute provided." He also said that he wanted J. A. Pritchett and W. L. Cooke to "look after his estate." In drafting the will, Cooke erroneously gave the residuary estate to testator's next of kin instead of disposing of the property "as if he had died intestate." Mr. Cooke said:

"I advised him he was writing a will that would leave his property as if he had died intestate, except for the $500.00 to Mr. Asher, and appointing his Executors. . . . It was my error that the words were left off after 'next of kin as provided by General Statutes of North Carolina' the words 'as if he had died intestate.' "

Upon objection by propounders, the evidence of Mr. Cooke was excluded.

Caveators also offered in evidence two deeds, each dated 11 August 1965, in which propounders and caveators, purportedly as tenants in common, had conveyed two tracts of the Bruce Cobb lands. Upon propounders' objections, these deeds were likewise excluded from the evidence.

Obeying the court's peremptory instruction, the jury returned a verdict which established the paper writing propounded as the last will and testament of Bruce Cobb. From the judgment entered, caveators appealed. They assign as error the exclusion of their proffered evidence and the peremptory instruction.

R. L. Coburn for caveator appellants.
Gillam & Gillam for propounder appellees.

SHARP, J. The words *next of kin* have a well defined legal significance. Unless the terms of the instrument show a contrary intent, in the construction of deeds and wills *next of kin* means *nearest of kin* — the nearest blood relations of the person designated. Without more, the term does not permit a representation. *McCain v. Womble,* 265 N.C. 640, 144 S.E. 2d 857; *Trust Co. v. Bass,* 265 N.C. 218, 231, 143 S.E. 2d 689, 698. Testator's brother, propounder A. J. Cobb, was his nearest blood kin at the time of his death. G.S. 29-5; G.S. 104 A-1. Therefore, if Item 3 of the will stands, he takes to the exclusion of the niece and nephews, since the instrument itself contains no suggestion that the words were used in other than the technical sense.

This case challenges the probate of Item 3 as a part of the will of Bruce Cobb; it involves no question of construction. The proffered deeds, however, are irrelevant to either inquiry. A will "must be interpreted from the language used by (testator) and not according to what others might think he meant or what he might have thought the words 'next of kin' meant. . . ." *McCain v. Womble, supra* at 644, 144 S.E. 2d at 859-60. By the same token, the joint execution of the deeds by caveators and propounders after the death of Bruce Cobb sheds no light on whether Item 3 was the will of testator. The excluded testimony of W.L. Cooke, however, does cast light on that question. If accepted by a jury, it would establish that Item 3 was not written in conformity with the instructions which testator gave his draftsman. The question presented, therefore, is this: Where a will has been read and duly executed by a mentally competent testator who has been subjected to no fraud or undue influence, can probate be revoked because the attorney who drafted it erroneously used language which produced a disposition of his property different from that intended by the testator and different from the one which the draftsman advised him would result? The answer to this question is No, and the reasons for it have been well stated in *In re Gluckman's Will,* 87 N.J. Eq. 638, 101 Atl. 295, L.R.A. 1918 D 742:

"Where a testator, in addition to complete testamentary mental capacity, is in full enjoyment of average physical and educational faculties, it would seem that, in the absence of fraud or of undue influence, a mistake, in order to defeat probate of his entire will, must in substance or effect really amount to one of identity of the instrument executed; as, for instance, where two sisters in one case, or a husband and wife in another, prepared their respective wills for simultaneous execution and through pure error one executed the other's and *vice versa.* (Citations omitted.)

"Short of this, however, or of something amounting in effect to the same thing, it is against sound public policy to permit a pure mistake to defeat the duly solemnized and completely competent testamentary act. It is more important that the probate of the wills of dead people be effectively shielded from the attacks of a multitude of fictitious mistakes than that it be purged of wills containing a few real ones. The latter a testator may, by due care, avoid in his lifetime. Against the former he would be helpless.

* * *

". . . It is no new thing for provisions in wills to turn out, under the established rulings of the courts, to have a very different meaning from that which the testators themselves, under the honest but mistaken advice of counsel, thought they had when the wills were executed, but this has never been a ground for refusing probate." *Id.* at 641, 643-44, 101 Atl. at 296, 297, L.R.A. 1918 D at 745, 746.

In a case involving facts substantially identical to those with which we deal here, the Supreme Judicial Court of Massachusetts reached the same conclusion as did the New Jersey court. In *Mahoney v. Grainger,* 283 Mass. 189, 186 N.E. 86, the will had been read to the testatrix before she executed it by the attorney who drafted it. Its residuary clause directed that the balance of her estate be equally divided among her "heirs at law" living at the time of her death. Testatrix' instructions to her attorney had been to let her 25 first cousins "share it equally." At the time of her death, testatrix' closest relative was a maternal aunt, who — under Massachusetts law — was her heir at law. In holding that testimony as to the instructions which testator gave the draftsman was incompetent to prove her testamentary intention, Rugg, C.J., said:

"The fact that it was not in conformity to the instructions given to the draftsman who prepared it or that he made a mis-

take does not authorize a court to reform or alter it or remould it by amendments. The will must be construed as it came from the hands of the testatrix. * * * When the instrument has been proved and allowed as a will oral testimony as to the meaning and purpose of a testator in using language must be rigidly excluded. (Citations omitted.) It is only where testamentary language is not clear in its application to facts that evidence may be introduced as to the circumstances under which the testator used that language in order to throw light upon its meaning. Where no doubt exists as to the property bequeathed or the identity of the beneficiary there is no room for extrinsic evidence; the will must stand as written." *Id.* at 191-92, 186 N.E. at 87.

In *Harrison et als. vs. Morton & Brown, ex'rs., &c.*, 32 Tenn. (2 Swan) 461, caveators offered evidence that testator had instructed the draftsman of his will to provide for his grandchildren, who were the children of his two deceased daughters, equally with his own children. In holding that this evidence was properly excluded, the court said:

"If such proof were allowed, it is easy to see that any will might be altered, revoked or annulled by verbal evidence, which would be in conflict with our statutes of wills, and of frauds, and the rules of evidence founded in the experience and wisdom of ages, for the preservation of writings from alteration or change, by the proof of facts, resting in the frail memory of man. Such a rule would open a door for frauds and perjuries of the most alarming character, and render insecure all the rights of man." *Id.* at 469.

In *In Re Estate of Burt*, 122 Vt. 260, 169 A. 2d 32, 90 A.L.R. 2d 916, testator instructed his attorney to prepare a will which would disinherit his brother *W* and give his entire estate to *B*. In writing the will, the attorney — after devising the estate to *B* — provided that if *B* should predecease the testator, his estate should be divided according to the Vermont laws of descent. *B* survived testator and *W* contested the will upon several grounds, one being that it was not drawn in accordance with the instructions of the testator. The court, conceding that there was a variance between the legal effect and the *possible* results of the language used by the draftsman, and pointing out that the mistaken provisions never went into effect nor controlled the provisions of the will, said:

"Misunderstanding of the legal effect of the provisions of a will, whether resulting from erroneous legal advice or otherwise, will

not in the absence of fraud or of undue influence defeat probate. *In re Gluckman's Will,* 87 N.J. Eq. 638, 101 Atl. 295, L.R.A. 1918D, 742. As stated in *Leonard v. Stanton,* 93 N.H. 113, 36 A. 2d 271, 272, '. . . according to the prevailing view, if the testator knew and approved the contents of his will, it is immaterial that he mistook the legal effect of the language used or that he acted upon the mistaken advice of counsel; provided that advice was given in an honest belief that it was sound.' (Citations omitted.) What the testator has done, not what he meant but failed to do, is to be given effect." *Id.* at 267-68, 169 A. 2d at 37, 90 A.L.R. 2d at 923.

Mistakes of draftsmen have caused much litigation and varied attempts to correct them by deletion, reformation, and construction. See *Yates v. Cole,* 54 N.C. 110; *Hoover v. Roberts,* 144 Kan. 58, 58 P. 2d 83; *In re Mullin's Estate,* 128 So. 2d 617 (2d Dist. Ct. App. Fla., 1961). Different factual situations have produced varying, and sometimes conflicting, results. In consequence, annotators have preferred to discuss the results reached in cases involving different types of mistakes rather than to attempt the formulation of general rules. See Annotations, Effect of mistake of draftsman (other than testator) in drawing will, 90 A.L.R. 2d 924 (1963) and 16 B.R.C. 1006 (1931), where a variety of cases are collected. In 90 A.L.R. 2d at p. 939, however, this statement appears with reference to the factual situation here presented:

> "It has generally been held or recognized that where the terms used in a will have well-defined and clearly understood legal meanings the draftsman's mistake as to the legal effect of the language used is to be regarded as a mistake of the testator and binding upon him. In other words, the will as written is regarded as expressing the testator's intention."

Accord, Annot., 16 B.R.C. 1006, 1011 (1931); 57 Am. Jur., Wills §§ 16, 375, 376, 875 (1948); Thompson on Wills § 136 (3d Ed., 1947); I Jarman on Wills 484-490 (1910). The above rule is also recognized in 1 Page, Wills § 13.6 (Bowe-Parker Rev., 1960):

> "If the testator knows the contents of his will, the fact that he may not understand the technical meaning of the language which is employed, does not amount to mistake which the law will recognize.
>
> * * *
>
> "If a will could be contested upon the ground that the testator did not have a perfect knowledge of the legal consequences

of all the provisions of his will, and a jury could concern itself with all of the subjective subtleties involved in determining just what the testator thought the law was, 'half the wills in the country' might be upset. * * *

"Cases opposed to the majority view stated above are very rare, but there are a few cases holding that a mistake as to the legal effect of a will may render it invalid. * * * *Id.* at 670, 671.

We deem the majority rule to be the only safe rule. In this case, we suggest no doubt whatever as to the truth of the proffered testimony of the draftsman, who has confessed error. More is at stake, however, than caveators' loss of the share which they have good reason to believe testator intended them to have in his estate. In the absence of fraud, duress, mistake in the identity of the instrument executed, or lack of mental capacity, public policy requires that a testator's will remain inviolate. It follows, therefore, that the evidence in question was properly excluded and the peremptory instruction correct.

The judgment of the court below is

Affirmed.

MAJOR S. HIGH, ADMINISTRATOR OF THE ESTATE OF PHILLIP D. WATKINS, DECEASED, v. LOUIS ANDERSON BROADNAX AND JOE WILLIE WILLIAMS.

(Filed 25 August, 1967.)

1. **Limitation of Actions § 12; Trial § 30—**

Our statute permitting a suit to be reinstituted within a specified time after dismissal of the original action by nonsuit does not apply when the original suit is brought in another jurisdiction. G.S. 1-25.

2. **Limitation of Actions §§ 12, 18; Death § 4—**

In this action for wrongful death, plaintiff instituted action in a Federal District Court of another state within a year, which action was dismissed "without prejudice." Plaintiff instituted the present action in this State within a year of the dismissal. *Held:* The action was barred by the statute of limitations, G.S. 1-53(4), since G.S. 1-25 has no application.

3. **Limitation of Actions § 16—**

Where the allegations of the complaint disclose that, *prima facie*, the action is barred by the statute of limitations, defendant's plea in bar is properly allowed in the absence of a reply by plaintiff alleging facts which would avoid the plea.

4. Appeal and Error § 10—

A motion in the Supreme Court to be allowed to amend will not be allowed when, under the law of the case, the requested amendment would avail appellant nothing.

APPEAL by plaintiff from *Martin, S.J.*, 25 July 1966 Civil Session of ROCKINGHAM.

Action for wrongful death.

Plaintiff's intestate, Phillip D. Watkins, a resident of Virginia, was killed in Rockingham County, North Carolina, on 21 April 1963, when he was struck by a car driven by defendant Broadnax and owned by defendant Williams. In a complaint filed 13 July 1965, plaintiff alleged that his intestate's death was caused by the actionable negligence of defendant Broadnax, who was the agent of defendant Williams acting within the scope of his employment at the time in question. Answering, defendants denied the allegations with reference to Broadnax' negligence, pled intestate's contributory negligence, and, as a further defense, alleged that this action was instituted more than two years after the death of plaintiff's intestate. They pled the provisions of G.S. 1-53(4) in bar of plaintiff's right to recover.

Upon the trial, after offering evidence bearing upon the allegations in the complaint, for the purpose of repelling the bar of the statute of limitations, plaintiff introduced duly authenticated records of the United States District Court for the Western District of Virginia, Danville Division, which revealed:

On 13 April 1964, William O. Watkins, who had qualified as administrator of Phillip Douglas Watkins in the Circuit Court of Pittsylvania County, Virginia, instituted an action against defendants in the United States District Court for the Western District of Virginia for the wrongful death of his intestate. In the District Court action, plaintiff's counsel of record was J. L. Williams, one of his present attorneys. Thereafter, on 2 July 1965, upon the plaintiff's motion, Honorable Ted Dalton, United States District Court judge, entered an order dismissing the action "without prejudice." At the same time, plaintiff paid all court costs.

At the conclusion of the evidence in the trial below, defendants moved for judgment of nonsuit. Judge Martin allowed the motion upon the ground that the action was barred by the statute of limitations, G.S. 1-53(4), and plaintiff appealed.

Lee, High, Taylor & Dansby; J. L. Williams for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter by Richmond G. Bernhardt, Jr., for defendant appellees.

SHARP, J. The period prescribed for the commencement of an action for wrongful death under G.S. 28-173 is two years. G.S. 1-53(4). Intestate was killed in North Carolina on 21 April 1963. The first action to recover damages for his death was instituted against defendants by his Virginia administrator in the United States District Court of the Western District of Virginia on 13 April 1964 — less than one year after his death. That case was nonsuited on 2 July 1965, and this action was brought on 13 July 1965 — more than two years after intestate's death, but less than one year after the judgment of nonsuit in the Federal Court in Virginia. In pertinent part, G.S. 1-25 provides that if an action is commenced within the time prescribed therefor, and plaintiff is nonsuited, he or his representative may begin a new action within one year after such nonsuit if he has paid costs of the original action before the commencement of the new suit.

Plaintiff contends that, since he instituted this action within one year after the nonsuit in the U. S. District Court in Virginia, G.S. 1-25 repels defendants' plea of the statute of limitations. This appeal, therefore, presents the question whether G.S. 1-25 prevents the bar of the statute of limitations where an action is brought in this State within one year after a judgment of nonsuit has been entered in the original action which was instituted in another jurisdiction.

Since this cause of action arose in North Carolina, we are concerned only with the statutes of this State. "Where the action is regarded as controlled by the statute of limitations of the forum, it has usually been held that a plaintiff invoking the saving statute of the forum may not rely upon a nonsuit in an earlier action brought in another state." Annot., Statute permitting new action, after failure of original action timely commenced, as applicable where original action was filed in another state, 55 A.L.R. 2d 1038, 1039 (1957); *accord, C & L Rural Electric Cooperative Corp. v. Kincade,* 175 F. Supp. 223 (N. D. Miss., 1959); *Sorensen v. The Overland Corporation,* 142 F. Supp. 354 (D. C. Del., 1956); *Scurlock Oil Co. v. Three States Contracting Co.,* 272 F. 2d 169 (5th Cir., 1959); 54 C.J.S., Limitation of Actions §§ 288(c), 299 (1948). See *Milliken v. O'Meara,* 74 Colo. 475, 222 Pac. 1116.

In *Riley v. Union Pac. R. Co.,* 182 F. 2d 765 (10th Cir., 1950), it was held that a Wyoming statute permitting a new action to be commenced within one year after the original action (which had been commenced in due time) had failed otherwise than upon the merits, did not apply to a prior action brought in another state. In construing the Tennessee nonsuit, or saving, statute, which is substantially the same as Wyoming's, in *Sigler v. Youngblood Truck*

Lines, 149 F. Supp. 61 (E. D. Tenn., 1957), the court held that the statute did not apply to suits instituted in North Carolina and that our G.S. 1-25 had no extraterritorial effect.

In *Morris v. Wise,* 293 P. 2d 547 (Okla., 1956), the Supreme Court of Oklahoma held that its nonsuit statute did not permit the renewal of a case in the State court after a dismissal in the United States District Court (Houston, Texas). In *Anderson v. Southern Bell Telephone & Telegraph Company,* 108 Ga. App. 314, 132 S.E. 2d 820, the same result was reached with reference to the Georgia nonsuit statute.

We adhere to the general rule that a statute of the forum which permits a suit to be reinstituted within a specified time after dismissal of the original action otherwise than upon its merits has no application *when the original suit was brought in another jurisdiction.* This rule, however, has no application to an action which was originally instituted in the Superior Court of this State and was thereafter transferred to a United States District Court, where it was later terminated by a nonsuit, or "dismissed without prejudice." In *Brooks v. Lumber Co.,* 194 N.C. 141, 138 S.E. 532, plaintiff's intestate died 20 November 1923 as a result of defendant's negligence. Suit for wrongful death was instituted in Macon County on 3 March 1924. Upon defendant's petition, the action was removed to the United States District Court for the Western District of North Carolina for trial. On 3 August 1925, plaintiff took a voluntary nonsuit and, on 8 September 1925, reinstituted the action in the Superior Court of Macon County for damages low enough to prevent a second removal. At that time, the applicable statute provided that suits for wrongful death must be brought within one year after the death. In the second suit, the plaintiff recovered judgment which, upon appeal, was sustained. The court held:

> "(W)here an action has been removed from the State court to the Federal Court, under the act of Congress providing for such removal, and a voluntary nonsuit is taken by plaintiff in the action while same is pending in the Federal Court, he may bring a new action upon the same cause of action in the State court within one year from the date of such nonsuit, by reason of the provisions of C.S. 415 (G.S. 1-25)." *Id.* at 143, 138 S.E. at 533.

Accord, Motor Co. v. Credit Co., 219 N.C. 199, 13 S.E. 2d 230; *Fleming v. R. R.,* 128 N.C. 80, 38 S.E. 253; Annot., 156 A.L.R. 1104 (1945), Tolling statute applied to permit a new action in State court though original action in State court was removed to Federal court and there dismissed.

Highway Comm. v. Transportation Corp., 226 N.C. 371, 38 S.E. 2d 214, cited by appellant, is inapposite. In that case the plaintiff sued to recover for damage done a bridge over the Cape Fear River when defendant's steamship collided with it. Shortly after the collision, defendant "filed libel in admiralty *in personam*" against the owner of the Stone Towing Line. Thereafter the U. S. District Court enjoined plaintiff and all others having claims for damages arising out of the collision from proceeding except in admiralty in that court. Plaintiff promptly filed its claim there and, as soon as it was dismissed from that court for want of jurisdiction, it instituted in the Superior Court of New Hanover County the action in which the appeal was taken. This Court held that defendant's plea of the statute of limitations was not good. The statute had been tolled by G.S. 1-23 during the time commencement of the action had been stayed in the State court by the Federal Court injunction. G.S. 1-25, although cited along with G.S. 1-23, had no application to the facts of that case.

In this case, the allegations in the complaint disclose that, *prima facie*, plaintiff's cause of action was barred by the statute of limitations. It contained no averments (such as were made in *Blades v. R. R.*, 218 N.C. 702, 12 S.E. 2d 553) to bring the action within the protection of G.S. 1-25. Defendants correctly point out that, after they pled the two-year statute of limitations as a bar to this action, it was incumbent upon plaintiff, under the rule enunciated in *Little v. Stevens*, 267 N.C. 328, 148 S.E. 2d 201, to plead the facts upon which they would rely to repel defendants' plea of the statute of limitations. In this Court, defendants moved for permission to file a reply setting up the prior action in the Federal Court in Virginia and the institution of this action within one year after a voluntary nonsuit had been taken in the Federal Court. Pleading the nonsuit in the Federal Court would avail plaintiff nothing; the motion to be allowed to file a reply is denied.

The judgment of nonsuit is
Affirmed.

DUKE POWER COMPANY, PETITIONER, v. NEIL G. ROGERS AND WIFE, ELIZABETH ROGERS, RESPONDENTS.

(Filed 25 August, 1967.)

1. **Eminent Domain §§ 5, 9—**

Where an electric power company condemns an easement for its transmission lines together with the right to enter upon the land to maintain the lines, with the landowners retaining such rights in the land not inconsistent with the rights acquired by easement, the measure of compensation is the difference in the market value of the land free of the easement and the market value of the land subject to the easement, and an instruction to the effect that the landowners are entitled to recover the market value of the land taken, and the difference between the market value of the remaining tracts before and after the taking, is error.

2. **Same—**

The nature and extent of the easement acquired determines whether there is any substantial difference in the easement condemned and a fee simple estate in the land, and each case must stand on its exact facts.

3. **Appeal and Error § 5—**

When the case must be remanded for a new trial on one exception, the Supreme Court may discuss another exception relating to meritorious matter even though such other exception is not in the approved form.

APPEAL by petitioner from *Falls, J.*, August 1966 Civil Session of HENDERSON.

This is a condemnation proceeding instituted under G.S. 40-11 *et seq.* by Duke Power Company, a company which generates and distributes electricity, to acquire a right-of-way and easement for its transmission lines across the 8-acre home site of respondents, Neil G. Rogers and Elizabeth Rogers, his wife. Petitioner instituted the proceeding after failing to acquire the right-of-way by negotiation and purchase. The specific easement covers 0.93 acres, more or less, on the southwestern half of respondents' homeplace.

Petitioner proposes to construct within the right-of-way condemned one or more lines of towers, poles, or other structures, together with such transmission lines, telephone wires, guys, and other apparatus and appliances as its needs may, from time to time, require. In addition, petitioner acquires (1) the right to keep the right-of-way clear of all structures, trees, fire hazards, and other natural objects of any nature; (2) "danger tree rights," which are the right to trim, fell, and clear away any trees off the right-of-way which are hazardous to wires, towers, or any other structures and apparatus on the right-of-way; (3) the right of ingress to, and egress from, the right-of-way over and across the other lands of respondents by means of existing roads and lanes thereon or by such routes as shall occasion the least practicable damage and inconvenience to re-

spondents; provided that such right of ingress and egress shall not extend to any portion of respondents' lands which is separated from the right-of-way by any public road now or hereafter crossing said lands. Petitioner, however, must repair, or reimburse respondents for, any actual damage done to their property by the exercise of its right of ingress and egress. Respondents' rights in the strip are defined as follows:

> "Respondents shall have all other rights to said strip of land not inconsistent with the rights and prohibitions herein contained, but respondents cannot; (1) construct streets, roads, water lines or sewer lines across said strip at an angle of less than sixty (60) degrees between the center line of said streets, roads, water lines or sewer lines and the center line of the right of way; nor closer than 20 feet to any structures placed upon the right of way by petitioner, nor shall the outside limit of any cut or fill be closer to said structures than 20 feet; (2) maintain fences that are not safely removed from structures to be placed on said strip; (3) dig wells on said strip; (4) place septic tanks, septic tank fields or any other underground construction on said property; (5) use said right of way for burial grounds; (6) interfere with or endanger the construction, operation, or maintenance of the petitioner's facilities."

Respondents' 8-acre tract in question is located in Henderson County approximately 2½ miles from the Hendersonville city limits and a quarter of a mile from the Hendersonville airport. The property fronts on State Road No. 1779 for approximately 800 feet in the neighborhood known as the Tracy Grove Community, a developed rural area. The tract is located on a grade or bluff. The house, a brick or permastone structure with wood siding, is built on the summit. It contains 9 rooms and a large hall. The land slopes downward in a southwesterly direction away from the front of the dwelling, which is surrounded by a plank fence, located approximately 50 feet from the house. Outside the fenced area, the remainder of the tract is kept mowed with a bush hog, pulled by a tractor. The 0.93-acre right-of-way crosses the property approximately 250 feet from the house. It runs in front of it and down the hill to the right. According to respondents, it mars their view of Mt. Pisgah and spoils the vista of surrounding mountains.

After the pleadings were filed, commissioners were duly appointed, and they assessed respondents' damages at $12,333.00. Petitioner excepted to the report. When the Clerk of the Superior Court confirmed it, petitioner appealed to the Superior Court at term. At the trial, both petitioner and respondents offered evidence. The issue of dam-

ages was submitted to the jury and answered as follows: "What amount, if any, are the respondents entitled to recover from the petitioner? ANSWER: $12,500.00."

From judgment entered on the verdict petitioner appealed, assigning errors.

H. D. Coley, Jr.; Crowell & Crowell; Carl Horn, Jr., for petitioner appellant.

Garren & Stepp for respondent appellees.

SHARP, J. Petitioner assigns as error the following portion of the judge's charge on the measure of damages:

> "So, you see, ladies and gentlemen of the jury, there are two elements of compensation to be considered by you. Number one, the market value of the land actually appropriated for easement purposes here, consisting of approximately one acre, and, second, the injury or damage done to the remainder of the tract or portion of the land, used by the owners as one tract. So the amount of compensation which the landowners are entitled to recover, if you find they are entitled to recover at all, is, first, the fair market and reasonable market value of the property taken or appropriated, and second, the difference between the reasonable market value of the additional tract or tracts just before the taking and appropriation of said lands, and the reasonable market value of such additional tracts or portions immediately following the taking. (Exception No. 1, Assignment of Error No. 1).

This instruction required the jury to award respondents the full value of the 0.93-acre tract traversed by petitioner's right-of-way as well as damages to the property on each side of it, as if each were a separate tract. This was prejudicial error. *Sanitary District v. Canoy,* 252 N.C. 749, 114 S.E. 2d 577; *Light Co. v. Clark,* 243 N.C. 577, 91 S.E. 2d 569. Petitioner does not acquire the right to occupy the surface of the 0.93-acre right-of-way to the *total* exclusion of respondents. It is condemning only an easement; respondents retain the fee in the land. Subject to the prohibitions specifically enumerated in the petition, they may make any use of the surface of the strip which will not interfere with petitioner's transmission of electricity. *Light Co. v. Bowman,* 229 N.C. 682, 51 S.E. 2d 191. Necessarily, that use will be limited; but it cannot be said that the right to use it and to traverse it freely has no value to them.

The jury should have been instructed that petitioner was required to pay respondents "the difference in the market value of (their)

property free of the easement and subject to the easement." *Sanitary District v. Canoy, supra* at 754, 114 S.E. 2d at 581. Stated more fully:

> "The measure of permanent damages for the appropriation of a right of way for the construction of an electrical overhead system is the difference between the fair market value of the tract as a whole before the right of way was taken and its impaired market value directly, materially and proximately resulting to the respondents' land by the placing of a power line across the premises in the manner and to the extent and in respect to the uses for which the easement was acquired." *Light Co. v. Carringer,* 220 N.C. 57, 58-59, 16 S.E. 2d 453, 454; *accord, Light Co. v. Clark, supra.*

The rule given by his Honor is the rule ordinarily applicable to the assessment of damages in condemnations of railroad, highway and other rights of way in which the bare fee remaining in the landowner, for all practical purposes, has no value to him and the value of the easement is virtually the value of the land it embraces. *Highway Commission v. Black,* 239 N.C. 198, 79 S.E. 2d 778; *R. R. v. Armfield,* 167 N.C. 464, 83 S.E. 809; see *Power Co. v. Russell,* 188 N.C. 725, 125 S.E. 481. Whether there is any substantial difference in the easement condemned and a fee simple estate in the land depends upon the nature and extent of the easement acquired. "Each case must stand on its exact facts." *Light Co. v. Clark, supra* at 582, 91 S.E. 2d at 572. *Light Co. v. Rogers,* 207 N.C. 751, 178 S.E. 575 and *Power Co. v. Russell, supra,* cited by appellee, appear to have involved more extensive easements than the one here condemned, but, however that may be, to the extent that they conflict with this opinion, they have been superseded by *Light Co. v. Clark, supra,* and *Sanitary District v. Canoy, supra.*

Petitioner's second assignment of error is that the judge failed to instruct the jury as to the rights acquired by petitioner and what rights respondents retained in the land covered by the easement. This assignment of error does not comply with our rules in that petitioner did not set out at the end of the charge what it contends the judge should have told the jury. Nevertheless, since the case goes back for retrial we take note of the court's omission. The judge should have instructed the jury as to the respective rights of petitioner and respondents and explained to them what use each was entitled to make of the strip condemned. *Sanitary District v. Canoy, supra; Light Co. v. Clark, supra.*

For the errors indicated, there must be a

New trial.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1967

WILLIE LEE GASQUE v. STATE OF NORTH CAROLINA.

(Filed 20 September, 1967.)

1. **Constitutional Law § 32—**

The guarantee to a defendant of the right to be represented by counsel in a criminal case does not apply to every stage of the proceedings but only to the "critical stages," and what constitutes a critical stage is to be determined both from the nature of the proceedings and from the facts in each case.

2. **Same; Criminal Law § 21—**

A preliminary hearing is not prerequisite to the finding of an indictment in this State nor a critical stage of the proceeding, and a defendant may waive the hearing and consent to be bound over to the Superior Court to await grand jury action without forfeiting any defense or right available to him; therefore, the denial of defendant's request for counsel at the hearing does not deprive defendant of any constitutional right.

3. **Same—**

Defendant's contention that the preliminary hearing afforded the only opportunity to ascertain the evidence of the State before trial, thereby requiring the presence of counsel to obtain this information, is without merit, since the State's witnesses can be examined by defendant before trial by permission of the court or the solicitor, or by resort to the writ of *habeas corpus*.

4. Rape § 9—

An indictment under G.S. 14-26, charging defendant with ravishing and carnally knowing a female child under the age of twelve years, need not allege that the child was abused.

5. Criminal Law § 161—

The Supreme Court may consider an assignment of error in a capital case, although the assignment is defective in compelling the Court to search through the record to find the precise question involved.

6. Rape § 10; Criminal Law § 34—

In a prosecution for carnally knowing a female child under the age of twelve years, testimony of the prosecuting witness that the defendant had made improper advances to her approximately four years prior to the offense charged is competent in evidence in corroboration of the offense charged.

7. Criminal Law § 161—

The admissibility of evidence challenged only by an exception is considered by the Supreme Court in this capital case, although the jurisdiction of the Court on appeal is ordinarily limited to questions of law presented both by objections duly entered and exceptions duly taken to the rulings of the lower court.

8. Rape § 10—

Testimony by prosecutrix' grandmother as to statements of the prosecutrix that the defendant had intercourse with her on the date of the offense and had made improper advances approximately four years prior to the offense is competent for the purpose of corroborating the testimony of prosecutrix to like effect.

9. Same; Criminal Law § 169—

In a prosecution for carnally knowing a female child under the age of twelve years, the admission of testimony of prosecutrix' aunt that prosecutrix had stated that the defendant had had intercourse with her many times prior to the date of the offense charged, even though technically incompetent as corroborative evidence in that it exceeded the scope of prosecutrix' testimony, *held* not prejudicial under the facts of this case, there being plenary evidence of defendant's guilt of the crime charged and the question of prosecutrix' consent not being material to the offense.

BOBBITT, J., dissenting.

HIGGINS AND SHARP, JJ., join in dissenting opinion.

ON *certiorari* from *Hobgood, J.,* 4 January 1965 Criminal Session of CUMBERLAND to permit petitioner appellant *in forma pauperis* by court-appointed counsel to perfect a delayed appeal.

This is a criminal action prosecuted on an indictment charging appellant on 14 August 1964, with force and arms at and in Cumberland County, "did, unlawfully, wilfully and feloniously ravish

and carnally know one Anna Jean Gasque, a female, under the age of twelve years by force and against her will."

At the trial appellant, an indigent, was represented by his court-appointed counsel, James C. MacRae. Plea: Not guilty. Verdict: Guilty of rape as charged in the indictment with recommendation of life imprisonment.

From a judgment of life imprisonment in the State's prison, appellant appeals.

Attorney General T. W. Bruton and Deputy Attorney General James F. Bullock for the State.

W. Ritchie Smith, Jr., for petitioner appellant.

PARKER, C.J. We allowed appellant's petition for *certiorari* to bring up his case on a delayed appeal of his conviction. Appellant, an indigent, is represented in this Court by his court-appointed counsel, W. Ritchie Smith, Jr., a member of the Cumberland County Bar. The case on appeal has been agreed to by appellant's counsel and the State, and the case on appeal and the brief of appellant have been mimeographed in the same manner as if he were a rich man.

Appellant assigns as error, based upon his exception No. 3, as stated in the agreed case on appeal: "No lawyer was appointed to represent the defendant at his preliminary hearing in the Recorder's Court of the City of Fayetteville, and the defendant, without counsel, waived his hearing and was bound over to the Superior Court without privilege of bond." Appellant stated in his petition for post conviction review that he requested counsel at the preliminary hearing because he was an indigent, and the court refused his request. Jane W. Herring, judge of the recorder's court of the city of Fayetteville, states in an affidavit:

> "That the undersigned appointed no attorney to represent Willie Lee Gasque at said Preliminary Hearing, and the undersigned does not now recall whether Willie Lee Gasque was represented by counsel at said hearing.
>
> "That the undersigned does not recall whether Willie Lee Gasque waived his right to be represented by counsel at said hearing."

The warrant in the recorder's court charged the appellant with the commission of the crime of rape on one Anna Jean Gasque, a female child under the age of twelve years, to wit, eleven years of age, which is a capital felony in this jurisdiction punishable by death, unless the jury recommends at the time of rendering its ver-

dict in open court that the punishment shall be imprisonment for life in the State's prison. G.S. 14-21.

Coming as it does in the wake of *Gideon v. Wainwright,* 372 U.S. 335, 9 L. Ed. 2d 799, 93 A.L.R. 2d 733 (1963), the right to counsel here presented is of particular significance. *Gideon* overruled *Betts v. Brady,* 316 U.S. 455, 86 L. Ed. 1595 (1942), and thereby abolished the distinction between the right to counsel in capital and non-capital cases in State prosecutions. *Gideon* was concerned with the right of an accused to counsel at trial and did not involve the right of counsel at a preliminary hearing or arraignment. The situation at bar is markedly different from that of the *Gideon* case. Well in advance of the trial in the Superior Court on the charge of the capital felony of rape, James C. MacRae, an experienced member of the Cumberland County Bar, was appointed by the court to represent the appellant, an indigent person, and he represented the appellant throughout the trial. Bailey, J., at the 7 November 1966 Session of Cumberland, entered an order appointing W. Ritchie Smith, Jr., a member of the Cumberland County Bar, to represent appellant and directing him to file a petition for a writ of *certiorari* with the Supreme Court to bring up his case on appeal, and directed Cumberland County to pay the cost of the transcript and the cost of appeal in the Supreme Court. Bailey, J., in his order states:

> "(A)nd it appearing to the Court from the statement of the petitioner and the statement to this court by his appointed attorney, Mr. Ritchie Smith of the Cumberland County Bar, that the petitioner now states in open Court that he had every opportunity for witnesses, that he and his attorney had time and opportunity to prepare for a criminal trial, but that it appears from the transcript of the record that the petitioner did in fact give notice of appeal and there is no showing in the record of any attorney having been appointed to perfect said appeal; and it appearing to the Court that through a misunderstanding that his court-appointed counsel at his original trial, to wit, James C. McRae, Jr., *(sic)* through inadvertence and misunderstanding did not perfect such appeal, and that said petitioner ought not to be denied his right of appeal."

Nevertheless, apart from any assertion that he was not given a fair trial, or that he was in fact prejudiced, appellant contends that his conviction is defective because he was not represented by counsel when he waived preliminary hearing in the recorder's court. In support of this proposition, appellant relies on *Powell v. Alabama,* 287 U.S. 45, 77 L. Ed. 158, 84 A.L.R. 527; *Crooker v. California,*

357 U.S. 433, 2 L. Ed. 2d 1448; *Hamilton v. Alabama,* 368 U.S. 52, 7 L. Ed. 2d 114; *White v. Maryland,* 373 U.S. 59, 10 L. Ed. 2d 193; *Pointer v. Texas,* 380 U.S. 400, 13 L. Ed. 2d 923; *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 10 A.L.R. 3d 974.

Hamilton v. Alabama, supra, involved a State capital conviction where the petitioner had pleaded not guilty at his arraignment. At the time of entering this plea, petitioner was not represented by counsel, although he did have counsel at the trial. The Supreme Court reversed his conviction stating: "Whatever may be the function and importance of arraignment in other jurisdictions, . . . in Alabama it is a critical stage in a criminal proceeding." The Court enumerated several defensive maneuvers which are waived in Alabama if not asserted at the arraignment: the defense of insanity, pleas in abatement, and improper grand jury selection. Whatever happens at arraignment in Alabama, therefore, may well affect the whole trial. The Court took care in the *Hamilton* case to indicate, however, the "differing consequences" that attach to arraignment in the various jurisdictions.

While *White v. Maryland, supra,* is factually distinguishable from *Hamilton v. Alabama, supra,* similar principles governed. In the *White* case petitioner had entered a guilty plea at a Maryland preliminary hearing when he was not represented by counsel. Later at his arraignment, when he did have counsel, petitioner entered pleas of not guilty and not guilty by reason of insanity. The guilty plea made at the preliminary hearing was introduced in evidence at the trial. Under these circumstances, the Court held that the preliminary hearing was a "critical" stage in the proceedings and there was no need to determine whether prejudice resulted from the absence of counsel. It is clear from the Court's opinion that what made the preliminary hearing "critical" was that a guilty plea had been entered and that the plea had been used against petitioner at the trial. Thus, the Court commented: "Whatever may be the normal function of the 'preliminary hearing' under Maryland law, it was *in this case* as 'critical' a stage as arraignment under Alabama law." (Emphasis ours.)

In *Pointer v. Texas, supra,* at the defendant's trial in a Texas State court on a charge of robbery, the State, over defendant's objections, introduced the transcript of a witness' testimony given at the preliminary hearing at which defendant was not represented by counsel and had no opportunity to cross-examine the witness. The State showed that the witness had moved out of Texas with no intention to return. Defendant was convicted and his conviction was affirmed by the Texas Court of Criminal Appeals, 375 S.W. 2d 293. On *certiorari,* the Supreme Court of the United States reversed. In

an opinion by Black, J., expressing the views of seven members of the Court, it was held that the facts as stated above constituted a denial of defendant's constitutional right of confrontation. Black, J., in his opinion, said:

> "In this court we do not find it necessary to decide one aspect of the question petitioner raises, that is, whether failure to appoint counsel to represent him at the preliminary hearing unconstitutionally denied him the assistance of counsel within the meaning of *Gideon v. Wainwright, supra.* In making that argument petitioner relies mainly on *White v. Maryland,* 373 U.S. 59, 10 L. Ed. 2d 193, 83 S. Ct. 1050, in which this Court reversed a conviction based in part upon evidence that the defendant had pleaded guilty to the crime at a preliminary hearing where he was without counsel. Since the preliminary hearing there, as in *Hamilton v. Alabama,* 368 U.S. 52, 7 L. Ed. 2d 114, 82 S. Ct. 157, was one in which pleas to the charge could be made, we held in *White* as in *Hamilton* that a preliminary proceeding of that nature was so critical a stage in the prosecution that a defendant at that point was entitled to counsel. But the State informs us that at a Texas preliminary hearing, such as is involved here, pleas of guilty or not guilty are not accepted and that the judge decides only whether the accused should be bound over to the grand jury and if so whether he should be admitted to bail. Because of these significant differences in the procedures of the respective States, we cannot say that the *White* case is necessarily controlling as to the right to counsel. Whether there might be other circumstances making this Texas preliminary hearing so critical to the defendant as to call for appointment of counsel at that stage we need not decide on this record, and that question we reserve. In this case the objections and arguments in the trial court as well as the arguments in the Court of Criminal Appeals and before us make it clear that petitioner's objection is based not so much on the fact that he had no lawyer when Phillips made his statement at the preliminary hearing, as on the fact that use of the transcript of that statement at the trial denied petitioner any opportunity to have the benefit of counsel's cross-examination of the principal witness against him. It is that latter question which we decide here."

The precise questions decided in *Crooker v. California, supra,* are not the same as in the case before us. In that case, the opinion as written by Clark, J., expressing the views of five members of the Court, said:

"Petitioner, however, contends that a different rule should determine whether there has been a violation of right to counsel. He would have every state denial of a request to contact counsel be an infringement of the constitutional right *without regard to the circumstances of the case.* In the absence of any confession, plea or waiver — or other event prejudicial to the accused — such a doctrine would create a complete anomaly, since nothing would remain that could be corrected on new trial."

Miranda v. Arizona, supra, is not in point on the precise question we are considering, for the reason that that case deals with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation, and the necessity for procedures which assure that the individual is accorded his privilege against self-incrimination. There was no custodial interrogation in the instant case, according to the record before us.

Powell v. Alabama, supra, decided that the right to appointment of counsel sufficiently in advance of trial to permit effective preparation for trial was an element of due process of law guaranteed the accused by the Fourteenth Amendment. The Supreme Court said: "Even the intelligent and educated layman . . . requires the guiding hand of counsel at every step in the proceedings against him." But, despite the sweep of the Supreme Court's language it seems to be settled law that the guarantee of counsel applies not to every step in the criminal proceedings but only to what has come to be denominated with some circularity, "critical stages" of the criminal proceeding.

From *Hamilton v. Alabama* and *White v. Maryland,* it is plain that there is no arbitrary point in time at which time right to counsel attaches in pre-trial proceedings. Even in *White,* decided after *Gideon,* the Court did not mention any requirement that counsel be present "at every stage." Rather, the "critical" point is to be determined both from the nature of the proceedings and from that which actually occurs in each case. Our initial concern in the case at Bar, therefore, is whether the pre-trial procedure under the particular facts here was of such consequence that it was a "critical" stage of the proceedings. More specifically, did the pre-trial proceedings become "critical" when appellant, an indigent without counsel, waived his preliminary hearing in the recorder's court of the city of Fayetteville and was bound over to the Superior Court of Cumberland County for grand jury action?

This is said in *S. v. Hargett,* 255 N.C. 412, 121 S.E. 2d 589:

"A preliminary hearing is not an essential prerequisite to the finding of an indictment in this jurisdiction. 'We have no

statute requiring a preliminary hearing, nor does the State Constitution require it. It was proper to try the petitioner upon a bill of indictment without a preliminary hearing.' "

In *S. v. Hackney,* 240 N.C. 230, 81 S.E. 2d 778, it is said:

"Unless there is a statute requiring it, it is the general, if not the universal, rule in the United States that a preliminary hearing is not an essential prerequisite to the finding of an indictment. Such hearing is unknown to the common law. 27 Am. Jur., Indictments and Informations, p. 596; 22 C.J.S., Crim. Law, p. 484; *U. S. ex rel. Hughes v. Gault,* 271 U.S. 142, 70 L. Ed. 875."

In *People v. Daniels,* 49 Ill. App. 2d 48, 199 N.E. 2d 33 (1964), an Illinois appellate court saw no deprivation of the accused's right to counsel since "the record before us is silent as to any occurrences at the preliminary hearing. There is neither a claim nor any showing that absence of counsel at the preliminary hearing or a failure to make an earlier appointment of counsel in any manner prejudiced the defendant or in any way adversely infected or contaminated the subsequent proceedings in this case. A preliminary hearing in Illinois is not a 'critical stage' where rights or defenses must be raised or lost and hence the right to counsel in such a proceeding does not, *ipso facto,* obtain."

To the same effect, see *Warner v. Commonwealth,* 386 S.W. 2d 455, 456 (Ky. 1965); *Commonwealth v. O'Leary,* 198 N.E. 2d 403 (Mass. 1964), accused stood mute at preliminary hearing and court entered not guilty plea on his behalf; *Matthews v. State,* 206 A. 2d 714 (Md. 1965), plea of not guilty entered at preliminary hearing; *Bonner v. Director,* 206 A. 2d 708 (Md. 1965), defendant pleaded not guilty at preliminary hearing; *Rainsberger v. State,* 399 P. 2d 129 (Nev. 1965), plea at preliminary was not prejudicial because, later, at arraignment, defendant again pleaded guilty, with advice of counsel; *State v. Baier,* 399 P. 2d 559 (Kan. 1965), defendant without counsel waived preliminary hearing but, at trial, while represented by appointed counsel, pleaded guilty; *United States ex rel Maisenhelder v. Rundle,* 229 F. Supp. 506 (E.D. Pa. 1964), plea or testimony at preliminary hearing was never put before trial court (Also see, *Commonwealth ex rel Maisenhelder v. Rundle,* 198 A. 2d 565 (Pa. 1964); *Sanders v. Cox,* 395 P. 2d 353 (N.M. 1964), noncapital offender pleaded guilty at trial when represented by counsel, guilty plea at preliminary hearing, while not represented, was not prejudicial; *State v. Dennis,* 204 A. 2d 868 (N.J. 1964), proceedings or plea at preliminary hearing never brought before trial court, nor even divulged in appellate opinion; *Johnson v. State,* 207 A. 2d 643

(Md. 1965), where defendant was charged with three capital crimes; (1) murder of seven-year-old girl, (2) assault with intent to rape the seven-year-old girl, and (3) forcible rape of a neighbor woman, convicted of each, and sentenced to death three times. In the latter case the Court affirmed the conviction, and said:

> "With reference to the claim that he did not have counsel at his preliminary hearing in Municipal Court, it is not alleged or shown that he entered any plea there, or that any plea or statement he may have made there was introduced at his trial in the Criminal Court, and thus the preliminary hearing was not such a critical stage of the proceedings as to require the presence of counsel. . . . As to alleged lack of counsel at his arraignment, the record shows that court appointed counsel entered pleas of not guilty on his behalf at the arraignment."

For numerous other cases to the same effect, see 6 Seventh Dec. Dig., Con. Law, key No. 263.

Other courts have found there to be no constitutional injury in the failure to appoint counsel where no plea offered at the preliminary hearing could be offered in evidence at trial, *State v. White,* 133 S.E. 2d 320 (S.C. 1963); *DeToro v. Pepersack,* 332 F. 2d 341 (4th Cir. 1964); or where the accused could not under state law offer a plea at the preliminary hearing, *Williams v. State,* 237 F. Supp. 360 (E.D.S.C. 1965); or where the accused did not in fact offer a plea, *Mercer v. State,* 237 Md. 479, 206 A. 2d 797 (1965); *Ronzzo v. Sigler,* 235 F. Supp. 839 (D. Neb. 1964). And most states adhere to the view that the accused is not denied due process of law by the failure to appoint counsel at the preliminary hearing if the preliminary hearing is not a critical stage. *State v. Osgood,* 123 N.W. 2d 593 (Minn. 1963); *People v. Sedlak,* 256 N.Y.S. 2d 84 (N.Y. Sup. Ct. 1965); *State v. Richardson,* 399 P. 2d 799 (Kan. 1965); *Bussey v. Maxwell,* 177 Ohio St. 111, 202 N.E. 2d 698 (1964); *Ronzzo v. Sigler, supra; People v. Morris,* 30 Ill. 2d 406, 197 N.E. 2d 433 (1964); *Freeman v. State,* 392 P. 2d 542 (Idaho 1964).

It has been the practice in this State for generations that a defendant can waive a preliminary examination and be bound over to the Superior Court. See G.S. 15-85. The hearing of probable cause before a committing magistrate or inferior judge can be readily dispensed with by the State in this jurisdiction since, as stated above, a preliminary hearing is not an essential prerequisite to the finding of an indictment.

Appellant's waiving a hearing in the recorder's court of the city of Fayetteville and being bound over by that court to the Superior Court for grand jury action cannot, therefore, be characterized as

"critical" as is arraignment in Alabama. At the trial in the Superior Court appellant had every opportunity to present any defense whatever that was available initially, even a motion to quash the indictment.

There is nothing in the record before us to indicate that appellant was asked any question by the committing inferior judge or that he made any statement of any kind whatsoever before the committing inferior judge. No evidence of the preliminary hearing was introduced at the trial in the Superior Court. No evidence of an admission or confession by the appellant was admitted at the trial in the Superior Court. All that appears in the record before us is that the appellant, without counsel, waived a preliminary hearing, and that it appears in an affidavit of his that the warrant at the preliminary hearing charged him with the capital offense of rape and that he requested counsel, and his request was not granted. In the trial no mention was made of appellant's waiving a preliminary hearing. Under these facts, failure to supply counsel cannot be said to be a deprivation of any constitutional right of appellant, because under the specific facts here appellant's waiving of a preliminary hearing was not such a "critical stage" of the proceeding as to require the presence of counsel.

The appellant contends a preliminary hearing is the only opportunity a defendant has, prior to the actual trial, to learn what evidence he must defend against and he needed counsel at the preliminary hearing in order to obtain this information, and, if there was not sufficient evidence against him, he should be discharged for lack of probable cause. This contention is without merit for the following reasons: Appellant at his trial in the Superior Court was represented by court-appointed attorney, James C. MacRae, an experienced member of the Cumberland County Bar and a son and partner of an ex-Special Judge of the Superior Court, and a great grandson of a former member of this Court and a former Dean of the University of North Carolina Law School. He could easily have found out the evidence against the appellant by asking the court's permission to examine the State's witnesses. It is a custom in this State for a solicitor prosecuting a capital offense to give the attorney for the defendant permission to talk to the State's witnesses. In addition, if Mr. MacRae had desired information as to the State's witnesses, he could have compelled the disclosure by a writ of *habeas corpus*. There is nothing in the record to indicate that Mr. MacRae did not talk to the State's witnesses before the trial in the Superior Court.

In the oft cited case of *United States ex rel. Cooper v. Reincke*, 333 F. 2d 608 (2d Cir. 1964), cert. den. 379 U.S. 909, 13 L. Ed. 2d

181, the United States Court of Appeals reasoned that the preliminary hearing could not be deemed a critical stage. The Court said:

"The Connecticut hearing in probable cause has been accurately characterized as a mere '"inquest" made to determine the existence of probable cause, and to discharge the accused if none exists.' (Citing authority.) The finding of probable cause is not final and it cannot be used against an accused on the trial before the Superior Court. (Citing authority.) The hearing in probable cause and appearance before a judge or committing magistrate can be readily dispensed with by the State since an original information may be filed in the Superior Court. In that event no hearing in probable cause is held. (Citing authority.) And, no such hearing is provided where the State's Attorney chooses in the first instance to obtain a bench warrant from the Superior Court. (Citing authority.)

"The Connecticut hearing in probable cause cannot, therefore, be characterized as critical as is arraignment in Alabama. Indeed, it can hardly be termed a proceeding against the accused; to the contrary, it appears to operate entirely for the accused's benefit. And the mere fact that an accused is required to plead does not in itself demand a contrary conclusion where the plea entered is a self-serving denial of guilt. At trial, appellant had every opportunity to present any defense that was available initially. Under these facts failure to supply counsel at this stage in the proceedings cannot be said to be a deprivation of a constitutional right."

In *Freeman v. State,* 392 P. 2d 542, 547 (Idaho, 1964), the Supreme Court of Idaho states:

"While it is recognized that an accused has a right to counsel at every stage of proceedings, we do not understand this to mean that he must be so represented in the preliminary processes which take place primarily for the purpose of ascertaining whether a crime has been committed and whether there are reasonable grounds to believe that the accused has committed it, and particularly where no prejudice has befallen him."

The headnote in *Gallegos v. Cox,* 341 F. 2d 107, cert. den. 381 U.S. 918, 14 L. Ed. 2d 438 (1965), correctly summarizes the decision as follows:

"State prisoner, who was serving sentence imposed for unlawful sale of marihuana, brought *habeas corpus* proceeding.

> The United States District Court for the District of New Mexico, H. Vearle Payne, J., entered judgment dismissing the petition, and prisoner appealed. The Court of Appeals held that the District Court properly dismissed the petition alleging that sentence was invalid because prisoner had not been furnished counsel at preliminary hearing and later on arraignment at which he pleaded not guilty to indictment, where prisoner did not testify at the preliminary hearing, and no contention was made that any incriminating statements were made then or on his arraignment, since no prejudice was shown."

In 5 A.L.R. 3rd there is a lengthy annotation entitled, "Accused's Right to Assistance of Counsel at or Prior to Arraignment," beginning on page 1269 and ending on page 1399. In this annotation beginning on page 1314 and ending on page 1342 there is a discussion of counsel at a preliminary hearing. On pages 1315 to 1319 there are listed and analyzed cases that affirm the right, and on pages 1319 to 1342 there are cases listed and analyzed where the right is denied.

The recent decisions of the Supreme Court of the United States, and particularly the decision in *Miranda v. Arizona, supra,* a six to three decision, and their meticulous effort to preserve every possible right of a defendant have apparently ignored the rights of protection of the victims who have been robbed, raped, and murdered. They seem to be forgotten people. In a dissenting opinion in the *Miranda* case written by Harlan, J., with Stewart, J., and White, J., joining in the dissenting opinion, it is said: "I believe the decision of the Court represents poor constitutional law and entails harmful consequences for the country at large. How serious these consequences may prove to be only time can tell." The crime rate is rapidly increasing because of the shackling effects of those decisions upon law enforcement officers. The streets of our big cities, and in particular of the Capital City of Washington, are not safe for law-abiding citizens. No reasonable person can object to the preservation of every reasonable constitutional right of a defendant to a fair trial, but at the same time the rights of the suffering public are entitled to recognition and protection. The country is aroused over the lawlessness prevailing in our midst.

The appellant's assignment of error that the court failed to appoint an attorney to represent him at his preliminary hearing, the appellant being an indigent at such time, is overruled. There are thousands of committing justices and inferior judges throughout the State who accept complaints and hold hearings at almost every hour of the day and night. To require counsel to be appointed by these

courts and to attend proceedings before the minor judiciary, in some instances many miles away, just would not work.

Assignment of error No. 2 reads as follows: "The Bill of Indictment does not sufficiently charge the offense of carnally knowing and abusing a female child under the age of twelve years in that it does not allege that Anna Jean Gasque was abused."

The indictment upon which appellant was tried is set forth above. This assignment of error is overruled upon authority of *S. v. Gibson,* 221 N.C. 252, 20 S.E. 2d 51; *S. v. Monds,* 130 N.C. 697, 41 S.E. 789.

This is a brief summary of the State's evidence:

On 14 August 1964, Anna Jean Gasque was eleven years old. She became twelve years old on 26 August 1964. On the night of 14 August 1964 her mother and Edna were away from home at work and she was there with the babies. At about 9:30 p.m. that night appellant, who is her stepfather, came home. He smelled like he had been drinking. He went into his room, and called Anna Jean Gasque into his room. At the time he was wearing Bermuda shorts and no shirt. The babies were asleep. She went into his room. At that time she had on her nightgown and panties. He pulled her down on his bed and had sexual intercourse with her without her consent, by violence and against her will. She was lying on her back crying, and he was on top of her. He told her if she ever told anybody he would kill her. At that time her mother and Edna came home, and he told her to get up. A few days before she was twelve years old, she told her grandmother about it. On 1 September 1964 Dr. Alexander Webb, Jr., an admitted medical expert in the field of surgery, with gynecological training, made a pelvic examination of Anna Jean Gasque. In his opinion, based upon his examination, her hymen had been broken and her female organ had been penetrated. Her grandmother corroborated her in respect to what she told her.

This is a brief summary of the appellant's evidence: Appellant offered the testimony of two witnesses. The testimony of appellant's witness, Joseph Melvin Byrd, is in substance as follows: He lives in the same apartment house in Fayetteville in which appellant lives. Appellant lives across the hall from him. On the evening of 14 August 1964 he was at home all evening, and heard no noises at all. Appellant's wife and the other girl came in about 11:30 p.m., because he was awakened when they slammed the front door. The door of his bedroom was open, but the screen was latched. He does not know whether the doors in appellant's apartment were closed or not. Mrs. Emma Byrd lives with her husband in the same apartment house in which appellant lives. The door of the apartment in

which she lives was open. Mrs. Gasque and the other girl came in about 11:30 p.m. She heard no crying or hollering or any unusual noises in the Gasque apartment. It was quiet all evening. One can hear anything he wants to hear from one apartment to the other.

Appellant did not testify in his own behalf.

The appellant's assignment of error No. 4 reads as follows: "The Court erred in permitting evidence of a prior independent occurrence. DEFENDANT'S EXCEPTIONS Nos. 4 and 5 (R. p. 4)."

What is said in *Kleinfeldt v. Shoney's, Inc.*, 257 N.C. 791, 127 S.E. 2d 573, is in point here:

> "This assignment of error is not sufficient in form to present the alleged errors relied on, for the reason that we have repeatedly held that Rules 19(3) and 21, Rules of Practice in the Supreme Court, 254 N.C. 783 *et seq.*, require an assignment of error to state clearly and intelligently what question is intended to be presented without the necessity of the Court going beyond the assignment of error itself 'on a voyage of discovery' through the record to find the asserted error and the precise question involved. These rules are mandatory, and will be enforced."

In support of this statement the opinion cites voluminous authority. "It is not sufficient to merely refer to the page for the asserted error." *Conrad v. Conrad,* 252 N.C. 412, 113 S.E. 2d 912. Nevertheless, we have gone on a "voyage of discovery" through the record and this appears on page 4 of the record:

> "Q. Had the defendant ever made any advances to you before this, August 14, 1964? OBJECTION. OVERRULED. DEFENDANT'S EXCEPTION No. 4.
>
> "This happened to me one time before August 14, 1964. Me and my Mama and my two sisters and Daddy were going fishing. Daddy told Mama she could get the two sisters ready, because they were little, and he would take me on up with him. We got the poles for fishing and when we got up there Daddy just started messing with me and all. He was trying to mess with me and my private, and I wouldn't let him, but I didn't think anything of it. I was seven at the time. DEFENDANT'S EXCEPTION No. 5.
>
> "I was examined by Dr. Webb in Raleigh after August 14, 1964. I made a statement to him about what had happened."

In *S. v. Browder,* 252 N.C. 35, 112 S.E. 2d 728, the Court said:

> "In most jurisdictions it is held or recognized that in prosecutions for statutory rape, or rape of a female under the age

of consent, or otherwise unable to consent, evidence is admissible which tends to show prior offenses of the same kind committed by the defendant with the prosecuting witness, provided they are not too remote in point of time, such evidence being admitted in corroboration of the offenses charged, or to prove identity, and not to prove a separate offense. 44 Am. Jur., Rape, Sec. 80; Wharton's Criminal Evidence, 12th Ed., Vol. I, p. 547; 22 C.J.S., Criminal Law, p. 1165; Annotation, 167 A.L.R. p. 574, *et seq.;* Underhill's Criminal Evidence, 5th Ed., Vol. I, Sec. 211; Wigmore on Evidence, 3rd Ed., Vol. II, Sec. 398. The above works cite in support of their statements a multitude of cases, and the Annotation in 167 A.L.R., and Wharton's Criminal Evidence cite cases from 36 states including our case of *S. v. Parish, supra* [104 N.C. 679, 10 S.E. 457], which recognizes the rule, and the District of Columbia."

In *S. v. Parish,* 104 N.C. 679, 10 S.E. 457, the defendant was convicted of the common law offense of rape of his eleven-year-old daughter. At that time the age limitation for statutory rape of a female child was under the age of ten years. Code of N. C. 1883, Vol. I, Sec. 1101. The age limitation was changed to under the age of twelve years during the 1917 Session of the General Assembly. Public Laws of North Carolina, Session 1917, Chapter 29. Over defendant's objection, his daughter was permitted to testify that at various other times and places her father had violated her person. This Court said: "It would be unreasonable to deny to the State the right to show repeated acts, and that all were committed against her will in order to explain her conduct on the particular occasion to which the attention of the jury is directed, and to throw light upon the question whether she yielded willingly to his embraces. . . . The rule is, that testimony as to other similar offenses may be admissible as evidence to establish a particular charge, where the intent is of the essence of the offense, and such testimony tends to show the intent or guilty knowledge."

In *S. v. Leak,* 156 N.C. 643, 72 S.E. 567, the indictment charged defendant with assaulting a twelve-year-old girl with intent to commit rape. This Court said:

"It was competent for the State to prove that the defendant placed his hands on the prosecutrix at another time on the day of the assault, as evidence of another assault of which the defendant could have been convicted under the indictment, and as tending to prove the *animus* and intent of the defendant."

S. v. Broadway, 157 N.C. 598, 72 S.E. 987, was a prosecution for incest. The record on file in the office of the Clerk of the Supreme

Court shows that defendant was charged with committing the crime of incest with his daughter of the whole blood, Mary Broadway. The record shows that the court, over defendant's objection, permitted Mary Broadway to testify that "within the past three or four years he (her father) had to do with me every time he got a chance," to testify as to the first time it occurred, and the last time it occurred, and to testify as to other acts of intercourse with her father. The record also shows that the court, over defendant's objection, permitted Mary C. Morgan, grandmother of Mary Broadway, to testify Mary Broadway told her the first time her father had intercourse with her, and that thereafter he had to do with her every time he got a chance, and permitted her brother, George Broadway, to testify that he saw Mary Broadway "come from a room crying, saying her father had had to do with her." In respect to this evidence, which is not in the decision, but is in the record on file in the office of the Clerk of the Supreme Court, this Court said:

> "The exception to proof of other acts of the same nature cannot be sustained. They are competent in corroboration, (citing authority), as was also evidence of cruel treatment of the daughter offered to show compulsion, 22 Cyc. 53. The evidence of similar statements made by the witness before the trial was also competent as corroborative evidence, and this may be shown by the witness himself."

Appellant in his brief relies upon *S. v. Gammons,* 258 N.C. 522, 128 S.E. 2d 860. That case is not in point because the factual situation is entirely different. In that case the original record on file in the office of the Clerk of the Supreme Court shows that defendant was tried on an indictment charging him with an assault on Ruth Mills with intent to commit rape. A new trial on appeal in this Court was granted because the court permitted, over the objection of defendant, the testimony of Caroleta Garner, a witness for the State, to the effect that defendant had sexual intercourse with her by fraud.

Appellant's assignment of error No. 4 is overruled.

Appellant's assignment of error No. 5 reads as follows: "The Court erred in allowing hearsay evidence of a prior, independent occurrence. DEFENDANT'S EXCEPTIONS Nos. 6, 7, 8 and 9 (R. pp. 7, 8, 9.)"

Again going on a "voyage of discovery" through the record we discover this in the testimony of Ida M. Byrd, grandmother of Anna Jean Gasque:

> "On the 31st of August, Anna Jean Gasque told me that right after she came out of the foster home that they were go-

ing fishing and that her father had told her that she was to go with him to the fishing place while her mother got the two children ready. When they got to the river bank, he asked her to take off her panties and he tried to love her. This happened four years ago last June. DEFENDANT'S EXCEPTION NO. 6.

"Anna Jean Gasque also said that he had done that in Fayetteville on the 14th of August. She just said that he took her on the bed and had intercourse with her. She did not use the word intercourse but said that he used his 'ding dong.'"

The record does not show any objection to this testimony, but only an exception. This is said in 1 Strong, N. C. Index 2d, Appeal and Error, § 1: "The jurisdiction of the Supreme Court on appeal is limited to questions of law or legal inference, which, ordinarily, must be presented by objections duly entered and exceptions duly taken to the rulings of the lower court." This is said in *Conrad v. Conrad, supra:* "Error can only be asserted by an exception taken at an appropriate time and in an appropriate manner. Errors based on rulings made during the trial must ordinarily be called to the attention of the court by an objection taken when the ruling is made. G.S. 1-206."

The testimony of Ida M. Byrd is challenged only by an exception. It is in corroboration substantially of what this little girl told her grandmother. Appellant's assignment of error to the testimony of the grandmother, Ida M. Byrd, is overruled.

Going on another "voyage of discovery" through the record we find this set forth in the testimony of Barbara C. Byrd, an aunt of Anna Jean Gasque:

"Q. What, if any, statement did she make concerning Willie Lee Gasque? OBJECTION.

COURT: This is limited for the purpose of corroboration, if in fact you, the jury, find that it does corroborate Anna Jean Gasque, and for no other purpose. All right.

"She told us that her father had been molesting her. We asked what she meant and she said that he had been putting his private in her private and that he had been doing so quite frequently. She said this had been happening since the time she came from the foster home four years ago and that it had happened the last time in Fayetteville, before we went and got her on the 17th of August. DEFENDANT'S EXCEPTION NO. 7.

"CROSS EXAMINATION

"She told me that her stepfather had intercourse with her and that it had happened many times. She said it first started after she came back from the foster home four years before.

She said it had been frequent since that time. DEFENDANT'S EXCEPTION NO. 8.

"She told me that the last time that it happened was on the Friday before we came to town and picked her up at 117 B Street. She said he put his 'ding dong' in her and that he had used her about once a week when the children were asleep. DEFENDANT'S EXCEPTION NO. 9."

On the cross-examination of Barbara C. Byrd the record shows no objection. These exceptions are overruled upon authority of what we have said above in respect to no objection being taken upon which the exception is based. Even conceding technical error in the testimony of Barbara C. Byrd brought out on direct examination over the objection of appellant, yet it is our opinion, and we so hold, considering all the facts of this case, and particularly the youthful age of the victim, the specific testimony of Dr. Alexander Webb, Jr., and the quoted testimony of her grandmother, that the admission of the challenged testimony of Barbara C. Byrd was not so prejudicial as to warrant a new trial, and that it is likely a different result would not have been reached if this challenged evidence had been excluded. In *S. v. Temple,* 269 N.C. 57, 152 S.E. 2d 206, the Court said:

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

Appellant states in his brief that he specifically abandons his assignments of error Nos. 1 and 8.

In support of his assignment of error No. 6, the appellant states: "We have no authority to support this contention." The other assignments of error relate to the charge. We have carefully read the charge in its entirety, and we find no prejudicial error.

The evidence offered by the State is amply sufficient to support the verdict. In the trial below we find

No error.

BOBBITT, J., dissenting. Although the court-appointed counsel who appeared for defendant at trial did not note objections and exceptions in the manner required by our Rules, the testimony of

Barbara C. Byrd, the aunt of the prosecutrix, is so palpably incompetent and, in my opinion, so devastatingly prejudicial, as to necessitate a new trial. Her testimony as to what the prosecutrix told her as to incidents between the prosecutrix and defendant prior to August 14, 1964, does not corroborate the prosecutrix but is in direct conflict with her testimony. Moreover, the impact of this incompetent and prejudicial testimony is emphasized by the court's review thereof in the charge to the jury. Conceding there is sufficient competent evidence to support a conviction of defendant if a new trial is awarded, our function is to make sure that he has a trial free from prejudicial error.

While I vote for a new trial on the ground stated above, I wish to say that I am in full accord with that portion of the Court's opinion to the effect that "under the specific facts here appellant's waiving of a preliminary hearing was not such a 'critical stage' of the proceeding as to require the presence of counsel," and that the failure to supply counsel for such preliminary hearing was not "a deprivation of any constitutional right of appellant." I approve fully the Court's excellent review of decided cases and the conclusions reached as to this feature of the case.

HIGGINS and SHARP, JJ., join in dissenting opinion.

STATE OF NORTH CAROLINA v. GRADY WORTH OLD.

(Filed 20 September, 1967.)

1. Criminal Law § 158—

The rule that the case on appeal as certified imports verity and must be presumed complete and correct cannot apply when the record recites inconsistent and contradictory statements in regard to a material matter.

2. Criminal Law § 160—

The trial court has the inherent power to correct error, mistake or omissions in its records so as to make its records speak the truth, and no lapse of time will bar the court from discharging this duty.

3. Criminal Law § 146—

The record proper recited as to each indictment against defendant a verdict of not guilty directed by the court, a plea of guilty entered by defendant, and a verdict of guilty returned by the jury. *Held:* The Supreme Court, in the exercise of its supervisory power, will remand the cause to the Superior Court with direction that upon a hearing after notice to counsel and parties it certify any corrections necessary to make the record conform to the facts.

APPEAL by defendant from *Peel, J.*, April 1967 Session, CAMDEN Superior Court.

The defendant, Grady Worth Old, was indicted by Camden County Grand Jury in three cases, Nos. 66-CrS-7, 66-CrS-9 and 66-CrS-10, charging respectively, a secret assault on E. L. Taylor, the murder of Montelle B. Williams, and the secret assault on John Joseph Walston. The agreed case on appeal discloses the following: The three cases were consolidated and tried together. In No. 66-CrS-7, charging secret assault on E. L. Taylor, this is the verdict according to the record:

> "(a) At the close of the State's evidence, the Court Orders a Verdict of Not Guilty.
> (b) At the close of the State's evidence, the defendant pleads Guilty.
> (c) The jury heretofore sworn and empanelled to try the issue for their verdict say that the defendant is Guilty of the charge of Murder in the first degree with a recommendation of life imprisonment."

In No. 66-CrS-9, charging the murder of Montelle B. Williams, this is the verdict:

> "(a) At the close of the State's evidence, the Court orders a Verdict of Not Guilty.
> (b) At the close of the State's evidence, the defendant pleads Guilty.
> (c) The jury heretofore sworn and empanelled to try the issue for their verdict say that the defendant is Guilty of the charge of assault with a deadly weapon upon E. L. Taylor."

In No. 66-CrS-10, charging assault on John Joseph Walston, this is the verdict:

> "(a) At the close of the State's evidence, the Court orders a Verdict of Not Guilty.
> (b) At the close of the State's evidence, the defendant pleads Guilty.
> (c) The jury heretofore sworn and empanelled to try the issue for their verdict say that the defendant is Guilty of the charge of assault with a deadly weapon upon John Joseph Walston."

The record here further discloses that each of the verdicts was signed on April 13, 1967 by the Clerk of Superior Court. On each of the charges of assault with a deadly weapon, the Court imposed a

prison sentence of 24 months. On the murder charge, the Court imposed a sentence for life in the State's prison. From all judgments, the defendant has appealed, assigning 65 errors based on 255 exceptions.

T. W. Bruton, Attorney General; George A. Goodwyn, Assistant Attorney General for the State.

John T. Chaffin for defendant appellant.

HIGGINS, J. The case on appeal as agreed, and as certified by the Clerk, shows that a life sentence for murder was imposed on the defendant in the case in which he was charged with assault on Taylor, and a sentence of imprisonment for 24 months was imposed in the case in which he was charged with the murder of Williams.

In each of the three cases, the record shows (1) a verdict of not guilty was directed by the Court, (2) a plea of guilty was entered by the defendant, and (3) a verdict of guilty was found by the jury. Patently, the record can speak the truth only with respect to one of the verdicts. If the Court entered a verdict of not guilty, that ended the prosecution. If the defendant entered a plea of guilty, no issue remained for jury determination. Only if (a) and (b) are eliminated may the jury intervene.

Here involved is a judgment of life imprisonment for first degree murder. Before dealing with the merits of the appeal, we must first have before us an accurate record of the proceedings in the Superior Court. Any error, mistake, or omission in the records of that Court must be corrected in that Court.

> "It is universally recognized that a court of record has the inherent power and duty to make its records speak the truth. It has the power to amend its records, correct the mistakes of its clerk or other officers of the court, or to supply defects or omissions in the record, and no lapse of time will debar the court of the power to discharge this duty. 14 Am. Jur., Courts, sections 141, 142, and 143, page 351, *et seq.;* 21 C.J.S., Courts, section 227(b), page 423; McIntosh, N. C. Practice and Procedure, Second Edition, Volume 2, section 1711, page 161; *Galloway v. McKeithen,* 27 N.C. 12, 42 Am. Dec. 153; *Phillipse v. Higdon,* 44 N.C. 380; *Mayo v. Whitson,* 47 N.C. 231; *Foster v. Woodfin,* 65 N.C. 29; *Walton v. Pearson,* 85 N.C. 34; *Brooks v. Stephens,* 100 N.C. 297, 6 S.E. 81; *Ricaud v. Alderman,* 132 N.C. 62, 43 S.E. 543; *R. R. v. Reid,* 187 N.C. 320, 121 S.E. 534; *Oliver v. Highway Commission,* 194 N.C. 380, 139 S.E. 767; *S. v. Tola,*

222 N.C. 406, 23 S.E. 2d 321; *S. v. Maynor*, 226 N.C. 645, 39 S.E. 2d 833; *Gagnon v. United States*, 193 U.S. 451, 48 L. Ed. 745.

"This Court has quoted with approval many times the statement contained in the opinion of Ruffin, J., in the case of *Walton v. Pearson, supra*, which is as follows: 'It is the duty of every court to supply the omissions of its officers in recording its proceedings and to see that its record truly sets forth its action in each and every instance; and this it must do upon the application of any person interested, and without regard to its effect upon the rights of parties, or of third persons; and neither is it open to any other tribunal to call in question the propriety of its action or the verity of its records, as made. This power of a court to amend its records has been too often recognized by this Court, and its exercise commended, to require the citation of authorities — other than a few of the leading cases on the subject. See *Phillipse v. Higdon*, 44 N.C. 380; *Foster v. Woodfin*, 65 N.C. 29; *Mayo v. Whitson*, 47 N.C. 231; *Kirkland v. Mangum*, 50 N.C. 313.'"

The foregoing statement is quoted from the opinion of Denny, J., (later C.J.) in *State v. Cannon*, 244 N.C. 399, 94 S.E. 2d 339. The opinion points out the method by which errors may be corrected.

A record of a case certified to us by the Superior Court must be accepted as importing verity and, unless shown otherwise on its face, it must be presumed to be complete. *Redden v. Bynum*, 256 N.C. 351, 123 S.E. 2d 734. However, if a case on appeal contains in material parts of the record proper such inconsistent and contradictory statements so that obviously if one material recital is correct, others therein equally material cannot be, then it becomes the duty of this Court, under its supervisory power, to remand the action to the Superior Court with directions that notice be given to counsel and parties, and after hearing, to certify any corrections necessary to make the record conform to the facts. In a criminal case, the solicitor should be given notice as well as defense counsel, and the defendant should be before the Court. It is the duty of the Superior Court to correct its own records in the manner pointed out by this Court in *State v. Cannon, supra*, and *State v. Stubbs*, 265 N.C. 420, 144 S.E. 2d 262.

The action is remanded to the Superior Court and when the corrections are made and certified, they shall be attached to and made a part of the case on appeal.

Remanded.

IN RE ESTATE OF ISHAM LOWTHER, DECEASED.

(Filed 20 September, 1967.)

1. Executors and Administrators § 5—

The clerk of Superior Court has authority to revoke letters of administration issued by him under mistake of fact and to remove any administrator who has been guilty of default or misconduct in the execution of his office. G.S. 28-32.

2. Clerks of Court § 3—

The jurisdiction of clerks of court with reference to the administration of estates of deceased persons is altogether statutory, G.S. 2-1, and the clerk's special probate jurisdiction is separate and distinct from his general duties and jurisdiction as clerk. G.S. 1-273.

3. Same; Courts § 6—

A proceeding to remove an executor or administrator is neither a civil action nor a special proceeding, and G.S. 1-276 providing that the Superior Court acquires jurisdiction of any civil action or special proceeding begun before the clerk which is for any ground whatever sent to the Superior Court, does not apply to probate matters.

4. Executors and Administrators § 5— In absence of exception thereto, clerk's finding in probate proceedings is conclusive if supported by evidence.

Where the clerk removes an administratrix upon his finding that she was not the widow of the deceased and therefore was not entitled to appointment as a matter of right, and an appeal is taken to the Superior Court from such order, the Superior Court, even though its jurisdiction is derivative, hears the matter *de novo*, and may review the finding of the clerk provided the appellant has properly challenged the finding by specific exception, and may hear evidence and even submit the controverted fact to the jury; but where there is no exception to the finding, the Superior Court may determine only whether the finding is supported by competent evidence, and if the order is so supported the Superior Court is without authority to vacate the clerk's judgment and order a jury trial upon the issue.

5. Same; Judgments § 30—

An adjudication by the clerk that the administratrix theretofore appointed by him was not the widow of decedent is not *res judicata* in any other proceeding between the parties which respondent may be entitled to pursue.

APPEAL by petitioner from *Hubbard, Judge Presiding* in the Second Judicial District, at chambers, 27 December 1966.

This proceeding was instituted under G.S. 28-32 before the Clerk of the Superior Court to remove an administratrix.

Petitioner and his sister are the only children of Isham Lowther, who died domiciled in Washington County on 15 December 1964. Upon her representation that she was the widow of Isham Lowther,

on 21 December 1964, the clerk appointed Mary Lowther as the administratrix of his estate. On 29 December 1965, petitioners filed a motion to remove Mary Lowther as administratrix for the following reasons: (1) She was never lawfully married to Isham Lowther; (2) She has sold and disposed of the personal property belonging to the estate; and (3) She had filed no inventory of the assets of the estate nor made any accounting of her transactions as administratrix.

Because of the illness and subsequent death of the attorney for the administratrix, the motion to remove her was not immediately heard. On 19 September 1966, Mary Lowther filed a "reply and affidavit" to the petition, in which she averred, *inter alia,* that in March 1944 she was married to Isham Lowther in Chowan County "by a duly ordained minister of the gospel" and "that she did see a marriage license"; that she had lived with Isham Lowther in Washington County as his wife from that day until his death — over twenty years. She also asserted that she had qualified as administratrix at the request of the petitioner and his sister, who are the children of Isham Lowther by a former marriage; that she had filed her inventory and had properly distributed the personal estate.

On 23 September 1966, the Clerk of the Superior Court heard the motion to remove the administratrix. Petitioner offered evidence tending to show: The records in the offices of the Register of Deeds of Chowan County and Washington County revealed no record of any marriage between Isham Lowther and Mary Lowther. Mary Lowther had, on several occasions, stated to petitioners "that she had not married their father but was simply living with him."

Mary Lowther, although present, did not testify. The clerk, upon his finding that Mary Lowther had never married Isham Lowther, removed her as his administratrix and directed her to account to the personal representative who was thereafter to be appointed. She appealed to the judge presiding in the district. Judge Hubbard heard the matter and entered the following order:

> "[T]he Court on the record finds that an issue of fact as to whether or not Mary D. Lowther is the widow of Isham Lowther arises on the pleadings; that the Clerk had authority to determine the issue since this is a probate matter, but as the issue will of necessity have to be finally determined by a jury, the Court in its discretion directs that the cause be transferred to the civil issue docket for the determination of the issue of fact by a jury.
>
> "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the judgment entered herein on 23 September 1966 be, and the

same is vacated, and the cause be, and it is hereby transferred to the civil issue docket for trial."

Petitioner appealed.

W. L. Whitley for petitioner appellant.
C. L. Bailey, Jr., for respondent appellee.

SHARP, J. The Clerk of the Superior Court has express authority under G.S. 28-32 to revoke letters of administration which were improperly issued and to remove any administrator who has been guilty of default or misconduct in the execution of his office. (For the technical distinction between revocation and removal, see 33 C.J.S. Executors and Administrators § 84b (1942).) When, upon disputed facts, the clerk removes an administrator who appeals, under what circumstances and to what extent does the judge review the clerk's findings of fact? The state of our decisions requires an examination of the history of the clerk's authority as judge of probate and an analysis of the cases in order to answer the question posed by this appeal.

In the absence of a constitutional or statutory requirement providing for a jury trial, probate proceedings are heard by the court without the intervention of a jury, "since the constitutional guaranty is limited to the right of trial by jury as it existed prior to the adoption of the Constitution and the right never existed in such matters which belonged historically to the ecclesiastical jurisdiction." 31 Am. Jur. Jury § 30 (1958). "Probate courts, having always proceeded without the intervention of a jury, are not within the application of the constitutional provisions relating to the right of jury trial. . . . [T]he right exists only as to the matters specified by statute." 50 C.J.S. Juries § 13 (1947).

The Constitution of 1868, art. IV, § 17, gave the clerks of the Superior Court general probate jurisdiction and directed that "all issues of fact joined before them shall be transferred to the Superior Courts for trial, and appeals shall lie to the Superior Courts from their judgments in all matters of law." This constitutional provision was incorporated as § 490 in the Code of Civil Procedure of 1868 as compiled by Barringer, Rodman, and Tourgee. With reference to § 490, in *Rowland v. Thompson,* 64 N.C. 714, 716, 718 (1870), the Court said:

"An issue of fact is one made by the pleadings, and no other; it does not include every question of fact which may collaterally come before the Probate Judge in the course of taking an account. *Heilig v. Stokes,* 63 N.C. 612. For example, if in answer

to a complaint against a guardian, the defendant should deny that he had ever been guardian, or should set up a release from his ward after his coming of full age; and the plaintiff should take issue on the denial, or should reply generally to the allegation of a release, issues of fact would be joined such as are intended in the act, and which, as they can only be tried by a jury, must be transferred to the Superior Court for trial.

. . .

"The final decision of the Probate Judge will generally embrace the determination both of matters of fact and of matters of law, and upon an appeal both must be reviewed. The Judge may decide on the questions of fact, as well as of law, without the aid of a jury; but it may be that some of the questions of fact are so important and difficult that he may be unwilling to do so. In such a case we think it would be within his power, as it formerly was in that of a Judge in equity, to make up issues of fact and submit them to a jury."

The Constitutional Convention of 1875 struck out § 17 of art. IV. *In re Estate of Styers,* 202 N.C. 715, 164 S.E. 123; *Brittain v. Mull,* 91 N.C. 498 (1884). Since then the jurisdiction of the clerks of the Superior Courts with reference to the administration of estates of deceased persons has been altogether statutory. *In re Estate of Wright* and *Wright v. Ball,* 200 N.C. 620, 158 S.E. 192. Section 102 of N. C. Code of 1883 — now G.S. 2-1 — abolished the office of probate judge and transferred the duties which the clerks had previously performed as judges of probate to them as clerks of the Superior Court. *Brittain v. Mull, supra.* In the exercise of his probate jurisdiction, however, the clerk is now authorized to sign his orders and judgments "Clerk Superior Court, Ex Officio Judge of Probate." N. C. Sess. Laws 1951, ch. 158.

Although the office of probate judge was abolished, the special probate powers and duties of the clerk continued distinct and separate from their general duties as clerk of the courts to which they belong. *In re Estate of Pitchi,* 231 N.C. 485, 57 S.E. 2d 649; *Moses v. Moses,* 204 N.C. 657, 169 S.E. 273; *In re Estate of Styers, supra; Edwards v. Cobb,* 95 N.C. 4. "[B]ut," as Merriman, J., said in *Brittain v. Mull, supra,* "in respect to their jurisdictional functions, they are in convenient relation to their respective courts." In laying down the rules of procedure in probate proceedings, he said:

"The purpose of the statute (Code of 1883, § 102) seems to be to charge such clerks with such special jurisdictional authority, in order to avoid a multiplicity of officers, and facilitate the decisions of questions of law arising in matters before them,

> by a judge of the superior court, and *the trial of issues of fact so arising,* under the supervision of such judge, and as well to economize in respect to time and costs. . . . and sec. 116 (Code of 1883) prescribes how issues of fact raised in matters so before the clerk shall be tried in term time, and questions of law so decided by the clerk and excepted to, shall be decided by the judge in or out of term time.
>
> "If issues of fact are joined before the clerk in such matters, these and the pleadings upon which they arise must be *transferred* (sec. 116,) to the superior court, that is, to another jurisdiction, in such respect to be there tried. And when the issues are so tried, the court remands the same and the pleadings or papers with the findings of the jury upon them, and the clerk will then proceed with the matter according to law. This provision has reference to issues of fact." *Brittain v. Mull, supra* at 500-01. (Emphasis added.)

The provisions of § 116 of the Code of 1883 are now contained in G.S. 1-174 and G.S. 1-272.

G.S. 1-174 provides: "All issues of fact joined before the clerk shall be transferred to the superior court for trial at the next succeeding term, and in case of such transfer neither party is required to give an undertaking for costs."

G.S. 1-272 provides:

> "Appeals lie to the judge of the superior court having jurisdiction, either in term time or vacation, from judgments of the clerk of the superior court in all matters of law or legal inference. In case of such transfer or appeal neither party need give an undertaking for costs; and the clerk shall transmit, on the transfer or appeal, to the superior court, or to the judge thereof, the pleadings, or other papers, on which the issues of fact or of law arise. An appeal must be taken within ten days after the entry of the order or judgment of the clerk upon due notice in writing to be served on the appellee and a copy of which shall be filed with the clerk of the superior court. But an appeal can only be taken by a party aggrieved, who appeared and moved for, or opposed, the order or judgment appealed from, or who, being entitled to be heard thereon, had no opportunity of being heard, which fact may be shown by affidavit or other proof."

In *Brittain v. Mull, supra,* it was pointed out that Code § 116 applied to the clerk's probate jurisdiction, which is separate and distinct from his general duties as clerk, and that Code § 256 (now G.S. 1-273) applied to the transfer of cases to the civil issue docket

"in the same court and jurisdiction — not to the superior court, another jurisdiction. . . ." *Id.* at 503.

In authorizing the clerk to remove executors and administrators for cause, G.S. 28-32 does not specifically direct the manner in which the facts shall be ascertained, "but it plainly implies that he shall act promptly and summarily," and, pending any litigation in that respect, he has power to make all necessary and interlocutory orders for the protection of the estate. *Edwards v. Cobb, supra.*

In *Murrill v. Sandlin,* 86 N.C. 54 (1882), a proceeding to remove an administrator, the Court said:

> "It is . . . incumbent on the Probate Judge to make the inquiry, and ascertain for himself the facts upon which the legal discretion reposed in him to remove an incompetent or unfaithful officer is to be exercised. The original authority to act is delegated to him alone, and he may require the whole issue made between the parties, or any specific question of fact, to be tried by a jury, under the supervision of the Judge of the Superior Court. When these have been determined by the jury, the Probate Judge, with such supplemental findings of fact by himself as may be necessary, proceeds to decide the question of removal, subject to the right of either party to the contest to have the cause reheard upon appeal." *Id* at 55.

A proceeding to remove an executor or administrator "is neither a civil action nor a special proceeding." *In re Estate of Galloway,* 229 N.C. 547, 551, 50 S.E. 2d 563, 566; *In re Estate of Styers, supra; Edwards v. Cobb, supra.* See *In re Simmons,* 266 N.C. 702, 147 S.E. 2d 231. Therefore, G.S. 1-276, which provides that "[w]henever a civil action or special proceeding begun before the clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction. . . ." has no application to probate matters.

> "[The purpose of a proceeding to remove an executor or administrator] is not to litigate the alleged rights and liabilities of adverse parties . . . but it is to require one who is charged by the law with special duties and trusts, for whosoever may be interested, to show cause why . . . he shall not be removed from his place or office, because of some disqualification, malfeasance, misfeasance or nonfeasance, that disqualifies or unfits him in that respect, and renders it necessary that he shall be promptly removed from it. . . .
>
> "*Ordinarily, in such matters, issues of fact do not arise* — only questions of fact are presented, and the Clerk hears the matter before him summarily — he finds the facts from affidavits

> and competent documentary evidence, and founds his orders and judgments on the same. He may, in his discretion, in some cases, direct issues of fact to be tried by a jury, and transfer them to the Superior Court to be tried, as directed by The Code, § 116, but regularly he will not. No doubt, in some cases, he ought to do so. And also, by virtue of this section, the executor or administrator, or any person interested, may appeal from the findings of fact and the judgment of the Clerk, to the Judge having jurisdiction in term time, or in vacation, *and the Judge may review the findings of fact,* if need be, and decide such questions of law as may be raised, affirm, reverse or modify the order or judgment of the Clerk, and remand the matter to him for such further action as ought to be taken. From the judgment of the Judge, an appeal would lie to this Court, and errors of law only should be assigned. The Judge in reviewing the findings of fact, might, in his discretion, direct proper issues of fact to be tried by a jury, for his better information, and in some cases it may be he ought to do so." *Edwards v. Cobb, supra* at 9-10. (Emphasis added.)

The statement that issues of fact are for the jury and questions of fact for the judge is a familiar one, but it is equivalent to defining a crime by its punishment. Whether a dispute presents an issue or a question of fact is itself a circuitous question. See McIntosh, N. C. Practice and Procedure §§ 23, 508 (1929); 31 Am. Jur. Jury § 22 (1958).

Despite the statements in *Brittain v. Mull, supra,* with reference to the trial of issues of fact in probate matters, it seems that in actual practice and in the contemplation of the courts (as indicated in *Edwards v. Cobb, supra*) issues of fact did not arise. If they did, they were nevertheless decided by the clerk, or by the judge on appeal.

In *In re Battle,* 158 N.C. 388, 74 S.E. 23, the widow of the deceased petitioned the clerk to remove his administrator, who claimed that she had renounced in his favor. The clerk, upon a finding that the widow had not renounced, entered judgment revoking his letters. On appeal, the judge found that the widow had signed a renunciation but that the manner of its procurement proved the administrator unfit to administer the estate. Upon this finding, he affirmed the clerk's judgment. The administrator appealed upon the ground that the pleadings and affidavits before the clerk raised an *issue* of fact and that the proceeding should have been transferred to the civil issue docket for trial by jury. In affirming the judgment of the lower court, Hoke, J. (later C.J.), speaking for the Court, said:

> "It is well understood that our clerks of the Superior Court, on petition filed and notice duly served, in the exercise of powers conferred upon them in matters of probate, may remove an executor or administrator for good cause shown. They make such orders in the exercise of a legal discretion, which may be reviewed upon appeal. An application of this character is not regarded as being in the nature of an adversary proceeding, but a power conferred with a view of protecting the estate, and because prompt action may often be necessary to this end, a clerk is not required, on issues raised, to transfer the cause to Superior Court for a jury trial, but may and ordinarily should take definite action in the premises. The practice in such cases is very well stated in *Edwards v. Cobb,* 95 N. C., pp. 4-9." *Id.* at 390, 74 S.E. at 24.

Mills v. McDaniel, 161 N.C. 112, 76 S.E. 551, was a proceeding to establish the proper probate of a deed, including the privy examination of a *feme covert.* The clerk heard the matter and found that no proper probate had ever been had. The judge reversed the clerk's judgment upon a finding that the deed had been correctly and properly proven. Respondent appealed, contending that the judge had no power to review the finding of the clerk made in his probate jurisdiction. In rejecting this argument, the Court said:

> "Under the law as it now exists with us, these matters of probate are chiefly referred to the clerks of the Superior Court and the judgments and rulings of these officers are on appeal very generally subject to the supervision and control of the court, either in chambers or in term. If determinative issues arise on the pleadings in a procedure where the adversary rights of litigants are ordinarily presented, such issues must be 'transferred for trial to the next succeeding term of the Superior Court' (Revisal, secs. 78, 114, 529, and 717), and if there be issues of law or material questions of fact decided, these may be reviewed by the judge at term or in chambers on appeal properly taken, and in passing upon these questions of fact the court may act on the evidence already received, or if this is not satisfactory, it may ordinarily require the production of other evidence as an aid to the proper disposition of the questions presented. With the view of promoting right decisions very large latitude is allowed in the method of procedure and the extent of the relief which may be afforded by the appellate court, a position supported by authoritative decisions and which is in accord with the policy and express provisions of our statutes on the subject." *Id.* at 114-15, 76 S.E. at 551.

In *In re Meadows,* 185 N.C. 99, 116 S.E. 257, a widow, who had qualified as administratrix of her husband's estate, petitioned the clerk to recall her letters so that she might dissent from his will. She alleged that she was "mentally disqualified from attending to the business in hand" at the time she applied for letters. The clerk, being of the opinion that her allegations of fact were not sustained, denied her petition. Upon appeal to the judge, a jury was impaneled as requested by petitioner, but pending the trial of the issue, the judge, without considering the evidence offered, held that petitioner was estopped to renounce her office. This Court reversed and directed the judge to review the action of the clerk and decide the issue of petitioner's mental capacity at the time of her qualification as executor. The Court noted that in such matters "a jury trial is not allowed as of right, but the matters in dispute are properly dealt with as questions of fact by the court before which the action is pending, or to which it may be carried by appeal." *Id.* at 101, 116 S.E. at 258. See *In re Johnson,* 182 N.C. 522, 109 S.E. 373.

In re Martin, 185 N.C. 472, 117 S.E. 561, involved a petition to revoke letters of administration upon the allegation that deceased was not a resident of the county at the time of his death. The clerk denied the petition and, upon appeal, the judge found the facts and affirmed the clerk. Stacy, J. (later C.J.), speaking for the Court, said:

> "The method here pursued in hearing and determining the motion of petitioners finds approval in the following cases: *In re Meadow's Will, ante,* 99; *In re Johnson,* 182 N.C. 522; *In re Battle,* 158 N.C. 388, and cases there cited.
>
> "The findings of fact made by the judge of the Superior Court, found as they were upon competent evidence, are conclusive on us, and we must base our judgment upon his findings, which amply sustain his order." *Id.* at 475, 117 S.E. at 562; *accord, In re Estate of Loflin,* 224 N.C. 230, 29 S.E. 2d 692 (petition to revoke letters because another had the prior right to administer); *In re Estate of Finlayson,* 206 N.C. 362, 173 S.E. 902 (domicile of testator disputed); *Mills v. McDaniel,* 155 N.C. 249, 71 S.E. 339 (petition to correct defective probate). See *In re Bane,* 247 N.C. 562, 101 S.E. 2d 369.

It is sometimes said that, upon an appeal from an order of the clerk made in the performance of his duties as judge of probate, the jurisdiction of the judge of the Superior Court is derivative. *In re Estate of Johnson,* 232 N.C. 59, 59 S.E. 2d 223; *In re Will of Hine,* 228 N.C. 405, 45 S.E. 2d 526. We construe such derivative jurisdiction to mean, *inter alia* (1) that the Clerk of the Superior Court

has the sole power *in the first instance* to determine whether a decedent died testate or intestate, and, if he died testate, whether the paper writing offered for probate is his will, *Brissie v. Craig,* 232 N.C. 701, 62 S.E. 2d 330; (2) that "proceedings to repeal letters of administration" must be commenced before the clerk who issued them in the first instance, *Ledbetter v. Lofton,* 5 N.C. 224; *Pearce v. Lovinier,* 71 N.C. 248; *Murrill v. Sandlin, supra;* and (3) that the judge of the Superior Court has no jurisdiction to appoint or remove an administrator or a guardian, *In re Estate of Styers, supra; Moses v. Moses, supra.* In other words, jurisdiction in probate matters cannot be exercised by the judge of the Superior Court except upon appeal. *In re Will of Gulley,* 186 N.C. 78, 118 S.E. 839.

When the Superior Court, on appeal, hears a matter committed to the exclusive original jurisdiction of a justice of the peace, *Howard v. Insurance Co.,* 125 N.C. 49, 34 S.E. 199, or upon a warrant issued by an inferior court having jurisdiction of the criminal offense charged, *State v. Evans,* 262 N.C. 492, 137 S.E. 2d 811, its jurisdiction is also derivative. Nevertheless, it hears the matter *de novo.* To say that the Superior Court has jurisdiction to hear a probate matter only upon an appeal from a final judgment entered below does not mean that the judge can review the record only to ascertain whether there have been errors of law. He also reviews any findings of fact which the appellant has properly challenged by specific exceptions.

Until the decision in *In re Sams,* 236 N.C. 228, 72 S.E. 2d 421 (1952), the procedure for determining disputed facts appears to have been as laid down by Merriman, J., in *Edwards v. Cobb, supra,* and by Hoke, J. (later C.J.), in *Mills v. McDaniel, supra,* and in *In re Battle, supra.* The facts were customarily found by the clerk and, upon appeal, were reviewed by the judge, who either affirmed, reversed, or modified them. He could act on the evidence before the clerk; he could consider — and require — other evidence. He could, in his discretion, submit issues of fact to the jury for his "better information," but if this procedure was followed in probate matters, the cases do not reveal it.

In re Sams, supra, was a proceeding to revoke the letters of an administrator upon allegations that he had become a nonresident and had interests antagonistic to the estate. The clerk revoked the letters. The administrator excepted to the judgment and appealed to the judge, who, after a *de novo* hearing, found facts and entered judgment "approving and affirming" the order of the clerk. The administrator then appealed to this Court, which said that his general exception to the order of the clerk carried to the judge for review

only the question whether the facts found by the clerk supported his order, and, in turn, the general exception to the judgment brought up for review the single question whether the facts found supported the judgment. Both the order and the judgment were supported by the facts found, and the judgment was affirmed. By way of dicta, the Court "noted" that the judge heard the appeal from the clerk *de novo* "rather than in his appellate capacity by review of the record as approved by numerous decisions of this Court. . . . However, there was no objection or exception to the *de novo* hearing . . . and . . . no prejudicial error has been made to appear." *Id.* at 230, 72 S.E. 2d at 422.

In support of its intimation that a *de novo* hearing on the questions of fact was not proper, the Court cited the following cases:

> "*In re Estate of Johnson,* 232 N.C. 59, 64, 59 S.E. 2d 223; *In re Will of Hine,* 228 N.C. 405, 411, 45 S.E. 2d 526; *In re Estate of Styers,* 202 N.C. 715, 164 S.E. 123; *In re Estate of Wright,* 200 N.C. 620, 158 S.E. 192; *In re Will of Gulley,* 186 N.C. 78, 118 S.E. 839; *Edwards v. Cobb,* 95 N.C. 4. See also: McIntosh, N. C. P. & P., Sections 65, 72, 696 and 701; *Rowland v. Thompson,* 64 N.C. 714; *In re Estate of Edwards,* 234 N.C. 202, 66 S.E. 2d 675; *Mills v. McDaniel,* 161 N.C. 112, 76 S.E. 551." *Id.* at 230, 72 S.E. 2d at 422.

These cases do not sustain the conclusion that, upon appeal, exceptions to the clerk's findings of fact must be overruled if the record contains any competent evidence to support them.

In *In re Simmons, supra,* the clerk removed a guardian upon findings that the guardian's interests were adverse to those of his ward and that the guardian had not maintained his ward in a suitable manner. Upon appeal, respondent demurred to the petition and moved that the court hear the cause *de novo* and take additional evidence or remand the cause to the clerk to hear additional evidence and to find additional facts. The judge, relying upon *In re Sams, supra,* ruled that his jurisdiction was derivative only and that he would hear the appeal by reviewing the record as produced by the clerk. After reviewing the record, he found that the facts supported the judgment and affirmed the clerk. Upon appeal, this Court affirmed and repeated the statement in *Sams* that the judge is confined to correcting errors of law and that the hearing is on the record and not *de novo*. This statement, in its application to the records in both *Sams* and *Simmons,* is correct because in both cases exceptions were not taken to specific findings of fact. Where no exexceptions are taken to specific findings of fact, a general exception to the judgment presents only the question whether the facts found

support the conclusions of law. 1 Strong, N. C. Index, Appeal and Error § 21 (1957). Where such exceptions are properly taken to specific findings of fact, however, it remains the rule that the judge will review those findings, and either affirm, reverse, or modify them. If he deems it advisable, he may submit the issue to a jury. Obviously, he could not follow this latter course without hearing evidence.

"The office of executor, administrator, or collector is valuable, and consequently, a person is not to be deprived of it without due process of law." 2 Mordecai's Law Lectures 1309 (1916). If respondent were the widow of Isham Lowther, she would have an absolute legal right to retain the letters of administration which have been issued to her absent default or misconduct in office. G.S. 28-6(1). *In re Estate of Edwards,* 234 N.C. 202, 66 S.E. 2d 675. Upon conflicting evidence, however, the clerk found that she was never married to Lowther. Had she excepted to this finding she would have been entitled to have the judge review it. It was a crucial finding, involving a substantial right. To hold an administrator or executor is bound by the clerk's findings if there is any evidence, however slight, would, in effect deny him the right of appeal. This is not the policy of the law. Respondent, however, like the appellants in *Sams* and *Simmons,* excepted only to the entry of the clerk's order. Her appeal, therefore, carried to the judge the single question whether the clerk's finding that she had never married Isham Lowther sustained his order revoking her letters of administration on his estate. Obviously it did. In this state of the record, therefore, the judge was without authority to vacate the clerk's judgment and to order a jury trial on that issue. Had the question been properly before him, he could have, in his discretion, submitted the issue to the jury.

The judgment must be reversed and the clerk's order reinstated. The clerk's finding of fact that respondent is not the widow of Isham Lowther is, however, not *res judicata* in any other proceeding between the parties which respondent may be entitled to pursue. *Jones v. Palmer,* 215 N.C. 696, 2 S.E. 2d 850. See 1 Lee, Family Law §§ 10, 11.

Reversed.

W. B. HARRILL v. TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM, A CORPORATION

AND

W. E. BIRD v. TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM, A CORPORATION.

(Filed 20 September, 1967.)

1. **Retirement Systems § 1; Constitutional Law § 19—**

Allowances to which a member of the Teachers' and State Employees' Retirement System is entitled upon retirement constitute compensation for public services previously rendered and do not violate Article I, § 7, of the State Constitution.

2. **Retirement Systems § 5; *Administrative* Law § 3— Retirement benefits may not be suspended on the basis of remuneration received in part-time employment.**

Where a teacher has become a beneficiary of the Retirement System upon retirement by reason of age and service, the accrued right to retirement benefits may not be suspended under a resolution of the Board of Trustees stipulating that payments for any calendar year should be suspended after a beneficiary had earned the amount of $1,500 in part-time employment, even though no deductions or payments to the fund were made on the basis of the remuneration for such part-time employment, since G.S. 135-18 (repealing G.S. 135-15) does not authorize the Board of Trustees to pass such resolution either expressly or by implication, and a person engaged in such part-time employment is not a teacher or employee as defined in G.S. 135-1.

APPEAL by defendant from *Falls, J.*, May 15, 1967 Mixed Session of JACKSON.

These are actions by W. E. Bird, former President of Western Carolina College (now University and hereafter called "Western"), an educational institution supported by and under the control of the State of North Carolina, and W. B. Harrill, former teacher and Acting Dean of Western, against the Teachers' and State Employees' Retirement System (referred to hereafter as the "System"), to recover the monthly retirement allowance, for each, withheld by the System for the month of December, 1966, and for declaratory relief with respect to retirement benefits under Chapter 135 of the General Statutes.

The causes were consolidated for trial, by consent. Jury trial was expressly waived, and the causes were determined upon an agreed statement of facts and the pleadings.

Bird, a resident of Jackson County, was born on July 21, 1890. He was employed initially by Western in 1920 and was continuously sc employed until July 31, 1957. When the System was established as of July 1, 1941, pursuant to Chapter 25, Public Laws of 1941, he became a member and retained his membership until July 31, 1957, paying a portion of his earnings, during all this time, to the System

as required by statute. By reason of age and service, he became eligible to retire as a member in good standing and he retired on July 31, 1957, elected to receive a retirement allowance under one of the elections open to him and applied for and received a retirement benefit from the System of $236.80 per month. Thus he became a "beneficiary" under the provisions of Chapter 135 of the General Statutes on July 31, 1957.

The monthly retirement benefit was paid to him monthly up to and including the month of November, 1966. But his retirement allowance for the month of December, 1966, was withheld by the System. Bird demanded the payment of this withheld benefit but the System continued to withhold it, and further, the System demanded that Bird pay to the System the sum of $6,156.80, alleging that Bird owed this amount to it.

The System asserted its actions were authorized under G.S. 135-18 and a Resolution passed by the System on October 13, 1965, to become effective January 1, 1966. It further alleged that Bird was not entitled to monthly retirement benefits for the last three months of 1963, the last eight months of 1964, the last eight months of 1965 and the last eight months of 1966 since in each such year his other earnings had exceeded the amounts allowed by the System.

Since July 31, 1957, Bird has not been under contract to Western. After July 31, 1957, at the request of the administrative officers of Western, he performed certain "emergency, part-time, temporary" teaching at Western for which he was paid on the basis of a fee paid for each course taught.

For this he received $1,856.68 by September 30, 1963; $1,707.00 by April 30, 1964; $1,706.66 by April 30, 1965; and $1,706.66 by April 30, 1966.

No part of this remuneration to Bird was contributed to the System; neither the State nor any of its agencies contributed any money to the System for the benefit of Bird for this period of time. Bird did not accrue any further longevity nor any further or increased retirement benefits from the System for any service during this time.

Bird, replying to the System, asserted that the acts of the System in withholding his monthly retirement allowance was arbitrary and capricious, wrongful and illegal and without authority in law. He further asserted that such acts were not pursuant to G.S. 135-18, that the Resolution of October 13, 1965, if adopted, was not pursuant to statute, and that the same was wrongful and illegal, beyond the authority of the System and was null and void.

This Resolution, passed by the Board of Trustees of the System on October 13, 1965, to be effective January 1, 1966, provided, *in-*

ter alia, that if a retired teacher were re-employed by a State college or agency in part-time employment, his retirement allowance would "be suspended for the balance of the calendar year after earnings in such" employment equalled $1,500.00.

The facts with respect to W. B. Harrill are similar. He was born on September 15, 1899, and he is also a citizen of Jackson County. When the System was created, he became a member and remained so until June 30, 1965. He had been employed at Western in 1947, and was, among other things, Acting Dean. He, too, from the beginning, paid his statutory contributions to the System. By reason of age and service he became eligible to retire as a member in good standing and retired from Western on June 30, 1965, elected to receive a retirement allowance under one of the elections open to him and applied for and received a retirement benefit from the System of $415.82 per month. Thus, he became a "beneficiary" under the provisions of Chapter 135 of the General Statutes on June 30, 1965. He, too, received his monthly retirement benefit up to and including November, 1966. But his retirement allowance for the month of December, 1966, was withheld by the System. Harrill also made demand, as had Bird, but the System continued to withhold and made demand, as it did on Bird, for $2,494.92 on the same grounds as in the Bird case, the amount applying to the last seven payments in 1966.

Since June 30, 1965, Harrill has not been under contract to Western. After June 30, 1965, at the request of the administrative officers of Western, he performed certain "emergency, part-time, temporary" teaching at Western for which he was paid on the basis of a fee paid for each course taught. For his services from January 1, 1966, through May 30, 1966, he received $1,706.69.

No part of this remuneration to Harrill was contributed to the System; neither the State nor any of its agencies contributed any money to the System for the benefit of Harrill for this period of time. Harrill did not accrue any further longevity nor any further or increased retirement benefits from the System for any service during this time.

Harrill raised the same issues as did Bird.

The court below, after finding (undisputed) facts as set out above, concluded that each plaintiff became a "beneficiary" under the provisions of Chapter 135 upon their respective retirement dates, and that each thereupon ceased to be a "member" of the System within the statutory meaning of the term. No exceptions were taken to these conclusions. The court then concluded that neither plaintiff ever again acted or became or was a "teacher" within the meaning of the statute after the respective retirement dates; that each,

upon retirement, had a vested interest in his retirement allowance; that each was entitled to recover his December 1966 allowance; that neither was indebted to the System; and that the System had no legal authority to promulgate the Resolution of October 13, 1965, nor to make demand on plaintiffs for recovery.

No resolution other than the said Resolution adopted October 13, 1965, to be effective January 1, 1966, was pleaded, offered in evidence or exhibited to the court.

The court entered separate judgments. Each adjudged the plaintiff was entitled to recover the amount of his retirement allowance for December, 1966, with interest, and that defendant was not entitled to recover any amount on account of retirement allowances previously paid to the plaintiff, and that defendant pay the costs. Defendant excepted and appealed.

Van Winkle, Walton, Buck & Wall and Herbert L. Hyde for plaintiff appellees.

Attorney General Bruton and Mrs. Christine Y. Denson, Staff Attorney, for defendant appellant.

BOBBITT, J. In *Bridges v. Charlotte,* 221 N.C. 472, 20 S.E. 2d 825, the constitutionality of Chapter 25, Public Laws of 1941, as amended by Chapter 143, Public Laws of 1941, was upheld. Although not the basis of decision, the opinion of Seawell, J., for the Court, strongly intimated, and the concurring opinion of Barnhill, J. (later C.J.), in which Winborne, J. (later C.J.), concurred, expressly stated: "The Retirement payment provided by this Act constitutes delayed compensation in consideration of services rendered. It is compensation for public services. Its purpose is to induce experienced and competent teachers to remain in service and thus promote the efficiency and effectiveness of the educational program." In *Brumley v. Baxter,* 225 N.C. 691, 697, 36 S.E. 2d 281, 285-286, 162 A.L.R. 930, 936, the opinion of Devin, J. (later C.J.), contains this statement: "In *Bridges v. Charlotte,* 221 N.C. 472, 20 S.E. 2d 825, it was declared that payments from the retirement fund to teachers after they had ceased to serve were not offensive to Art. I, sec. 7, of the Constitution, in that they were regarded as in the nature of delayed compensation for public services rendered, or delayed payments of salary." See also, *Motley v. Board of Barber Examiners,* 228 N.C. 337, 344, 45 S.E. 2d 550, 554, and *Bryant v. Woodlief,* 252 N.C. 488, 498, 114 S.E. 2d 241, 248.

It appears from the cases cited that this Court has accepted as established that the allowances to which a member of the System is

entitled upon retirement constitute compensation for public services previously rendered and therefore do not violate Article I, Section 7, of the Constitution, providing "(n)o person or set of persons are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."

Attention is called to the statutory provisions set out below.

Chapter 195, Session Laws of 1943, authorized the employment "during the continuation of the present World War, and for six months after its termination, or at the termination of the school term in which such teachers shall be engaged," of persons who had retired on account of age. This statute provided expressly that, during the period of such re-employment, "all service retirement benefits to which such person is entitled" would be suspended. The provisions of this statute were codified as G.S. 135-15 in the original (1943) edition of the General Statutes.

Two sections of Chapter 1056, Session Laws of 1949, are pertinent. Section 8 thereof, which is now codified as G.S. 135-18, provides: "The board of trustees of the Teachers' and State Employees' Retirement System may establish and promulgate rules and regulations governing the re-employment of retired teachers and employees." Section 9 thereof provides: "Section 135-15 of the General Statutes is hereby repealed."

Defendant bases its position on the Resolution adopted by its Board of Trustees on October 13, 1965, effective January 1, 1966, which *Resolution* provides, (1) with reference to full-time employment, that "Retirement allowances will be suspended for each full calendar month of employment," and (2) with reference to *part-time* employment, that "Retirement allowances will be suspended for the balance of the calendar year after earnings in such part-time employment equal $1500."

Each plaintiff retired after having attained the age of sixty years, Bird on July 31, 1957, and Harrill on June 30, 1965. Each retired subsequent to the repeal of G.S. 135-15 of the original (1943) edition of the General Statutes, and subsequent to the enactment of Section 8, Chapter 1056, Session Laws of 1949, now codified as G.S. 135-18. Each retired prior to the adoption of said *Resolution* by said Board of Trustees on October 13, 1965.

Obviously, the said Resolution did not affect retirement allowances paid to plaintiffs during years prior to 1966, the subject of defendant's cross claims. What effect, if any, this Resolution had on plaintiffs' rights with reference to their accrued retirement allowances for 1966 is the question for decision.

When plaintiffs retired, and since the date of their retirement, no *statutory* provision has provided, either expressly or by implica-

tion, that their acceptance of public employment would suspend or otherwise impair their existing right to retirement allowances. Unless provided or authorized by statute, we are of opinion, and so decide, that plaintiffs' acceptance of part-time re-employment did not suspend or otherwise affect their retirement allowances. See Annotation, "Effect of re-entry into public employment on retirement pension previously granted to public officer or employee." 162 A.L.R. 1469 *et seq.* Decisions cited therein (p. 1470) hold that "under a statute not forbidding, either expressly or by implication, the reentry into public employment of a public officer or employee retired with a pension, . . . a subsequent re-employment does not operate as a revocation or suspension of the pension granted." Also, see *Maybury v. Coyne*, 312 S.W. 2d 455 (Ky.).

We find it unnecessary to determine on this record to what extent, if any, plaintiffs' rights to their retirement allowances became vested so that the General Assembly could not by legislation constitutionally impair such rights. See Annotation, "Vested right of pensioner to pension," 52 A.L.R. 2d 437. See also *Dillon v. Wentz*, 227 N.C. 117, 41 S.E. 2d 202.

Decision on this appeal turns on whether the statutory provision enacted in 1949 and now codified as G.S. 135-18 conferred upon said Board of Trustees authority to establish and promulgate a rule or regulation providing that accrued retirement allowances should be suspended under prescribed conditions if retired teachers or employees accept part-time re-employment. In our opinion, the general language of this statutory provision did not confer upon said Board of Trustees, expressly or by implication, authority to adopt the resolution on which defendant relies. G.S. 135-18 contains no reference to retirement allowances. The subject to which the contemplated rules and regulations will relate is unclear. Are they to relate to the readmission into the System of persons who retired prior to attaining the age of sixty years as provided in G.S. 135-3 (7)d, referred to below? Are they to relate to the prohibition of or limitations upon the re-employment of retired persons?

G.S. 135-18 refers expressly to "the re-employment of retired teachers and employees." Teachers and employees are defined in G.S. 135-1, as amended by Chapter 750, Session Laws of 1965, as "full-time" employees. G.S. 135-18 contains no reference to "emergency, part-time, temporary teaching," the type of part-time re-employment in which plaintiffs were engaged.

Plaintiffs' rights to retirement allowances had accrued and become payable in accordance with statutory provisions. No express authority to prescribe conditions for the suspension of such rights was conferred upon the Board of Trustees by G.S. 135-18; and, in

our opinion, authority *to suspend accrued statutory rights* may not be reasonably implied from the general terms of G.S. 135-18.

In our opinion, and we so hold, the authority, if any, conferred by G.S. 135-18 is insufficient to support a resolution which, under the conditions set forth therein, purports to suspend plaintiffs' rights to their accrued retirement allowances on account of their recall for "emergency, part-time, temporary teaching."

It is noteworthy that the statutory provisions now comprising G.S. 135-3(7) are based on Chapter 561, Session Laws of 1951. Subsection d thereof, relating to retirement prior to the attainment of the age of sixty years and subsequent employment and membership in the System, provides, *inter alia,* "(u)pon his subsequent retirement, he shall be entitled to an allowance computed, subject to the provisions of chapter 135, in accordance with such rules and regulations as the board of trustees may establish and promulgate as provided in § 135-15." As set forth above, the statute codified as G.S. 135-15 was repealed in 1949. Moreover, it contained no provision for the establishment and promulgation by the Board of Trustees of rules and regulations. While not determinative, the confusion in the statutory provisions lends support to our view that the terms of the statute now codified as G.S. 135-18 are too vague and general to be considered authority for adoption of a resolution suspending plaintiffs' rights in respect of their accrued retirement allowances.

In view of the foregoing, it is unnecessary to consider whether G.S. 135-18, if construed as conferring authority on the Board of Trustees to suspend plaintiffs' accrued statutory rights, would be invalid as violative of the constitutional principle that the General Assembly cannot delegate legislative power and, where authority is conferred on a commission or board, "the legislative body must declare the policy of the law, fix legal principles which are to control in given cases, and provide adequate standards for the guidance of the administrative body or officer empowered to execute the law." *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 61, 74 S.E. 2d 310, 316; 2 Strong, N.C. Index 2d, Constitutional Law § 7.

For the reasons stated, the judgments of the court below are affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. OTTO WITHERS, JR.

(Filed 20 September, 1967.)

1. Criminal Law § 111—

It is not required that the court in its charge inform the jury as to who had made or brought the charges against defendant, it being sufficient that the indictment against defendant had been duly returned by the grand jury.

2. Criminal Law § 112—

The charge to the effect that reasonable doubt was not an imaginary or fanciful doubt but was a sane, rational doubt arising out of the evidence or lack of it, so that the evidence fails to satisfy or convince the jurors of defendant's guilt, *held* not prejudicial, it not being required that the court use any set formula in defining reasonable doubt.

3. Homicide § 22—

The court's definition of murder in the first degree, second degree, and manslaughter *held* without error in this case.

4. Criminal Law § 168—

A *lapsus linguæ* in the charge, immediately corrected by the court so that the jury could not have been misled, will not be held for prejudicial error.

5. Homicide § 27—

The court's definition of homicide by misadventure *held* not prejudicial to defendant in this case.

6. Criminal Law § 166—

Exceptions not brought forward in the brief and supported by reason or argument are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by defendant from *McLaughlin, J.*, 5 December 1966, Conflict Criminal "C" Term of MECKLENBURG Superior Court.

The defendant was charged in a bill of indictment with the first degree murder of his sister-in-law, Rachael Simpson, on 5 August 1966. He was represented by court-appointed counsel who entered a plea of not guilty. The jury returned a verdict of guilty of murder in the first degree with a recommendation of life imprisonment, and from the judgment the defendant appealed.

The State's evidence tended to show that the defendant and his wife, Annie Bell Withers, were estranged and that she had returned to the home of her mother where the deceased Rachael Simpson also lived. Another sister, Helen Simpson, said that the defendant came to the house sometime before lunch and that when she opened the front door in response to a little boy's knock that Otto jumped from behind the bushes, grabbed her, pulled out his pistol and asked her where his wife was, saying "I came here to kill and you are go-

ing to stay here until the rest of your family comes home, and I'm going to kill all of you." He then forced Helen into the house, locked the doors and windows and again said that he was going to stay there until everybody came home and was going to kill all of them. He kept Helen a captive all day long. Meanwhile, he stabbed her and raped her at the point of the gun. During the afternoon, the defendant phoned his brother to tell him to bring him some bullets "because I don't have enough bullets to kill everybody." Later, his brother, Jerry, came to the house, and Otto sent him out to get "$3.00 worth of bullets." Jerry returned with a little brown bag and gave it to Otto, who put it in his pocket. He took something out of it and put it in the gun. Rachael was the first in the family to get home, and later other members returned. When they came to the door Otto pointed the pistol at them and told them if they didn't come in he would kill them. Upon coming into the house he said "I'm going to kill all of you," and he snapped the pistol twice but it didn't go off, and he dropped something on the floor. When he went to get it, the others started running, leaving Rachael sitting in a chair by the window. As she went out the door, Helen heard three shots. The police were called, and upon their arrival found Rachael sitting in a chair, dead.

In addition, the State offered the testimony of Carolyn Blocker, cousin of the deceased, Evangeline Simpson, the mother of the deceased, Beatrice Carter, aunt of the deceased, and Alvin Simpson, a six-year old boy and nephew of the deceased. Their testimony in summary was that upon arriving at the house the defendant met them at the door with the pistol in his hand, told them that he had raped and stabbed Helen, that he was going to kill them all, that Helen was bleeding and they saw her bloody clothes. A few minutes later, he dropped something on the floor; and as he was reaching to get it, all of them left the house except Rachael and Alvin. They heard three shots fired and then called the police. Alvin testified that after the others ran out of the house. Otto "Went to the window and looked out the window to see was the police coming. After that he shot and ran. He shot Rachael — that's all he shot."

W. J. Edwards of the Charlotte Police Department testified that he had studied different phases of police investigation — criminology, photographing, and fingerprinting. When he arrived at the scene Rachael was "still in the chair" and was dead. He found three spent 9 millimeter cartridges, casings, near the place where Rachael was found and what appeared to be a bullet hole ripped in the inside facing of the front door. On top of the washing machine was

a mass of stained clothing. All of the above articles were offered in evidence.

The coroner testified that he saw Rachael's body at her home and later at the funeral home, that he examined the body at both places and found that she was dead. There were two bullet wounds in her right arm, one between the seventh and eighth rib on the right side and one between the second and third rib "slightly to the left of the sternum, that is the breast bone." He gave it as his opinion that she died from multiple gunshot wounds, particularly in the chest, from hemorrhaging.

The defendant testified that his wife had had him arrested, and he had gone to her mother's home to see if he could get her to drop the charges so that he would not lose his job or his house. That his wife and his mother-in-law had both previously threatened him and that he took the gun for his protection. When he arrived at the house he saw Helen, whom he thought at the time to be his wife, kissing a man, and that he hid in some bushes until the man left. He then went into the house and told Helen he wanted to stay there until his wife returned. He denied making any threats or raping Helen. He said Helen tried to stab him in the back with a little knife, that he twisted her arm behind her back, that they tussled and fell back on the floor, and he then saw blood on her back and told her she had been cut. He took a wet towel and tried to wipe the wound out until it stopped bleeding and put mercurochrome, bandaids and adhesive tape over the nick. He then wet a rag and wiped up all of the blood off the floor. He denied that he ever drew a revolver on her but said he pulled out his unloaded revolver when Evangeline and Beatrice came to the house. He later dropped the clip on the floor, at which time Helen and Evangeline ran from the house. He put the clip back in his gun and then Rachael jumped up and slapped him and snatched the pistol. They were scuffling with it and it fired twice. Rachael fell back "and she was hollering. I don't know what she was hollering. I don't know where she was shot. I don't know what happened — the only thing I know is we were tussling with the gun and the gun went off." He got excited, ran to the door, tried to open it, and the gun went off again. He ran out of the house, laid the pistol in some shrubbery, hired a car to take him to Salisbury and then went by bus to Baltimore where he stayed about three weeks or a month. Upon his return home, he was arrested. He denied calling his brother Jerry to get more bullets for him, and Jerry testified that he was not called and that he did not go to the house that afternoon as Helen had claimed.

When the case on appeal was being prepared, the court reporter

was ill and unable to transcribe his notes. Someone else attempted to transcribe them and his version of the charge was included in the case on appeal. Not being familiar with the reporter's symbols and abbreviations, several errors were made in transcribing the notes. The attorney for the defendant and the solicitor agreed that upon the recovery of the court reporter he should transcribe his notes correctly, which was done, and the correct version was filed as an addendum to the case on appeal by proper agreement and stipulation. Later, a second addendum was filed for the defendant, but it appeared irrelevant in view of the corrected charge, and it has been withdrawn upon motion of the Attorney General, to which the defendant has consented.

No exceptions were taken to the evidence. Exceptions were taken to the corrected charge which are considered in the opinion.

W. B. Nivens, Attorney for the defendant appellant.

T. W. Bruton, Attorney General, and James F. Bullock, Deputy Attorney General, for the State.

PLESS, J. The defendant complains that the judge did not inform the jury "who, what jury, and under what circumstances these charges were made." The judge began his charge with the statement, "(T)he State of North Carolina charges in this bill of indictment," etc. The defendant contends that the jury was left in a state of doubt as to who made or brought these charges against this defendant. Having been indicted by a grand jury, this was irrelevant, and the contention is without merit.

The defendant further claims that the court committed prejudicial error in the following statements:

> "Now, a reasonable doubt is not an imaginary or fanciful doubt, members of the jury, but a sane, rational doubt that arises out of the evidence or lack of evidence, or some deficiency in it." DEFENDANT'S EXCEPTION No. 7 (R. p. 78) (Addendum, p. 4).
>
> "A reasonable doubt is a term — as that term is employed in the administration of the criminal law is an honest, substantial misgiving generated by some insufficiency of the proof, an insufficiency which fails to convince your mind and judgment, and satisfy your reasoning of the defendant's guilt." DEFENDANT'S EXCEPTION No. 8 (R. p. 78) (Addendum, p. 5).

These statements are in substantial accord with the definitions approved by the court. *S. v. Hammonds*, 241 N.C. 226, 85 S.E. 2d 133; *State v. Steele,* 190 N.C. 506, 130 S.E. 308. In *Hammonds,*

supra, the court said, "The law does not require any set formula in defining reasonable doubt"; and we can see no prejudice to the defendant in the above definitions.

Another exception is to the following excerpts from the charge:

> "It will be obvious to you that the distinction between murder in the first degree and murder in the second degree is the presence of premeditation and deliberation in murder in the first degree and the absence of premeditation and deliberation in murder in the second degree . . . in the second degree, members of the jury. In other words, to convict of murder in the first degree, it will be essential that the State should satisfy you beyond a reasonable doubt that the defendant killed the deceased with malice, and with premeditation and deliberation." DEFENDANT'S EXCEPTION No. 14 (R. p. 81) (Addendum, p. 7).
>
> "So you will observe that the distinction between murder in the second degree and manslaughter is the presence of malice in murder in the second degree, and its absence in manslaughter." DEFENDANT'S EXCEPTION No. 15 (R. p. 81) (Addendum, p. 7).

There the court was explaining the differences between murder in the first degree and murder in the second degree, and manslaughter and murder in the second degree. The instructions are entirely correct as supported by our decisions in many cases. In *S. v. Downey,* 253 N.C. 348, 117 S.E. 2d 39, Winborne, C.J., succinctly summarized the degrees of murder:

> "(1) Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. (2) Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. And (3) manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation."

The given instructions are in accord.

The final group of exceptions relate to the part of the charge in which the judge was defining a misadventure. He said:

> "It is an intentional — uh — it is an unintentional killing in which the perpetrator had no wrong purpose in doing the act which caused the death; done accidentally and not negligently; while he was engaged in no unlawful act. In other words, misadventure, when applied to homicide, is the act of a man who, in the performance of a lawful act without any intention to do harm, and using proper precaution to avoid danger, unfortunately kills another." DEFENDANT'S EXCEPTION No. 17 (R. p. 85) (Addendum, p. 10).

While it appears that the judge used the word "intentional" at the beginning of the statement, it is quite clear that he immediately corrected himself by saying "it is an unintentional killing."

The above quotation is a correct statement of the law of killing by misadventure. In 26 Am. Jur., Homicide, § 220, p. 305, it is said: "Where it appears that a killing was unintentional, that the perpetrator acted with no wrongful purpose in doing the homicidal act, that it was done while he was engaged in a lawful enterprise, and that it was not the result of negligence, the homicide will be excused on the score of the accident." This is quoted by Sharpe, J., speaking for the Court in *S. v. Phillips*, 264 N.C. 508, 142 S.E. 2d 337. See also 40 C.J.S., Homicide § 112b, p. 980.

The instruction given was more than the defendant was entitled to receive. It could not be seriously contended that the defendant was "in the performance of a lawful act without any intention to do harm." Four witnesses testified that he had gone to his mother-in-law's home with his pistol and that he had threatened to kill everybody in the house. And while he denied the threats, he did admit that he had gone there with a pistol, with bullets for it, and had remained there awaiting the return of his wife for at least six or seven hours.

The defendant had other exceptions, but they were not brought forward in the brief, and no reason or argument is stated and no authority cited in support of them. They are thus deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 810, and 1 Strong, N. C. Index, Appeal and Error § 38.

It appears that the defendant has had a fair trial.

No error.

WILLIAM M. HARGUS, JR. v. SELECT FOODS, INC. AND U. S. CASUALTY COMPANY.

(Filed 20 September, 1967.)

1. Trial § 6—

Stipulations are in the nature of judicial admissions and, unless limited as to time or application, continue in force for the duration of the controversy.

2. Master and Servant § 93—

Except in matters determinative of jurisdiction, the Industrial Commission has exclusive authority to find facts.

3. Master and Servant § 53—

Mere fact of injury sustained by an employee in the course of his employment does not entitle him to compensation unless the injury arises

by accident, and therefore stipulations to the effect that plaintiff employee became disabled while at work is insufficient alone to support an award of compensation, and this case was properly remanded to the Industrial Commission for specific findings from the evidence and stipulations as to whether claimant was injured by accident.

LAKE, J., dissenting.

APPEAL by defendants from *Anglin, J.*, March 1967 Session, HENDERSON Superior Court.

This proceeding originated as a compensation claim before the North Carolina Industrial Commission. At all hearings the plaintiff appeared in person but was not represented by counsel. The jurisdictional facts were stipulated. Plaintiff and a co-employee were the only witnesses who testified at the hearings. The plaintiff did not offer medical testimony. He testified as to the details of his injury and the manner in which it occurred. On cross-examination he admitted that he had previously had trouble with his back and that after his injury his doctor performed surgery which resulted in permanent stiffness. The length of time he was unable to work was stipulated.

During the hearing before Commissioner Shuford, Mr. Scott, attorney for the defendants, tendered, and the plaintiff (not represented by counsel) accepted this stipulation:

> "MR. SCOTT: I will tender a stipulation that Mr. Hargus was paid in full for the day that this happened; that is for May 31, but that he did not work on June 1; that he remained disabled and did not work until he returned to work for Select Foods on November 9, 1965; and further, that during the period of his absence he was paid for two weeks of vacation. Is that right, Mr. Hargus?
> A. Yes."

Commissioner Shuford filed an Opinion and Award holding that the employee had suffered an injury by accident as defined in G.S. 97-2(6) and awarded benefits accordingly. The defendants appealed to the Full Commission on two grounds: First, that the evidence was not sufficient to establish injury by accident arising out of and in the course of his employment; and, second, that the evidence is not sufficient to show causal relationship between the injury and the need for the surgery.

The Full Commission adopted as its own the findings, conclusions and the Opinion and Award of Commissioner Shuford. One member of the Commission dissented. The defendants appealed to the Superior Court alleging error as set forth above.

The Superior Court affirmed the Commission's ruling with reference to accidental injury. It sustained the defendants' Exceptions addressed to the absence of medical evidence, that the need for the operation was a result of the accident. The Court ruled, however, that the record of the testimony before Commissioner Shuford contained a tender of stipulation by the defendants which might make it unnecessary for plaintiff to offer such medical evidence.

The Court entered judgment overruling in part and sustaining in part other exceptions, vacated the award, and remanded the proceeding to the Commission with these instructions:

"(a) To make its finding of fact as to whether or not the parties stipulated and agreed that plaintiff 'did not work on June 1; that he remained disabled and did not work until . . . November 9, 1965';

(b) To take evidence pertinent to the issue of disability, if it finds as a fact that the parties did not stipulate and agree as to plaintiff's disability; and

(c) To make its findings of fact and conclusions of law upon the issues of disability and compensation and make an award pursuant to such determination. . . ."

The defendants excepted and appealed.

Robert L. Scott for defendant appellants.
No counsel contra.

HIGGINS, J. The defendants have entered successive appeals from the Hearing Commissioner, from the Full Commission, and from the Superior Court. At all times they have contended the claimant has not shown competent evidence of injury by accident arising out of and in the course of his employment or a causal relationship between the injury complained of and the need for the operation. These are critical matters involved in the proceedings. The stipulations appear to be sufficient to dispose of other matters.

Stipulations are in the nature of judicial admissions. Unless limited as to time or application, they continue in full force for the duration of the controversy. *Hayes v. Ricard,* 244 N.C. 313, 93 S.E. 2d 540; *Wigmore on Evidence,* 3rd Ed., Vol. 8, § 2328. Except in matters determinative of jurisdiction, the Industrial Commission has exclusive authority to find facts. G.S. 97-83; *Moore v. Electric Co.,* 259 N.C. 735, 131 S.E. 2d 356.

The Court vacated the award except as to medical expenses and ordered the Commission to take evidence, find facts and state conclusions of law upon the issues of disability and compensation, and to make an award pursuant to such determination.

In making its findings, the Commission will determine from the evidence offered and the stipulations entered whether the claimant was injured by accident. If the findings are favorable to him, the Commission will determine the amount of compensation and any other benefits to which he is entitled. To sustain a claim for compensation, more must be shown than an injury while at work. "The North Carolina Workmen's Compensation Act does not provide compensation for injury, but only for injury by accident. G.S. 97-2(6)." *Lawrence v. Mill,* 265 N.C. 329, 144 S.E. 2d 3. Findings favorable to the claimant on the question of accidental injury are critical in this as in all compensation cases. *Conrad v. Foundry Co.,* 198 N.C. 723, 153 S.E. 266; *Moore v. Sales Co.,* 214 N.C. 424, 199 S.E. 605; *Smith v. Creamery Co.,* 217 N.C. 468, 8 S.E. 2d 231; *Hensley v. Cooperative,* 246 N.C. 274, 98 S.E. 2d 289; *Searcy v. Branson,* 253 N.C. 64, 116 S.E. 2d 175; *Harding v. Thomas & Howard Co.,* 256 N.C. 427, 124 S.E. 2d 109; *Keller v. Wiring Co.,* 259 N.C. 222, 130 S.E. 2d 342; *Byrd v. Cooperative,* 260 N.C. 215, 132 S.E. 2d 348.

Both parties will have opportunity to be heard before the Industrial Commission. The defendants will pay the costs of this appeal.

The order remanding this proceeding is

Affirmed.

LAKE, J., dissenting: It is my view that the award of the Industrial Commission should have been vacated in its entirety for the reason that the evidence before the Commission will not support a finding of an injury by accident.

DOHONOV GALLOWAY v. WILLIAM E. HARTMAN.

(Filed 20 September, 1967.)

1. Negligence § 24a—

On motion for nonsuit on the issue of negligence, the evidence is to be considered in the light most favorable to the plaintiff, and the motion is properly denied when there is sufficient evidence to support the essential elements of actionable negligence.

2. Automobiles § 19—

A municipality has plenary power to regulate traffic at intersections, and a motorist approaching an electrically controlled signal at an intersection of streets or highways may presume, in the absence of notice to the contrary, that it was erected by lawful authority, and he is under duty to

maintain a proper lookout and to keep his vehicle under reasonable control in order that he may stop if the green light changes to yellow or red before he actually enters the intersection.

3. Automobiles § 57—

Plaintiff's evidence was to the effect that a street intersected a north-south highway from the west, that the highway had two south bound lanes and one north bound lane, that plaintiff entered the intersection from a restaurant driveway opposite the street after plaintiff had observed that the lights for south bound traffic on the highway were red, and that plaintiff, traveling westerly, was hit on the right by defendant's vehicle traveling south in the middle lane of the highway. *Held:* The evidence is sufficient to be submitted to the jury on the issue of defendant's negligence.

4. 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 the defense that no other reasonable inference or conclusion can be drawn therefrom.

5. Automobiles § 79—

Failure of a motorist to yield the right-of-way to traffic on a public highway, G.S. 20-38(23), does not compel a finding of contributory negligence as a matter of law when there is evidence that traffic on the highway was faced with a red traffic light and there is no evidence of anything to give notice that a motorist on the highway would not obey the traffic control signal.

APPEAL by plaintiff from *Martin, S.J.*, February-March 1967 Special Session of TRANSYLVANIA.

Civil action to recover for personal injuries and property damage allegedly caused by the actionable negligence of defendant in the operation of his 1961 Cadillac automobile, which collided with plaintiff's 1962 Oldsmobile within the intersection of U. S. Highway 25 and Fleming Street in Hendersonville, North Carolina, at approximately 12:45 P.M. on 14 October 1965.

Plaintiff alleged defendant was negligent in that:

"(a) He operated his said automobile without regard for the safety of persons traveling upon the public highways of North Carolina, and without keeping a proper lookout for said persons and vehicles, contrary to such laws made and provided.

"(b) That he drove his said automobile through a red traffic signal and into the car operated by this plaintiff, contrary to the laws in such cases made and provided.

"(c) That he drove his vehicle into the vehicle operated by this plaintiff when in the exercise of reasonable diligence he should have seen the automobile driven by this plaintiff."

Defendant answered and counterclaimed against plaintiff for personal injuries and property damage. Defendant in his answer

also pleaded contributory negligence as a bar to plaintiff's recovery, alleging that plaintiff was guilty of contributory negligence in the following respects:

"(a) Negligently operating said vehicle in wanton and reckless disregard for the rights and safety of others;

"(b) Negligently operating said vehicle on a public street or highway without maintaining a proper lookout;

"(c) Negligently operating said vehicle over and upon a public street or highway without having same under proper control;

"(d) Negligently operating said vehicle at a fast, reckless and unlawful rate of speed;

"(e) Negligently entering a public street or highway from a private driveway without ascertaining that such could be done in safety;

"(f) Negligently operating said vehicle from a private driveway and immediately into the path of the defendant's vehicle, and thereby colliding with the defendant's vehicle."

Plaintiff's witness, W. E. Simpson, the investigating police officer, testified orally and illustrated the physical facts of the collision scene on a blackboard, a photograph of which was admitted into evidence as plaintiff's exhibit 7. His evidence tended to show: That U. S. Highway 25 is a north-south highway, 37 feet wide at the intersection, having three lanes of traffic, two southbound and one northbound. A white line, referred to as a stop bar, extends across both southbound lanes and is located 5 feet north of the northern curb of Fleming Street. The inside southbound lane is separated from the northbound lane by a double yellow line. Fleming Street is 30½ feet wide and intersects U. S. 25 from the west, forming a "T". The driveway from the A and W Restaurant is 29 feet wide and intersects U. S. 25 from the east. The southern boundary of the driveway is about on a line with the northern boundary of Fleming Street. Two traffic lights control the southbound traffic on U. S. 25 and are suspended over each southbound lane about 8 feet south of the southern boundary of Fleming Street. A traffic light controlling the northbound traffic and hanging over the center of that lane, is located on a line with the southern boundary of the driveway. A traffic light controlling the Fleming Street traffic is located on the eastern boundary of U. S. 25 at about the center of Fleming Street. There is no traffic light controlling the traffic on the driveway from the A and W Restaurant. The traffic lights were installed and maintained by an engineer for the City of Hendersonville. Unless a motorist is "calling for time" from Fleming Street, the two lights controlling the two southbound lanes of traffic on U. S. 25 turn red every 60 seconds and remain red for 15 seconds. These two

lights turn red and green at the same time. There was a 12-inch tire mark in a straight line and then 4 or 5 inches to the right leading up to the left front wheel of defendant's vehicle. This vehicle was damaged on the left front. Dirt was to the east end of the tire marks and in front or south of the stop bar in the outside southbound lane. Patrolman Simpson further testified: "The Hartman car was sitting in the right-hand, southbound traffic lane on U. S. 25 when I arrived at the scene. The Galloway car was rammed into a retaining wall, beside the Little Colonel Packing Store." Plaintiff's car came to a stop about 114 feet from the point of impact. A vehicle belonging to Thomas Miller and not involved in the collision, was in the inside southbound lane at the time of the collision. The speed limit on U. S. 25 was 35 miles per hour. Other than automobiles, there are no obstructions on the road or near U. S. 25 for traffic leaving the A and W Restaurant. The weather was clear and the roadway dry on the day of the collision.

Plaintiff testified in substance: On 14 October 1965 she, accompanied by her mother and father, went to A and W Drive-In Restaurant in Hendersonville, North Carolina, for lunch. There were two entrances to the Drive-in from U. S. 25, one to the north and one to the south. Plaintiff left the Drive-in by the driveway referred to as the southern exit. She stopped her automobile and waited for the light controlling the southbound traffic on U. S. 25 to turn red. When the light turned red, she observed an automobile stopped to her north on the inside lane of traffic on U. S. 25, going south, and she then pulled out of the driveway to go across to Fleming Street, which intersects U. S. 25. She was going straight across to Fleming Street at a slight angle. She said:

> "I didn't see any traffic on U. S. 25 at the time of the accident, only this one car that was stopped. As I crossed U. S. 25 from the driveway of the A and W restaurant toward Fleming Street, Mr. Hartman hit me. The front part of my car was damaged, that is, the right front. I did not see Mr. Hartman on that occasion. The automobile that was stopped on the inside lane of the southbound two lanes on U. S. 25 remained stationary from the time I left the driveway until the time of the impact. . . . The impact which I felt was not on the right front fender. It was on the right side of the car, not the fender."

She further testified that she was traveling at a speed of about ten miles per hour at the time of the impact. There were no traffic signals of any kind for traffic coming from A and W Drive-in. Her evidence as to her direction of travel was in conflict. She also testi-

fied as to her personal injuries, medical treatment and property damage.

Plaintiff introduced that portion of Paragraph 4 of defendant's further answer which alleged "That at the aforesaid time and place, the City of Hendersonville had erected and was maintaining a traffic signal at the intersection of U. S. Highway 25 and Fleming Street," and the corresponding portion of Paragraph 4 of her reply, which is as follows: "It is not denied that the City of Hendersonville had erected and was maintaining a traffic signal at the intersection of U. S. Highway 25 and Fleming Street."

At the conclusion of plaintiff's evidence the court allowed defendant's motion for judgment as of nonsuit. Defendant took a voluntary nonsuit as to his counterclaim against plaintiff.

Plaintiff appealed.

Potts and Hudson and Van Winkle, Walton, Buck & Wall for plaintiff.

Uzzell and DuMont for defendant.

BRANCH, J. Appellant contends the court erred in allowing defendant's motion for nonsuit, in that there was sufficient evidence of actionable negligence on the part of defendant to carry the case to the jury, and in that plaintiff's evidence, taken in the light most favorable to her, did not establish that plaintiff was guilty of contributory negligence as a matter of law.

In order for plaintiff to survive the motion for nonsuit, she must first offer sufficient evidence, when taken in the light most favorable to her, and when she is given the benefit of all permissible inferences to be drawn from it, to support all essential elements of actionable negligence. *McFalls v. Smith,* 249 N.C. 123, 105 S.E. 2d 297; *Lake v. Express, Inc.,* 249 N.C. 410, 106 S.E. 2d 518; *Barefoot v. Joyner,* 270 N.C. 388, 154 S.E. 2d 543.

> "Actionable negligence embraces negligence and proximate cause. The elements of each have been clearly defind. *Ramsbottom v. R. R.,* 138 N.C. 38, 41, 50 S.E. 448; *Hall v. Coble Dairies,* 234 N.C. 206, 67 S.E. 2d 63. There is no controversy as to these well established rules." *Williamson v. Clay,* 243 N.C. 337, 90 S.E. 2d 727.

The collision involved in this appeal occurred at an intersection where the traffic moving in defendant's direction was controlled by electrically operated signals. It is admitted in the pleadings that this traffic signal was erected and maintained by the City of Hendersonville.

Municipalities have plenary power to regulate traffic at intersections. *Upchurch v. Funeral Home,* 263 N.C. 560, 140 S.E. 2d 17. This Court held in the case of *Kelly v. Ashburn,* 256 N.C. 338, 123 S.E. 2d 775, that stop signs erected by the State Highway Commission and local authorities on an intersecting highway or street pursuant to G.S. 20-156(a) is a method of giving the public notice that traffic on one is favored over the other, and that a motorist facing a stop sign must yield. In that case the Court further stated: "Stop signs at intersections are in such general use and their function so well known that a motorist, in the absence of notice to the contrary, may presume that they were erected by lawful authority." While that case relates to a stop sign, rather than an electrically controlled signal, it would seem that the reasoning applied in that case would likewise be applicable to the present state of facts. Moreover, this Court considered the effect and meaning of electrically controlled traffic signals in the case of *White v. Cothran,* 260 N.C. 510, 133 S.E. 2d 132, where Denny, C.J., speaking for the Court, said:

> "The meaning and force to be given to electrically operated traffic control signals, in the absence of a statute or ordinance, 'is that meaning which a reasonably prudent operator of an automobile should and would understand and apply. *Coach Co. v. Fultz,* 246 N.C. 523. Traffic signals of the kind here described are in such general use that it is, we think, well known by motor vehicle operators that a red traffic light is a warning that the highway is closed in order to permit those using the intersecting highway safe passage through the intersection. Hence, prudence dictates that he should stop.'
>
> . . . ."
>
> "When a motorist approaches an electrically controlled signal at an intersection of streets or highways, he is under the legal duty to maintain a proper lookout and to keep his motor vehicle under reasonable control in order that he may stop before entering the intersection if the green light changes to yellow or red before he actually enters the intersection."

We hold that there is sufficient evidence here to allow the jury to find that defendant drove his automobile through a red traffic signal so as to endanger persons and property passing on the intersecting highway, or that he failed to keep a proper lookout for persons or vehicles traveling on the public highway, thus causing the collision and plaintiff's personal injuries and property damage. Plaintiff's allegations and evidence were sufficient to allow the court to submit the issue of negligence to the jury.

The remaining and decisive question is whether plaintiff's evidence established that she was guilty of contributory negligence as a matter of law.

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 the defense that no other reasonable inference or conclusion can be drawn therefrom. *Waters v. Harris*, 250 N.C. 701, 110 S.E. 2d 283; *Hood v. Coach Co.*, 249 N.C. 534, 107 S.E. 2d 154. Further, nonsuit on the ground of contributory negligence should be denied if diverse inferences upon the question are permissible from plaintiff's proof. *Wooten v. Russell*, 255 N.C. 699, 122 S.E. 2d 603.

Defendant contends that when plaintiff left the A and W Drive-in and entered the intersection, she violated the provisions of G.S. 20-156(a), which provides: "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."

G.S. 20-38(23) defines a private road or driveway to be: "Every road or driveway not open to the use of the public as a matter of right for the purpose of vehicular traffic."

The record is meager as to ownership, maintenance, use and other facts determinative of the public or private nature of the driveway leading from A and W Drive-in into the intersection. However, conceding, *arguendo*, that plaintiff entered the intersection from a private driveway, so that she had the duty to yield the right-of-way to all vehicles on U. S. Highway 25 at such time when her precaution would be effective, *Garner v. Pittman*, 237 N.C. 328, 75 S.E. 2d 111, nevertheless, her duty to yield the right-of-way must be considered in light of her statement that when she drove into the intersection the traffic signals controlling southbound traffic were red.

In the case of *Currin v. Williams*, 248 N.C. 32, 102 S.E. 2d 455, the evidence tended to show that the plaintiff entered an intersection while the traffic control signal facing him was green, and that the front of his car struck the right side of defendant's car, which entered the intersection from plaintiff's left while the traffic control signal facing him was red. The Court, speaking through Bobbitt, J., stated:

> "In *Wright v. Pegram, supra,* Higgins, J., states the rule as established by prior decisions as follows: '. . . a motorist facing a green light as he approaches and enters an intersection is under the continuing obligation to maintain a proper lookout, to keep his vehicle under reasonable control, and to operate it at such speed and in such manner as not to endanger or be

likely to endanger others upon the highway. (Citation). Nevertheless, in the absence of anything which gives or should give him notice to the contrary, a motorist has the right to assume and to act on the assumption that another motorist will observe the rules of the road and stop in obedience to a traffic signal.' *Cox v. Freight Lines, supra; Hyder v. Battery Company, Inc.*, 242 N.C. 553, 89 S.E. 2d 124; *Troxler v. Motor Lines, supra.*

"But the mere fact that plaintiff failed to look to observe traffic conditions on Western Avenue east of the intersection is insufficient to establish that plaintiff was contributorily negligent as a matter of law. Whether such failure to look was a proximate cause of the collision depended upon whether, if he had looked, what he would or should have seen was sufficient to put him on notice, at a time when plaintiff could by the exercise of due care have avoided the collision, that defendant would not stop in obedience to the red light. Defendant was chargeable with notice of what he would have seen had he exercised due care to keep a proper lookout. *Marshburn v. Patterson,* 241 N.C. 441, 85 S.E. 2d 683; *Smith v. Buie,* 243 N.C. 209, 90 S.E. 2d 514."

In the light of the evidence presented here, we cannot say that the only reasonable inference that can be drawn therefrom is that the plaintiff entered the intersection without ascertaining that it could be done in safety, or that the circumstances were such that the plaintiff should have been put on notice that defendant would not stop in obedience to the traffic signal, or that plaintiff failed to keep a proper lookout and act as a reasonably prudent person would under the circumstances.

Since the evidence permits diverse inferences, the issue of contributory negligence should have been submitted to the jury.

Reversed.

STATE v. MARVIN CUTLER.

(Filed 20 September, 1967.)

1. Criminal Law § 104—

Upon motion for nonsuit, all the evidence admitted, whether competent or incompetent, must be considered in the light most favorable to the State, giving it the benefit of every reasonable inference to be drawn therefrom, and so much of the defendant's evidence as is favorable to the State must also be considered.

2. Criminal Law § 106—

Motion for nonsuit is properly allowed when the evidence is insufficient to raise more than a suspicion or conjecture that the crime charged in the indictment or warrant has been committed or that the defendant committed it.

3. Same—

The test of the sufficiency of circumstantial evidence to withstand nonsuit is whether a reasonable inference of defendant's guilt may be drawn from the evidence; if so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is guilty.

4. Homicide § 20— Circumstantial evidence held insufficient to be submitted to the jury in this homicide prosecution.

The State's evidence tended to show that the deceased was found in his home, with a stab wound in his heart, that the body was lying in a pool of blood and that a quantity of blood was found throughout the house and inside defendant's pickup truck parked nearby. The evidence further tended to show that on the morning after the crime defendant had blood on his clothes and on the blade of his knife, and that a hair was stuck in the blood on the knife, which hair was similar to the hair on deceased's chest. An expert testified that the blood near deceased's body and the blood inside the truck came from different persons, and that he could not positively identify the hair as one from the body of the deceased. *Held:* The evidence discloses that defendant had opportunity to commit the offense charged, but is insufficient to be submitted to the jury on the question of defendant's guilt.

APPEAL by defendant from *Bundy, J.*, at the January 1967 Criminal Session of BEAUFORT.

The defendant, indicted for the murder of Joe Bierman, was convicted of manslaughter and sentenced to a term of six years in the State Prison. He assigns as error the admission, over his objection, of certain evidence offered by the State and the denial of his motion for judgment of nonsuit at the close of the State's evidence, the defendant having offered none.

The State relied entirely upon circumstantial evidence. Taking all of it, including that admitted over objection, to be true, and considering it in the light most favorable to the State, it tends to show the following:

On 24 November 1966, at about 1 p.m., a visitor to the house in which Joe Bierman lived alone found his body lying, face down, upon the kitchen floor in a pool of blood. He had been dead about five hours. The cause of death was a stab wound into the heart. This wound was one and one-half inches in length and, when opened, three-quarters of an inch in width upon the surface of the chest. There was also a straight, clean wound upon the outside of the right forearm two inches in length to the depth of about one-quarter of

an inch, beginning three and a half inches above the wrist bone and running across and up the arm. A shotgun lay across the legs of the body but there was no evidence to indicate that it had been fired.

There was blood all over the floor of the kitchen in puddles and droplets. A pool of blood was also found beside a bed in the room adjoining the kitchen and splotches of blood were found upon a broken plate lying on the floor in the doorway connecting the two rooms. There was also blood on the steps leading to the front door of the house, upon which blood someone had stepped. There was also blood, in substantial quantity, upon the right side of the seat and the steering wheel of a red Ford pickup truck, parked near the Bierman house in the lane leading from the highway to the house, which truck was similar in appearance to one owned by the defendant.

A sample of the blood taken from the pool beneath the body of the deceased and a sample of the blood taken from the seat of the pickup truck were examined by an expert in that field. In his opinion both samples were human blood but came from different persons, that taken from the pool beneath the body being Type AB and that taken from the seat of the pickup truck being Type B.

Between 6 a.m. and 7 a.m. on 24 November 1966, the defendant, driving his red Ford pickup truck, went to the home of his brother-in-law, approximately three-quarters of a mile from the Bierman home. After a brief inquiry as to the whereabouts of his mother, the defendant drove away.

At 7:10 a.m. on the day in question, an old model red pickup truck was seen, by a neighbor, driving up the lane to the Bierman home. It stopped in front of the house. A truck of similar appearance was there when this witness returned at 4:30 p.m.

At about 9:30 a.m. on the day in question, the defendant went to the home of his uncle, Charlie Cutler, 500 yards from the Bierman home, and asked to be carried home, stating that he wanted to see his mother. The defendant had been drinking and was "bloody as a hog." He was able to walk but was staggering. Charlie Cutler washed off the blood caked upon the defendant's face and observed a gash upon the defendant's head which then began to bleed again. This gash was about two inches long and appeared to be to the skull bone in depth. The defendant at that time told Charlie Cutler, "Joe had killed himself," nothing else being said about "Joe," and "Joe" not being otherwise identified. Charlie Cutler then got the defendant's sister to carry the defendant to his home. Thereafter, about 10:15 a.m., the defendant was carried to the hospital in the automobile of a neighbor. En route to the hospital, he stated to this neighbor that he "would rather get a pint of liquor and go back and

see how Joe was than go to the doctor." He was nevertheless carried to the hospital, where the cut on his head was dressed and sewed up. He was then taken back to his home.

At approximately 4 p.m. on the day in question, the sheriff, after his preliminary investigation at the Bierman home, went to the defendant's home and found the defendant, apparently asleep. There was blood on his clothing. A closed pocket knife lay upon the bureau beside the bed. The entire blade was bloody. A hair was stuck to the blade. The blood on the clothing, the blood on the knife, the hair on the knife and hair taken from the right arm and left chest of the deceased were examined by the above mentioned expert. The blood on the knife blade was human blood, but the expert could not determine whether it belonged to the same group as that taken from the pool beneath the body of the deceased. The blood on the clothing of the defendant was of Type B, that is, it was of the same type as that taken from the seat of the truck in the Bierman lane. The hair taken from the knife blade was of a different type from the hair taken from the arm of the deceased. It was similar to the hair taken from the chest of the deceased, but the expert was not able to say that the hair on the knife and the hair taken from the chest of the deceased came from the same person, methods for making that determination not being available to him.

On the afternoon of the day in question, the defendant stated to the sheriff and his deputy that he had left his pickup truck in Joe Bierman's yard some time that morning because he could not get it started.

On the following day, an insecticide can, covered with blood, was discovered in the third room of the Bierman house.

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

LeRoy Scott for defendant appellant.

LAKE, J. Upon a motion for judgment as of nonsuit in a criminal action, the evidence must be considered by the court in the light most favorable to the State, all contradictions and discrepancies therein must be resolved in its favor and it must be given the benefit of every reasonable inference to be drawn from the evidence. *State v. Bruton,* 264 N.C. 488, 142 S.E. 2d 169; *State v. Thompson,* 256 N.C. 593, 124 S.E. 2d 728; *State v. Bass,* 255 N.C. 42, 120 S.E. 2d 580. All of the evidence actually admitted, whether competent or incompetent, including that offered by the defendant, if any, which is favorable to the State, must be taken into account and so considered by the court in ruling upon the motion. *State*

v. Walker, 266 N.C. 269, 145 S.E. 2d 833; *State v. Virgil,* 263 N.C. 73, 138 S.E. 2d 777.

The question for the Court is whether, when all of the evidence is so considered, there is substantial evidence to support a finding both that an offense charged in the bill of indictment, or warrant if it be a case tried upon a warrant, has been committed and that the defendant committed it. *State v. Bass,* 253 N.C. 318, 116 S.E. 2d 772. If, when the evidence is so considered, it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion for nonsuit should be allowed. *State v. Guffey,* 252 N.C. 60, 112 S.E. 2. 734. This is true even though the suspicion so aroused by the evidence is strong. *State v. Chavis,* 270 N.C. 306, 154 S.E. 2d 340.

The test of the sufficiency of the evidence to withstand such a motion is the same whether the evidence is circumstantial, direct, or both. *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431. "When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Rowland,* 263 N.C. 353, 139 S.E. 2d 661. "If the motion is overruled, it becomes the court's duty to charge the jury that in making up its verdict it must return a verdict of not guilty unless the evidence points unerringly to the defendant's guilt and excludes every other reasonable hypothesis." *State v. Stephens, supra.* This, however, is not the test to be applied by the Court in determining whether the evidence is sufficient to warrant the submission of the case to the jury.

These controlling principles of law are more easily stated than applied to the evidence in a particular case. Of necessity, the application must be made to the evidence introduced in each case, as a whole, and adjudications in prior cases are rarely controlling as the evidence differs from case to case.

Applying these governing principles to the evidence introduced in the present case, we reach the conclusion that it is sufficient to raise a strong suspicion of the defendant's guilt but not sufficient to remove that issue from the realm of suspicion and conjecture. It may reasonably be inferred that the defendant was at the home of the deceased when the deceased came to his death, or shortly thereafter. However, it is not enough to defeat the motion for nonsuit that the evidence establishes that the defendant had an opportunity to commit the crime charged. *State v. Holland,* 234 N.C. 354, 67 S.E. 2d 272.

The evidence of the State is not sufficient to show any blood from the body of the deceased upon the person, clothing, knife or vehicle of the defendant. The hair found upon the bloody knife blade was, in the opinion of the expert offered by the State, similar to hair taken from the chest of the deceased, but the expert was not able to state that in his opinion it came from the body of the deceased. There is no evidence as to whether this hair was similar to the defendant's own hair. The State's evidence does not disclose that any blood found upon any object in the residence of the deceased came from the defendant. There is no evidence to show ill will between the deceased and the defendant or any other motive for the defendant to assault or kill the deceased. Neither the court nor the jury may draw any inference from the election by the defendant not to offer evidence in his own behalf.

The motion for judgment as of nonsuit should have been allowed. This being true, it is unnecessary to consider the assignments of error relating to the admission of evidence offered by the State.

Reversed.

P. E. MOODY, TRADING AND DOING BUSINESS AS FRANK MOODY FUNERAL HOME v. TRANSYLVANIA COUNTY.

(Filed 20 September, 1967.)

1. Municipal Corporations § 4—

A municipal corporation is a creature of the Legislature, and it has only those powers granted in express terms and powers necessarily or fairly implied or incident to the powers expressly granted which are essential and indispensable to, and not merely convenient for, the accomplishment of the declared objects of the corporation.

2. Same; Taxation § 6—

The providing of a county-wide ambulance service is not a necessary expense for which a municipality may incur debt without a vote of the people, and, in the absence of a vote or of authority expressly granted by the Legislature, a county may not legally contract with a funeral home for such services, and its attempt to do so prior to the enactment of G.S. 153-9(58) was *ultra vires.*

3. Municipal Corporations § 41; Pleadings § 12—

Allegations that the plaintiff contracted with the county commissioners to operate an ambulance service and that he was to be paid by the county in monthly installments, and that, in so contracting, the commissioners were acting within the scope of their authority as the governing body of the county, squarely present the issue of the authority of the county to

enter into such a contract, and the right of the plaintiff to maintain an action to recover for such services may be challenged by demurrer.

4. Municipal Corporations § 17; Estoppel § 5—

A municipal corporation is not estopped from pleading *ultra vires* to a void contract, even though it has accepted benefits from the contract and has made partial payments thereon, and even though the other party has substantially performed his part of the agreement.

5. Municipal Corporations § 42; Mandamus § 1—

A party seeking a writ of *mandamus* must have a clear legal right to demand it, and the party to be coerced must be under a positive legal obligation to perform the act sought to be done, and *mandamus* can not be invoked to compel the officers of a municipal corporation to perform the terms of a void contract.

APPEAL by plaintiff from *Martin, S. J.*, February-March 1967 Special Session, TRANSYLVANIA Superior Court.

The plaintiff alleged that on 7 September 1964 he entered into a contract with the Commissioners of Transylvania County to operate an ambulance service for the County for a period of five years. He was to be paid $4,000 per year in monthly installments. Pursuant thereto, he expended some $16,000 for additional equipment and began performing his duties. Two monthly payments were made, following which the defendant stopped making the payments, although the plaintiff has made repeated demands for them. Meanwhile, he has continued to render the ambulance service required in the contract. He brought suit to recover $333.33 for each calendar month from and after the last payment, which was 10 November 1964, and prayed that a writ of *mandamus* issue ordering the defendant to continue with the terms of the contract.

The defendant demurred, saying "that the complaint does not state facts sufficient to constitute a cause of action against the defendant for that the defendant has no authority to make a contract to furnish ambulance service, and if such a contract was entered into as alleged by the plaintiff, the same was done without any authority on the part of the defendant and is and was null and void, and the plaintiff cannot as a matter of law maintain an action thereon."

The Court sustained the demurrer, and the plaintiff appealed.

Hamlin, Ramsey & White by William R. White, Attorneys for plaintiff appellant.

Ramsey, Hill & Smart by Ralph H. Ramsey, Jr., Attorneys for defendant appellee.

PLESS, J. Two questions arise upon this appeal. Is ambulance service a necessary expense for which the County Commissioners

may legally contract? If such contract is *ultra vires,* must it be pleaded by the defendant, or is it proper ground for demurrer? The appellant's position cannot be sustained on either question.

In *Madry v. Scotland Neck,* 214 N.C. 461, 199 S.E. 618, Barnhill, J. (later C.J.) made this concise statement:

> "A municipality is a creature of the Legislature and it can only exercise (1) the powers granted in express terms; (2) those necessarily or fairly implied in or incident to the powers expressly granted; and (3) those essential to the accomplishment of the declared objects of the corporation — not simply convenient, but only those which are indispensable, to the accomplishment of the declared objects of the corporation. In exercising such powers the municipal corporation's authority to bind itself by contract is limited and it cannot contract any debt, except for necessary expenses, unless by vote of the majority of the qualified voters therein." Citations omitted.

While that case involved a city rather than a county, the same rule would apply to the latter.

When the questioned contract was made in Sept. 1964, the County Commissioners did not have the power "in express terms" to provide ambulance service. Without the "express" authority, we must determine whether the object of the purported contract was "essential to the accomplishment of the declared objects (of the County) . . . not simply convenient, but . . . indispensable to the declared objects" (of the County).

In *Palmer v. Haywood County,* 212 N.C. 284, 193 S.E. 668, the plaintiff sought an order to restrain the County Commissioners from issuing bonds to provide funds to construct an addition to the county hospital. The Superior Court denied the order, and in reversing it, this Court said:

> "What are necessary expenses is a question for judicial determination. The judicial decisions in this State uniformly so hold. 'The courts determine what class of expenditures made or to be made by a municipal corporation come under the definition of "necessary expense." The governing authorities of the municipal corporations are vested with the power to determine when they are needed. . . . That is to say, the courts determine whether a given project is a necessary expense of a municipality, but the governing authorities of the municipality determine in their discretion whether such given project is necessary or needed in the designated locality.'
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> "In defining 'necessary expense' it is said in *Henderson v. Wilmington, supra* (191 N.C. 269, 132 S.E. 25), 'We derive

practically no aid from the cases decided in other states. . . . We must rely upon our own decisions.' Then, after reviewing numerous cases dealing with the subject of 'necessary expense,' page 278, Adams, J., said: 'The cases declaring certain expenses to be necessary refer to some phase of municipal government. This Court, so far as we are advised, has given no decision to the contrary.' Then, on page 279, continues: 'The decisions heretofore rendered by the Court make the test of a "necessary expense" the purpose for which the expense is to be incurred. If the purpose is the maintenance of the public peace or the administration of justice; if it partakes of a governmental nature or purports to be an exercise by the city of a portion of the State's delegated sovereignty; if, in brief, it involves a necessary governmental expense.'

"This Court has repeatedly held that the building, maintenance, and operation of public hospitals is not a 'necessary expense.' " Citations omitted.

To hold that the County may provide transportation at public expense to a hospital whose operation is *not* a necessary public expense would be incongruous and inconsistent. We therefore hold that the Commissioners could not legally contract for such service, and that their attempt to do so was *ultra vires*.

The plaintiff cites several statutes and decisions in support of his position, but an examination of each of them discloses a distinction between them and the present question. G.S. 153-2(3) deals with the corporate powers of the counties in broad terms but has no explicit reference to the power sought here. G.S. 153-176.1 authorizes counties having a population of 60,000 or over to provide hospitalization for the indigent sick, but this does not apply to Transylvania County, which has less than half the required population. G.S. 131-28.3 and .4 deals with the authority of the counties to own and support hospitals by bonds authorized by the voters.

G.S. 153-9(58) does authorize the counties to contract for ambulance service, but it was not enacted until 1967, while the contract must be construed as of its date, which was September 1964.

The case of *Harrison v. New Bern*, 193 N.C. 555, 137 S.E. 582, is distinguishable here because it involved the purchase of ninety-three acres of land for use as a cemetery; and at the time the suit was brought, the transaction had been completed. The Court held that the action of the City in purchasing the lands and paying for them was *ultra vires*, but that since the transaction had been fully performed, it should be permitted to stand. *Morgan v. Town of Spindale*, 254 N.C. 304, 118 S.E. 2d 913, involved the issuance of bonds

by the Town following an election in favor of them; and *Turner v. Reidsville,* 224 N.C. 42, 29 S.E. 2d 211, also involved bonds issued after approval by the voters of the City. The other cited authorities do not, in our opinion, sustain the plaintiff's position.

The plaintiff further contends that the demurrer should not have been sustained for that the action of the County Commissioners did not appear invalid upon the face of the complaint and that it should have been required to answer. However, the plaintiff seeks to recover upon a contract allegedly made by the County Commissioners. That, without more, raises the question of their authority, and a demurrer seeks an immediate answer. The pleading should be liberally construed with a view to substantial justice between the parties, giving the pleader the benefit of every reasonable intendment in his favor. It admits the truth of the factual averments well stated and the relevant inferences of fact reasonably deducible therefrom. 3 Strong's N. C. Index, Pleadings, § 12, and many cases there cited.

> "The office of the demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of the allegations of facts contained therein, and ordinarily relevant inferences of fact, necessarily deducible therefrom, are also admitted . . ." *Mallard v. Housing Authority,* 221 N.C. 334, 20 S.E. 2d 281.

In *Madry v. Scotland Neck, supra,* the Court said:

> " 'If a contract is *ultra vires* it is wholly void and (1) no recovery can be had against the municipality; (2) there can be no ratification except by the Legislature; (3) the municipality cannot be estopped to deny the validity of the contract. 3 McQuillin, Municipal Corporations, 2nd Ed., page 817.' *Jenkins v. Henderson, ante,* 244 [214 N.C. 244, 199 S.E. 37]. The fact that the other party to the contract has fully performed his part of the contract, or has expended money on the faith thereof, will not preclude the city from pleading *ultra vires. Dawson v. Dawson Waterworks,* 106 Ga. 696, 32 S.E. 907; *Mealy v. Hagerstown,* 92 Md. 741, 48 Atl. 746; *Jenkins v. Henderson, supra.*
>
> "As it appears upon the face of the complaint that the plaintiff is seeking to enforce a contract which is *ultra vires* and void the demurrer interposed by the defendant should have been sustained."

The complaint contains the following allegation: "(I)n entering into this contract the Board of County Commissioners of Transylvania County were acting within the scope of their authority as

the governing body for Transylvania County." That squarely presents the question involved here; and we can see no practical reason why the County should be required to answer when, as stated in *Madry v. Scotland Neck, supra,* "As it appears on the face of the complaint that the pliantiff is seeking to enforce a contract which is *ultra vires* and void the demurrer interposed by the defendant should have been sustained."

In his brief the plaintiff takes the position that defendant is estopped to deny the validity of the contract.

> "A city is not estopped from pleading *ultra vires* in defense of an action on contract by the fact that the other party to the contract expended money to perform his part of the agreement. *Mealy v. Hagerstown,* 92 Md. 741, 48 Atl. 746. The fact that the other party to the contract has fully performed his part of the contract, or has expended money on the faith thereof, will not preclude the city from pleading *ultra vires. Dawson v. Dawson Waterworks,* 106 Ga. 696, 32 S.E. 907; *Mealy v. Hagerstown, supra.* No subsequent action on the part of the municipal corporation will prevent it from denying the validity of such contract." *Jenkins v. Henderson,* 214 N.C. 244, 199 S.E. 37.

The contention of the plaintiff that the contract had been largely executed by it, that the County had accepted the benefits of it, and had made two of the monthly payments, and that it was therefore estopped to deny its responsibility, cannot be sustained. In 38 Am. Jur., 202, Municipal Corporations § 522, it is said:

> "As a general rule, the doctrine of estoppel cannot be applied as against a municipal corporation to validate a contract which it has no power to make, . . . although the corporation has accepted the benefits thereof and the other party has fully performed his part of the agreement, or has expended large sums in preparation for performance. . . . to apply the doctrine of estoppel against a municipality in such case would be to enable it to do indirectly what it cannot do directly . . . The law holds those dealing [with the County] to a knowledge of the extent of the power . . . and of any restrictions imposed . . . (P)ersons dealing with a municipal corporation are charged with notice of all limitations upon the authority of its officers representing them . . ." See also *Jenkins v. Henderson, supra; Burgin v. Smith,* 151 N.C. 561, 66 S.E. 607, and *Board of Managers v. Wilmington,* 237 N.C. 179, 74 S.E. 2d 749.

The plaintiff's prayer for relief is (1) "That he . . . recover a sum of $333.33 for each calendar month from and after November 10, 1964, to the date of the filing of this complaint," etc.; and (2) "That a writ of *mandamus* issue . . . ordering the governing body of the defendant to continue with the terms of its contract" etc.

In *St. George v. Hanson,* 239 N.C. 259, 78 S.E. 2d 885, Parker, J. (now C.J.) said for the Court:

> "We have said in many cases that a party seeking a writ of *mandamus* must have a clear legal right to demand it, and the party to be coerced must be under a positive legal obligation to perform the act sought to be required. *Hancock v. Bulla,* 232 N.C. 620, 61 S.E. 2d 801; *Laughinghouse v. New Bern, ibid.,* p. 596, 61 S.E. 2d 802; *Steele v. Cotton Mills,* 231 N.C. 636, 58 S.E. 2d 620; *Ingle v. Board of Elections,* 226 N.C. 454, 38 S.E. 2d 566; *White v. Comrs. of Johnston,* 217 N.C. 329, 7 S.E. 2d 825; *Mears v. Board of Education,* 214 N.C. 89, 197 S.E. 752; *Person v. Doughton,* 186 N.C. 723, 120 S.E. 481. 'A mandatory injunction, when issued to compel a board or public official to perform a duty imposed by law, is identical in its function and purpose with that of a writ of *mandamus.* . . . Such writ (a *mandamus*) will not be issued to enforce an alleged right which is in question.' *Hospital v. Wilmington,* 235 N.C. 597, 70 S.E. 2d 833; *Harris v. Board of Education,* 216 N.C. 147, 4 S.E. 2d 328.
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> "It is well settled law that *mandamus* cannot be invoked to control the exercise of discretion of a board, officer, or court when the act complained of is judicial or *quasi*-judicial, unless it clearly appears that there has been an abuse of discretion. The function of the writ is to compel the performance of a ministerial duty — not to establish a legal right, but to enforce one which has been established. *Hayes v. Benton,* 193 N.C. 379, 137 S.E. 169; *Wilkinson v. Board of Education,* 199 N.C. 669, 155 S.E. 562; *Harris v. Board of Education, supra.*"

Also, in *Thomas v. Board of Elections,* 256 N.C. 401, 124 S.E. 2d 164, it is said:

> "'* * * *Mandamus* is an action or proceeding of a civil nature, extraordinary in the sense that it can be maintained only when there is no other adequate remedy and designed to enforce clear legal rights or the performance of ministerial duties which are enjoined by law; but the writ will not be issued to enforce an alleged right which is in doubt. Not only must the

plaintiff show that he has a clear legal right; he must show that the opposing party is under legal obligation to perform the act or to grant the relief for the performance or enforcement of which the action is prosecuted. * * *' McIntosh, North Carolina Practice and Procedure, Second Edition, Volume 2, Section 2445."

The plaintiff has not established "a clear legal right" to demand *mandamus,* nor that the defendant is "under a positive legal obligation to perform the act sought to be required."

The judgment of the Court below was correct, and it is hereby Affirmed.

STATE v. BOBBY JOE WHITE.

(Filed 20 September, 1967.)

1. **Homicide § 20—**

Evidence tending to show that the deceased and several persons were scuffling in a poolroom, and that the defendant, attempting to aid a friend, shoved the deceased and stated that "there was nobody going to run over" his friend, and that the defendant then shot the unarmed deceased with a pistol, *is held* sufficient to be submitted to the jury on defendant's guilt of murder in the second degree.

2. **Homicide § 16—**

Testimony that on the day before the homicide the defendant stated that he dreamed he had shot the deceased, while too uncertain and conjectural to show ill will and malice towards deceased, does not justify a new trial, it appearing that the evidence had no probative force upon the jury.

3. **Criminal Law § 170—**

A remark of the court, in excluding defendant's testimony which explained a prior offense, that "we can be here 60 days trying all this stuff," *held* cured by a prompt instruction to the jury not to consider the remark.

APPEAL by defendant from *Bundy, J.*, and a jury, 12 June 1967 Session of MARTIN.

Criminal prosecution on an indictment correctly charging defendant with murder in the first degree of James Henry Brown, alias "Bud". G.S. 15-144.

At the beginning of the trial, the solicitor for the State, in open court, announced that he would not ask for a verdict of guilty of

murder in the first degree, but a verdict of guilty of murder in the second degree or guilty of manslaughter as the facts may appear. Defendant entered a plea of not guilty through his counsel. Verdict: Guilty of murder in the second degree. Whereupon, upon request of defendant's counsel, the jury was polled and each juror was asked if his verdict was that the defendant was guilty of murder in the second degree and if he still assented thereto, to which each juror replied in the affirmative. From a judgment of imprisonment, defendant appeals to the Supreme Court.

Attorney General T. W. Bruton, and Deputy Attorney General, Ralph Moody, for the State.

Edgar J. Gurganus, and Weeks & Muse by T. Chandler Muse for defendant appellant.

PARKER, C.J. This is a brief summary of the State's evidence and the defendant's evidence favorable to the State: Defendant weighs about 230 pounds, and is about 27 years old. The deceased, James Henry Brown, alias "Bud" Brown, who hereafter will be called "Bud", was about 25 years old and weighed about 155 or 160 pounds. Defendant and Bud have been good friends and had never had any trouble. About 7:30 p.m. on 27 January 1967, Booker T. Brown, Wig Clark, a man by the name of Skeet, and Bud were in a poolroom located on Sycamore Street in the Town of Williamston shooting pool. While they were shooting pool, Wig Clark and Bud got into an argument over money; Bud said he owed Clark fifty cents and Clark said he owed him one dollar. After they had argued for two or three minutes, Bud got around behind Clark and was choking him. Booker T. Brown broke Bud's arm from around Clark. Bud and Clark started back together and the defendant shoved Bud. When defendant shoved Bud he was going toward Clark. Bud started back to defendant, and Booker T. Brown got in between them, having a hand on their chests. Defendant said, "(T)here was not nobody going to run over Clark." After he said that, somebody said, "(W)on't nobody going to run over Bud." Booker T. Brown said to the defendant, "You all quit this mess, no need of it."; and he talked to Bud the same way. At this time a shot went off. That is when defendant shot Bud in the chest with a pistol. Booker T. Brown had his hand in Bud's chest, and the pistol bullet wounded him in the hand. After Bud was shot he took about three or four steps and kneeled down on his knees and rolled over on his back, and died on the floor of the poolroom. When Bud was shot he had his left hand in his hip pocket. Bud is right handed. Defendant admitted Bud died as a result of the pistol wound in his chest. When Bud's dead

body was taken to the hospital, it was searched and all that was found in his pockets was a wallet and a little change.

The defendant's testimony in brief summary shows the following facts: On 27 January 1967, he worked at Aurora. He returned from his work, ate supper at home, and left about a quarter to eight. He had a pistol with him that he was carrying to a gunsmith to have the handle fixed. He kept it in his home for protection. He went into the Town of Williamston; the gunsmith lives on Highway 125 north of Williamston. When he came into Williamston he went to Booker T. Brown's house for his pay for hauling Booker T. Brown and Wig Clark to work. Booker T. Brown was not at home. In leaving for the gunsmith's, he turned down Sycamore Street and saw Booker T. Brown's truck parked in front of the poolroom. He stopped there to pick up the money that he owed him for riding. When he drove up, the pistol was on the dash of the truck; he put it in his pocket for fear some little boy would come along and take it. He went into the Hitching Post poolroom. When he went into the poolroom, Booker T. Brown and Clark paid him the money that they owed him. He joined them and shot a couple of games of pool, shooting pool for about an hour. While they were shooting pool, Bud and Skeet came in. He knew them both well; he had known Bud for fifteen years or longer; they had been good friends all this time; he had never had any trouble with him; he married Bud's first cousin. Bud and Wig Clark were arguing about money. Wig Clark started back to shooting pool. Bud jumped on him from behind his back, grabbed him, and was choking him. Booker T. Brown was standing three or four feet from them. He said, "You all stop that." Booker T. Brown was pulling them apart. Defendant said, "You all stop, you were raised up together, good friends, always known each other, no need of this mess." They stopped. The man said he had to close up the place. Defendant said, "Going to have trouble around here tonight." Bud started back at Wig Clark. Defendant said, "Come on, man, no need of this. * * * We all work together, raised together, ain't no need fighting each other, let's go home." When he said that, Bud turned from Clark and started toward him, blowing and puffing, and saying, "You're bad, bad." He pushed Bud back, and when he pushed him back he ran his left hand in his pocket, and that is when he shot him. He did not know what he was going after in his pocket, so he shot him. Booker T. Brown was holding Bud. He did not aim at Bud when he shot him. He knew that Bud had a reputation for being a dangerous and a violent man. He knew that Bud had broken the jaw and knocked three teeth out of the jaw of "Little Bud" Freeman about ten months previous. He learned Bud beat Robert Andrews down to the ground at the Williamston

depot; Bud could not go in Bobby Ormon's place because he had been fighting in there. He had taken Bud home several times to keep him from getting into trouble. Bud raped a girl in New York City and served time for it. Defendant admitted that he himself had been convicted in Federal Court in Washington, North Carolina, for non-taxpaid liquor in 1958 or 1959; that he had been convicted of assault on a female; that was for slapping his wife.

The evidence was amply sufficient to carry the case to the jury on the charge of murder in the second degree.

Booker T. Brown had known Bobby Joe White for twelve or thirteen years. They worked together in Aurora. He worked with the defendant the day before Bud Brown died. He was asked this question: "The day before Bud Brown died, what conversation did you have with Bobby Joe White?" The defendant objected and was overruled. He answered: "We were riding to work together every day. That Thursday morning we were going to work, he said he dreamed that he had shot Bud." Defendant assigns as error the admission of this testimony. Defendant denied making any such statement. Defendant contends in his brief the jurors were not competent to interpret the meaning of a dream, and states in his brief: "We submit that even a highly specialized expert would have difficulty explaining the meaning of such a dream. Where the matter is so speculative, appellant contends that it could have no probative value and could only have prejudiced him in the minds of the jury."

The State contends in its brief that the statement of defendant that he dreamed that he shot Bud was competent to show ill will and malice against the deceased.

Defendant states in his brief that he can find no authority in respect to dreams. Nor can we. Webster's International Dictionary, Second Edition, defines "dreams" as follows: "1. a series of thoughts, images, or emotions occurring during sleep; any seeming of reality or events occurring to one sleeping." Webster's Third New International Dictionary defines "dream" as follows: "1.a: a series of thoughts, images, or emotions occurring during sleep: a semblance of reality or events occurring to one asleep. b: psychoanalysis: condensed, elaborated, symbolized, or otherwise distorted images of memories or of unconscious impulses experienced esp. during sleep but also during other lapses in attention the meaning of which is concealed from the ego." We can find no definition of "dream" in Black's Law Dictionary, Fourth Edition; in Ballentine's Law Dictionary, Second Edition; in C.J.S., or in Am. Jur. 2d; or Words and Phrases. We agree with the statement in defendant's brief: "We submit that even a highly specialized expert would have difficulty explaining the meaning of such a dream." What a dream means, if

anything, presents an occurrence filled with mystery. As to the meaning of a dream, we can only conjecture. The evidence as to the statement of the defendant that he dreamed that he shot Bud leaves the meaning of the dream in the realm of mere conjecture, surmise, and speculation, and one surmise may be as good as another. Nobody knows. It is clear that a statement of a witness is competent when it declares an intention, a purpose, a design, a motive, an assent, a knowledge or belief. McCormick On Evidence, p. 567. A resort to a choice of possibilities is guesswork, not decision. *Hanrahan v. Walgreen Co.*, 243 N.C. 268, 90 S.E. 2d 392. Bacon, in his Essay of Prophecies, says in respect to prophecies and dreams, other than divine prophecies: "My judgment is, that they ought all to be despised; and ought to serve but for winter talk by the fireside." Even if the evidence were incompetent as contended by defendant, it is, in our opinion, so speculative and uncertain as to have had no probative force on the minds of a jury and would not justify a new trial of this case.

During the redirect examination of defendant by one of his counsel, the following question was asked: "You say you were charged with assault on a female, who was that on?" The court replied: "He said it was his wife." Counsel for defendant said: "Would you tell me what the circumstances were surrounding it?" The court replied: "Oh, I am not going to try out that case." Defendant's counsel asked him what disposition was made of that case. He answered that he paid the costs of court. He said he was convicted in a worthless check case. The disposition of that was that he paid the check off. He stated, "Yes, I gave a worthless check in that case." His counsel asked him: "Did you ask the man you gave the check to, to hold the check for you?" The court sustained an objection by the State and remarked: "We are not going to try it over. Gentlemen, we can be here 60 days trying all this stuff." Upon objection to the comment of the court, the court said to the jury: "Gentlemen, any comment the court made, if you heard it, do not pay any attention to it. I still say I am not going to try out these other cases." Defendant assigns as error the court's comment that "we can be here 60 days trying all this stuff." If the judge committed any error in his remarks, he promptly cured it by instructing the jury: "(D)o not pay any attention to it." Further, if all these collateral matters could be gone into in minute detail, the trial of cases would be unreasonably and unduly prolonged, and would lead to confusion in the minds of the jury. This assignment of error is overruled.

The defendant has several assignments of error to the charge. Reading the charge in its entirety, it shows that the judge delivered an accurate and correct charge on every aspect of law in the case

and applied the law to the facts. In addition, he explained fully the law of self-defense, which was the defendant's defense, and gave verbatim practically a full page of defendant's special prayers for instructions as applicable to the law of self-defense. The charge was entirely fair to the defendant. The law in respect to homicide in self-defense is well settled in this State. A careful examination of the assignments of error in respect to the charge discloses no new question or feature requiring extended discussion. The jury, under application of settled principles of law, resolved the issues of fact against the defendant. All the defendant's assignments of error to the charge are overruled.

In the trial below, we find

No error.

WILLIE M. BELL, ADMINISTRATOR OF THE ESTATE OF RICHARD LEWIS BELL, DECEASED, v. WILLIAM H. PAGE.

(Filed 20 September, 1967.)

1. **Negligence § 24—**

On motion to nonsuit on the issue of negligence, all the evidence must be considered in the light most favorable to the plaintiff, and defendant's evidence in conflict with plaintiff's evidence must be disregarded.

2. **Negligence § 4—**

It is not an act of negligence for a person to maintain an unenclosed pond or pool on his premises.

3. **Negligence §§ 36, 39—**

Evidence tending to show that the defendant maintained an unfenced swimming pool on his motel property in violation of a municipal ordinance requiring such pool to be fenced or an employee kept on duty at all times, and that the body of plaintiff's intestate, a nine-year old boy, was found in ten feet of water, and that the cause of death was drowning, *held* sufficient to permit a finding by the jury that the violation of the ordinance was a proximate cause of intestate's death, and therefore was sufficient to be submitted to the jury, notwithstanding intestate was a trespasser.

4. **Criminal Law § 1—**

The violation of a municipal ordinance is a misdemeanor. G.S. 14-4.

5. **Negligence §§ 1, 7—**

Where a municipal ordinance imposes a public duty and is designed for the protection of life and limb, a violation thereof is negligence *per se*, but in order for liability to arise for actionable negligence, it must be

established that such violation was a proximate cause of the alleged injury.

6. Negligence §§ 16, 26—

Since a child between the ages of seven and fourteen is rebuttably presumed incapable of contributory negligence, nonsuit may not be entered on the ground of such child's contributory negligence.

APPEAL by plaintiff from *Bundy, J.*, May 1967 Session of BEAUFORT.

Plaintiff, as administrator of Richard Lewis Bell, plaintiff's nine-year-old son, instituted this civil action May 26, 1966, to recover damages on account of his intestate's death by drowning on July 7, 1965, allegedly caused by the negligence of defendant.

On July 7, 1965, and prior thereto, defendant owned and operated a motel business in Washington, North Carolina, known as the Washington Motel, including a swimming pool located on said motel premises.

Uncontradicted evidence tends to show the body of intestate, hereafter referred to as Richard, when discovered about 1:50 p.m., was "down in the 10 feet water" in defendant's said pool, and that the cause of his death was drowning.

Plaintiff alleged, *inter alia,* that Richard's death was proximately caused by defendant's failure to comply with the legal duty imposed upon him by Article VIII, Section 3, Subsection (g) of the ordinances of the City of Washington, North Carolina, adopted May 11, 1964, and in full force and effect on July 7, 1965. This ordinance, offered in evidence, provides:

"(g) All swimming pools to be constructed or which are already constructed shall be enclosed by a fence which shall be at least four (4) feet in height and which shall be of a type not readily climbed by children.

"The gates shall be of a self-closing and latching type with the latch on the inside of the gate, not readily available for children to open. Provided, however, that if the entire premises of the residence is enclosed, then this provision may be waived by the Building Inspector upon inspection and approval of the residence enclosure. Provided that this section shall not apply to Commercial Swimming Pools operated under the following conditions:

"1. That the owner or operator of a commercial swimming pool has at least one employee on duty 24 hours a day, whose duty it will be, among other things, to watch the pool.

"2. That the principal work of this employee be located where he can clearly see the entire pool.

"3. That the pool area be sufficiently lighted to enable the employee on duty to see anyone in the immediate area."

Defendant denied all of plaintiff's essential allegations; and, as

a further defense, defendant pleaded conditionally the (contributory) negligence of Richard as a bar to plaintiff's action.

Evidence was offered by both plaintiff and defendant.

At the conclusion of all the evidence, the court, allowing defendant's motion therefor, entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

LeRoy Scott for plaintiff appellant.
Rodman & Rodman for defendant appellee.

BOBBITT, J. Although the complaint contains general allegations that defendant's swimming pool was attractive to children, there is neither allegation nor evidence that children other than guests of the motel had permission, express or implied, to go upon defendant's motel premises. Defendant's allegations and evidence are to the effect that such children, including Richard, had been given positive warning not to come upon defendant's motel premises and particularly to keep away from the pool.

"A person has the right to maintain an unenclosed pond or pool on his premises. It is not an act of negligence to do so." *Lovin v. Hamlet,* 243 N.C. 399, 402, 90 S.E. 2d 760, 763, and cases cited; *Burns v. Gardner,* 244 N.C. 602, 94 S.E. 2d 591.

Upon the present record, whether the court erred in entering judgment of involuntary nonsuit depends upon whether the evidence, when considered in the light most favorable to plaintiff, was sufficient to permit and support a finding that the violation by defendant of said ordinance proximately caused Richard's death.

All the evidence tends to show defendant's swimming pool was not enclosed by a fence of any kind. Defendant was maintaining said swimming pool in violation of the ordinance unless it was "a commercial swimming pool" within the meaning of the ordinance *and* unless defendant (1) had at least one employee on duty twenty-four hours a day, whose duty it was, among other things, to watch the pool, and (2) the principal work of this employee was located where he could clearly see the entire pool. Since it was available for use by all persons who became patrons of the motel, we are in accord with the views expressed by counsel for both plaintiff and defendant that defendant's pool must be considered "a commercial swimming pool" within the meaning of said ordinance. Hence, whether the maintenance by defendant of an unenclosed commercial swimming pool constituted a violation of the ordinance depends upon whether defendant complied with the two conditions stated above.

Plaintiff offered evidence tending to show: The pool was "30 or

40 foot" long. There was shrubbery around the pool "about 3 or 4 foot high." From the motel office, you could see through the shrubbery only "about three or four foot" of the pool. Statements made by defendant to plaintiff included the following: He didn't have anybody to watch the pool because he did not need anybody. He had been bothered with children coming up there and had run them away. He did not have any employee on duty twenty-four hours a day whose duty it was among other things to watch the pool. Plaintiff's evidence was sufficient to permit and support a finding that defendant's pool was maintained in violation of said ordinance.

Evidence offered by defendant tends to show (1) he did not make the statements attributed to him, and (2) he had an employee whose principal duty was to watch the pool, and (3) Richard entered the motel premises when no one was at the pool, defendant's said employee being absent for approximately ten or fifteen minutes. However, this evidence, since it contradicts that offered by plaintiff, is not for consideration in determining whether judgment of involuntary nonsuit should have been entered. Nor is it necessary or appropriate to consider whether, if the facts are as defendant's evidence tends to show, there was a violation of said ordinance. The gravamen of the complaint and of plaintiff's evidence is that defendant had *no* employee whose duty it was to keep watch at the pool, as distinguished from negligence on the part of such employee.

Defendant contends, and we agree, all the evidence tends to show Richard was a trespasser. See *Dean v. Construction Co.*, 251 N.C. 581, 587, 111 S.E. 2d 827, 831. Under the common law, the legal duty owned to trespassers is "that they must not be willfully or wantonly injured." *Jessup v. R. R.*, 244 N.C. 242, 93 S.E. 2d 84. Here, plaintiff bases his action on the legal duty imposed on defendant by the terms of said ordinance. The primary purpose and intent of said ordinance in imposing such legal duty on persons maintaining swimming pools was to provide protection for children without reference to whether they were legally entitled to use the pool.

It is noted that the violation of a municipal ordinance is a misdemeanor. G.S. 14-4.

Applicable legal principles established by our decisions are as follows: The violation of a municipal ordinance imposing a public duty and designed for the protection of life and limb is negligence *per se*. However, to impose liability therefor it must be established that such violation proximately caused the alleged injury. The general definition of proximate cause, including the element of foreseeability, is applicable in determining whether the violation of such ordinance constitutes actionable negligence. *Ledbetter v. English*, 166 N.C. 125, 81 S.E. 1066; *Ham v. Fuel Co.*, 204 N.C. 614, 169 S.E.

180; *Aldridge v. Hasty,* 240 N.C. 353, 82 S.E. 2d 331; *McNair v. Richardson,* 244 N.C. 65, 92 S.E. 2d 459; *Smith v. Metal Co.,* 257 N.C. 143, 125 S.E. 2d 377.

"What is the proximate or a proximate cause of an injury is ordinarily a question for a jury. It is to be determined as a fact from the attendant circumstances. Conflicting inferences of causation arising from the evidence carry the case to the jury." *Short v. Chapman,* 261 N.C. 674, 680, 136 S.E. 2d 40, 45.

There was evidence from which it may be inferred that Richard came to defendant's pool on a bicycle, wearing swim trunks, and that he either jumped or fell into an unfenced and unguarded pool where the water was ten feet deep and drowned. Under these circumstances, whether the violation of said ordinance, if such occurred, was a proximate cause of Richard's death is for determination by the jury.

Under our decisions, a person between the ages of seven and fourteen may not be held guilty of contributory negligence as a matter of law. "Whether he (is) capable of contributory negligence presents an issue for a jury, because there is a rebuttable presumption that he (is) incapable." *Hamilton v. McCash,* 257 N.C. 611, 619, 127 S.E. 2d 214, 219. Accord: *Wilson v. Bright,* 255 N.C. 329, 331, 121 S.E. 2d 601, 603, and cases cited; *Wooten v. Cagle,* 268 N.C. 366, 150 S.E. 2d 738. Under the evidence, the issue of contributory negligence raised by the pleadings is for determination by the jury.

We are advertent to the fact that plaintiff's case rests in substantial part on plaintiff's testimony as to statements made to him by defendant. Defendant categorically denied that he made such statements to plaintiff. However, we cannot accept defendant's contention that plaintiff's said testimony should be rejected. Cases cited by defendant have been considered and are distinguishable.

In *State v. Cope,* 240 N.C. 244, 81 S.E. 2d 773, cited by defendant, it was held that an extrajudicial confession must be corroborated by other evidence which at least establishes the *corpus delicti* in order to be sufficient to sustain conviction of a felony. Here, plaintiff is not relying solely on declarations made by defendant. The heart of plaintiff's case is the stark fact that the lifeless body of a boy was found in defendant's unfenced and unguarded pool. Moreover, the present factual situation does not fall within the rule that verbal testimony may be rejected if inherently impossible under the *undisputed* physical facts. Compare *Jones v. Schaffer,* 252 N.C. 368, 378, 114 S.E. 2d 105, 112. While we express no opinion as to the credibility of the testimony, the statements attributed to defendant are considered both relevant and competent in respect of what was

done, if anything, to comply with the ordinance and thereby minimize the risks of serious and fatal accidents.

For the reasons indicated, the judgment of involuntary nonsuit is reversed.

Reversed.

BUNCOMBE COUNTY BOARD OF HEALTH, PETITIONER, v. JAMES A. BROWN, JAMES L. WRIGHT, CARL CALABRESE, JOHN YOUNG, MITCHELL TAYLOR, JAMES D. SMITH, J. L. BURRELL, JAMES R. DOTSON, WILLIAM C. NICHOLS, R. G. PATTERSON, T. S. HENDERSON, JESSE D. DOTSON, J. A. STEWART, R. M. MORGAN, EVERETT S. SCROGGS, JAMES M. KESTLER, O. G. CAUBLE, H. C. GRYDER, J. T. RICKMAN, LLOYD FOX, JR., JOHN S. FOX, JOHN D. FOX, RAY E. SORRELLS, PHILIP R. DAVENPORT, HARRY B. CAUBLE, CONDIE A. O'BRINE, ROBERT AUSTIN, DOUGLAS L. DAVIS, CLARA SCHWAGER, RESPONDENTS.

(Filed 20 September, 1967.)

1. Judgments §§ 1, 19—

A judgment rendered by a court against a citizen affecting his rights in an action or proceeding to which he is not a party is absolutely void as to him and may be treated as a nullity by him whenever it is brought to the attention of the court.

2. Same—

In this proceeding brought by a county board of health against individual householders to compel the construction of a new sewer line, the court concluded upon facts stipulated by the county board and a householder that the local sanitary district was responsible for the installation of the sewer and entered an order directing the district to install the sewer; the sanitary district was not a party to the proceeding, nor was it represented by counsel. *Held:* The order is void as to the district, and is vacated by the Supreme Court *ex mero motu.*

3. Controversy Without Action § 2—

Where the case is submitted for adjudication upon stipulated facts, the court, in the absence of authorization to make additional findings of fact, is limited to the facts so stipulated.

APPEAL by petitioner from *Bryson, J.*, June 1967 Term, BUNCOMBE Superior Court.

Buncombe County Board of Health filed a petition in which some twenty-nine residents in the Wentworth Avenue section of Asheville were named as respondents. Dr. H. W. Stevens, the Director of Public Health, made an affidavit to be used as a petition which is summarized as follows:

T. S. Henderson was the main developer of this subdivision in which a six-inch sewer line was installed many years ago. It is now broken and damaged in several places and does not have the capacity to transport sewage from the greatly increased number of homes that have been built since it was installed. At the broken places it is discharging raw sewage, noxious odors, and breeding flies. The petitioner sought to restrain the respondents from the operation and lack of maintenance of the sewer line and to require them to submit plans for the construction and maintenance of at least an eight-inch sewer line as is required by the North Carolina Board of Health.

Upon the filing of this petition, Judge Harry C. Martin found that this proceeding was brought pursuant to G.S. 130-20, and that since 1963 the sewer line has broken on several occasions. Raw sewage is now running into the basements of several houses which constitutes a nuisance and is dangerous to the public health. He thereupon ordered the respondents to appear and show why the nuisance should not be abated. There was some delay in the hearing ordered by Judge Martin, but on 5 June 1967 Judge Bryson entered an order which will be referred to in the opinion. Prior to the return date of the hearing, Robert E. Riddle, counsel for petitioner, and Earl J. Fowler, counsel for Respondent Nichols, entered into certain stipulations. They included the following:

> "There are fourteen sanitary districts in Buncombe County, most of which were organized in 1927 as separate municipal corporations. Buncombe County as such holds title to no sewer lines in the county, the title being in the respective districts. The County Commissioners act as Trustees for each of the various districts with the exception of Woodfin Sanitary Water & Sewer District, which has its own Board of Trustees."

The stipulations also provided that on 24 March 1958 R. C. Torian requested the County Commissioners "to assume and take over a sewer line in what is now known as Wentworth Avenue; that action was deferred until a right-of-way study could be made; that no records reflect any subsequent action." Also, "That on the 24th day of March, 1958, a deed was placed on record from R. C. Torian and wife, . . . to Fairview Sanitary Sewer District, and that after said deed was recorded it was mailed to Roy Taylor, who at the time was County Attorney of Buncombe County . . . the line in dispute is in the Swannanoa Water & Sewer District . . . (the) line has never been inspected by the Superintendent of the Sanitary Department of Buncombe County for approval according to County and State specifications; . . . has never been maintained by the

County of Buncombe . . . that the County has no records of acceptance of said sewer line . . . That no action has been taken by the County to set aside said purported conveyance, nor has any action been taken by the property owners to enforce liability on the County pursuant to said purported conveyance."

The stipulations further agreed that the sewer line is six inches in diameter and runs approximately 1500 feet on Wentworth Avenue and serves twenty-nine houses presently owned by the respondents; that it has never been inspected by the Superintendent of the Sanitary Department of Buncombe County, that no fees were paid to the County of Buncombe for tapping as is required for County-owned and-maintained sewer lines; that as a new house was constructed, the owner tapped on to the sewer line which has never been maintained by Buncombe County; that the line was repaired on three occasions within recent years, once by the County, once by the City, and once by T. S. Henderson. There is no record to show the acceptance of the sewer line by Buncombe County, nor any inspection by it. The respondents have been paying a tax for debt service and maintenance of the Swannanoa Sanitary and Sewer District. The stipulation further provides that the sewer line is inadequate, broken, and that an eight-inch line should be installed according to proper specifications, and that it constitutes a health hazard.

When the matter was heard before Judge Bryson, he made a number of findings of fact, to which the petitioner excepted; and he thereupon made the following order:

> "That the sewer line, which is the subject matter of this action, is a part of the Swannanoa Sanitary and Sewer District, for which the County Commissioners acts as Trustees, and it is the responsibility of said sanitary and sewer district to install a proper sewer line abutting the property of the respondents named herein, which is adequate and which complies with the laws of the State of North Carolina covering the same.
>
> "IT IS THEREFORE CONSIDERED, ORDERED AND DECREED that said sewer line, which is the subject matter of this action, is owned by the Swannanoa Sanitary and Sewer District; and they are ordered to install and maintain said sewer line in accordance with the laws of the State of North Carolina."

The petitioner appealed.

Robert E. Riddle, Attorney for Buncombe County Board of Health, Petitioner Appellant.

No counsel contra.

PLESS, J. While the Swannanoa Sanitary and Sewer District (Swannanoa) is ordered to install and maintain the sewer line, it is not a party to this action and is not represented by counsel. The stipulations upon which the order is based are signed by counsel for the Buncombe County Board of Health and counsel for one of the individual respondents; consequently, they are not binding on Swannanoa, although the findings and order are dependent upon them.

> "It is axiomatic, at least in American jurisprudence, that a judgment rendered by a court against a citizen affecting his vested rights in an action or proceeding to which he is not a party is absolutely void and may be treated as a nullity whenever it is brought to the attention of the Court. We think that no case can be found in the courts of this country, State or Federal, in which this principle is questioned. Certainly in this jurisdiction it is fundamental. Reade, J., in *Doyle v. Brown,* 72 N.C. 393, says: 'When a defendant has never been served with process, nor appeared in person or by attorney, a judgment against him is not simply voidable, but void; and it may be so treated whenever and wherever offered, without any direct proceeding to vacate it. And the reason is that the want of service of process and the want of appearance is shown by the record itself, whenever it is offered.' To the same effect is *Condry v. Cheshire,* 88 N.C. 375. Smith, C.J., in *Lyon* [*Lynn*] *v. Lowe, ib.,* 478 (on page 482), says: 'It is the clear right of every person to be heard before any action is invoked and had before a judicial tribunal, affecting his rights of person or property. If no opportunity has been offered, and such prejudicial action has been taken, * * * the Court will at once, when judicially informed of the error, correct it: not because injustice is done in the particular case, but because it may have been done, and the inflexible maxim, *audi alteram partem,* will be maintained. In such case the Court does not investigate the merits of the mattter in dispute, but sets aside the judgment and reopens the otherwise concluded matter, . . ." *Card v. Finch,* 142 N.C. 140, 54 S.E. 1009. Refer also to *Powell v. Turpin,* 224 N.C. 67, 29 S.E. 2d 26, and *Clark v. Homes,* 189 N.C. 703, 128 S.E. 20.

The court made findings of fact in addition to the stipulated facts, and to each of these the petitioner excepted. The record, by which we are bound, contains no provision that the parties had agreed that the judge could make additional findings of fact, and no evidence is brought forward in the record to sustain them. In

the absence of such stipulation or agreement, the judge is limited to the stipulated facts; and because he made additional findings of fact, the petitioner's exceptions thereto are sustained. *Hood, Comr. of Banks v. Johnson*, 208 N.C. 77, 178 S.E. 855; *Auto Co. v. Insurance Co.*, 239 N.C. 416, 80 S.E. 2d 35; *Sparrow v. Casualty Co.*, 243 N.C. 60, 89 S.E. 2d 800.

In its brief the appellant says "Did the court err in holding that the facts warrant a finding that there was a valid conveyance of the sewer line in question? This question is really the meat of the controversy in this appeal and it is hoped that the Court will answer this question to avoid the necessity of any further appeals."

A copy of the conveyance is not before us, and we are given no information as to its terms nor whether it was accepted. The stipulations have no provision that the Torian deed was accepted by Fairview or that it was recorded by anyone authorized to do so on behalf of Buncombe County. Also, the authority of the Fairview and Swannanoa Districts to accept conveyances or to make them is not shown, and the record does not disclose whether those two districts were, or were not, some of the fourteen sewer districts organized in 1927 as separate municipal corporations. Without further information on these subjects, we are unable to answer the appellant's question.

The order of the Superior Court is not supported by the stipulations; and as it places responsibility upon the Swannanoa Sanitary and Sewer District, which is not a party hereto, it is hereby vacated.

Error and remanded.

T. T. DAVIS AND WIFE, VELMA ANN JONES DAVIS, v. NORTH CAROLINA STATE HIGHWAY COMMISSION.

(Filed 20 September, 1967.)

1. Appeal and Error § 6—

A motion to strike allegations on the ground that they failed to state a cause of action is equivalent to a demurrer, and an order allowing the motion has the effect of sustaining a demurrer, and is appealable. G.S. 1-277.

2. State § 4; Eminent Domain § 11—

The State Highway Commission, as an agency of the State, may be sued in tort only as authorized in the Tort Claims Act, G.S. 143-291, and in no forum is the Commission liable for fraudulent misrepresentations.

3. Eminent Domain § 11; State § 5a; Negligence § 2—

The Tort Claims Act authorizes claims against the State Highway Commission which arise out of a negligent act of an employee in the scope of his employment, G.S. 143-291, and allegations to the effect that the Commission by false representations fraudulently and unnecessarily induced the plaintiffs to vacate their home two years before it was required for highway purposes, *held* properly stricken, since an intentional misrepresentation is not a negligent act.

4. Fraud § 12—

Punitive, exemplary, or vindictive damages are ordinarily not recoverable for simple fraud.

5. Pleadings § 11—

A reply is a defensive pleading, and where the reply states a cause of action, it is properly stricken on motion.

6. Eminent Domain § 5—

Plaintiffs alleged that they vacated their home on the date the Highway Commission advised them it would require the property, but that the Commission did not take actual possession until some two years later. The Commission admitted the date of taking to be the day plaintiffs vacated the property. *Held:* The proper measure of damages is the fair market value of the property as of the date of the taking, plus interest for delayed payment of compensation, and plaintiffs are not entitled to damages for the loss of use of their property between the day it was vacated and the date the defendant deposited its estimate of compensation.

APPEAL by plaintiffs from *Martin, S.J.*, 12 June 1967 Non-Jury Civil Session of BUNCOMBE.

Plaintiffs instituted this action on 10 March 1967 under G.S. 136-111 to recover from North Carolina State Highway Commission compensation for the appropriation for highway purposes of a certain house and lot in Asheville. In brief summary, the complaint alleges:

Defendant took plaintiffs' property on 14 January 1965. On 14 July 1964, it had notified plaintiffs by letter that 14 January 1965 was "the approximate planned date" on which their residence would be demolished or removed from the lot. Plaintiffs vacated their home on or about 14 January 1965 and since that date "defendant has appropriated the property for its own use." Plaintiffs are entitled to recover actual damages in the sum of $50,000.00 with interest thereon from 14 January 1965 as a result of the appropriation. In addition, plaintiffs allege that defendant falsely represented to them that it would demolish their residence on 14 January 1965. Defendant made this representation with knowledge of its falsity and with the intent to deceive plaintiffs and force them from their home before it was actually necessary for them to leave. Deceived by this representation and acting in reliance upon it, plaintiffs va-

cated their property and acquired another residence. Plaintiffs are entitled to recover one million dollars as punitive damages.

In compliance with G.S. 136-111, plaintiffs filed in the office of the Register of Deeds of Buncombe County a memorandum of the action in which they stated that the taking occurred on 14 January 1965.

On 24 April 1967, defendant moved to strike all the allegations in the complaint concerning false representations and punitive damages. It also filed answer admitting that it had taken plaintiffs' property on 14 January 1965 and that plaintiffs were entitled to recover just compensation as provided by Article 9, Chapter 136 of the General Statutes of North Carolina. The answer included a declaration of taking and notice that defendant had deposited $15,500.00 as its estimate of just compensation for the appropriation. On 28 April 1967, under G.S. 136-105, plaintiffs petitioned the court to distribute this deposit to them "to be applied as a credit against just compensation."

On 10 May 1967, plaintiffs filed a reply to defendant's answer, in which they alleged that on 10 March 1966 they went back into possession of the property, and retained it until 10 March 1967; that defendant did not take possession of the property until 2 May 1967; "that the second and actual taking of said property occurred on or about April 24, 1967, when defendant filed a Notice of Taking"; that defendant defrauded plaintiffs "from having the use of the property for over two years"; that defendant pretended to take the property on 14 January 1965 pursuant to a scheme to induce plaintiffs to leave their property vacant so that it would deteriorate in value. They alleged that the fair market value of the property at the time of the taking on 24 April 1967 was $45,000.00 and prayed that they recover this amount. Defendant filed a motion to strike the reply.

The case was calendared at the 12 June 1967 Non-Jury Session of Buncombe County at which time Judge Martin entered an order allowing defendant's motion to strike the specified allegations of the complaint and the entire reply. In the same order, he determined that defendant had appropriated plaintiffs' property on 14 January 1965 and that the only issue raised by the pleadings was: What sum are plaintiffs entitled to recover of defendant as just compensation for the appropriation of their property for highway purposes on the 14th day of January, 1965?

Plaintiffs excepted to the various rulings and appealed.

Cecil C. Jackson, Jr., for plaintiff appellants.

Thomas Wade Bruton, Attorney General; Harrison Lewis, Dep-

uty Attorney General; Andrew McDaniel, Assistant Attorney General; Gudger and Erwin, Associate Attorneys, for defendant appellee.

SHARP, J. Defendant moved to strike from the complaint and reply the allegations that it had unnecessarily and fraudulently deprived plaintiffs of their property two years before it was required for highway purposes, and that plaintiffs were entitled to compensatory and punitive damages for the loss of its use. This was equivalent to a demurrer to that purported cause of action, and the effect of Judge Martin's order allowing the motion was to sustain the demurrer. *Insurance Co. v. Bottling Co.,* 268 N.C. 503, 151 S.E. 2d 14; *Williams v. Hospital Asso.,* 234 N.C. 536, 67 S.E. 2d 662. Rule 4(a) of this Court has no application to such orders for they come within the provisions of G.S. 1-277. *Etheridge v. Light Co.,* 249 N.C. 367, 106 S.E. 2d 560.

The North Carolina State Highway Commission is an agency of the State. It is, therefore, not subject to suit except in the manner provided by statute. It may be sued in tort only as authorized in the Tort Claims Act, G.S. 143-291. *Teer Co. v. Highway Commission,* 265 N.C. 1, 143 S.E. 2d 247. The Tort Claims Act empowers the *Industrial Commission* to pass upon tort claims against the State Highway Commission which "arose as a result of a negligent act" of an agent of the State while acting within the scope of his employment by the State. G.S. 143-291. Neither intentional misrepresentation nor conspiracy to defraud is negligence, and injuries intentionally inflicted are not compensable under the Torts Claim Act. *Jenkins v. Department of Motor Vehicles,* 244 N.C. 560, 94 S.E. 2d 577.

> "Fraud is distinguishable from mistake or negligence. 'Deceit excludes the idea of mistake, and fraud has been termed a grosser species of deceit. Deceit is a fraudulent misrepresentation, by which one man deceives another, to the injury of the latter.' . . .
>
> " 'Fraud is a malfeasance, a positive act resulting from a willful intent to deceive; negligence is strictly nonfeasance, a wrongful act resulting from inattention and not from design. . . . Negligence, whatever be its grade, does not include a purpose to do a wrongful act.' " *Walter v. State,* 208 Ind. 231, 241, 195 N.E. 268, 272, 98 A.L.R. 607, 613; 37 C.J.S. Fraud § 1.

In no forum is the State Highway Commission liable for fraudulent misrepresentations. *Teer v. Highway Commission, supra;* see *Price v. Trustees,* 172 N.C. 84, 89 S.E. 1066. Furthermore, it is "the

general rule that ordinarily exemplary, punitive, or vindictive damages are not recoverable in an action for fraud. 37 C.J.S., Fraud, section 144"; *Wilkins v. Finance Co.,* 237 N.C. 396, 404, 75 S.E. 2d 118, 124; *accord, Nunn v. Smith,* 270 N.C. 374, 154 S.E. 2d 497; *Swinton v. Realty Co.,* 236 N.C. 723, 73 S.E. 2d 785.

Even, however, if the allegations contained in plaintiffs' reply were sufficient to state a cause of action, the reply was properly stricken; the reply is a defensive pleading. A plaintiff's cause of action must be stated in the complaint — not in the reply. *Furniture Co. v. Bentwood Co.,* 267 N.C. 119, 147 S.E. 2d 612; *Nix v. English,* 254 N.C. 414, 119 S.E. 2d 220; *Phillips v. Mining Co.,* 244 N.C. 17, 92 S.E. 2d 429; *Miller v. Grimsley,* 220 N.C. 514, 17 S.E. 2d 642; 3 Strong, N. C. Index, Pleadings § 11 (1960).

When, under its power of eminent domain, the State Highway Commission takes private property which it is entitled to condemn, it is liable for the fair market value of the property "as of the date of the taking, and unaffected by any subsequent change in the condition of the property." *DeBruhl v. Highway Commission,* 247 N.C. 671, 676, 102 S.E. 2d 229, 233. Where the payment of compensation is delayed, the condemnee is entitled to interest on that sum at the rate of six per cent from the date of the taking. *Winston-Salem v. Wells,* 249 N.C. 148, 105 S.E. 2d 435; *DeBruhl v. Highway Commission, supra.*

Plaintiffs were not legally required to leave their home on 14 January 1965, the date defendant advised them it would require the property. G.S. 136-104. However, in deference to defendant's notice to vacate, they acceded to the request, acquired another residence, and moved. They alleged that defendant took their property on that date. Defendant, meeting the requirement of elemental justice, admitted the taking on 14 January 1965 and its liability to pay plaintiffs the sum determined to be the fair market value of the property plus interest from that date.

No doubt the property, while standing vacant from 14 January 1965 to 10 March 1966 (the date on which plaintiffs went back into possession), deteriorated in value. Although they retained it until 10 March 1967, and defendant did not take actual possession of the property until 2 May 1967, defendant seeks neither to penalize plaintiffs for their occupancy nor to change the time of taking from 14 January 1965.

Plaintiffs are not entitled to recover any damages — other than interest — for the loss of use of their property between the time they vacated it and the time defendant deposited its estimate of just compensation for the property appropriated. Its fair market value as of the day of the taking is the full measure of plaintiffs' damages.

Railroad v. Highway Commission, 268 N.C. 92, 150 S.E. 2d 70; *Williams v. Highway Commission,* 252 N.C. 141, 113 S.E. 2d 263.

The allegations contained in the reply and those stricken from the complaint were clearly improper and correctly stricken. *Spain v. Brown,* 236 N.C. 355, 72 S.E. 2d 918. The issue determined by the judge is the only issue which arises upon the pleadings.

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

Affirmed.

HELEN E. SAWYER v. LIFE AND CASUALTY INSURANCE COMPANY OF TENNESSEE.

(Filed 20 September, 1967.)

1. Trial § 21—

On motion to nonsuit, the plaintiff's evidence is to be taken as true and considered in the light most favorable to him, giving him the benefit of every fact and inference of fact in his favor which may be reasonably deduced from the evidence, and defendant's evidence which tends to impeach or contradict plaintiff's evidence is not considered.

2. Insurance § 34— Evidence held not to show insured provoked felonious assault as matter of law and therefore was sufficient to be submitted to jury in action on accident policy.

Plaintiff's evidence was to the effect that insured and his mother went to the home of his wife's parents after his wife had left him, that he and his mother-in-law became engaged in an altercation, she ordering him from the house, that he hit her and that she called her son who came into the room and stabbed him with a knife, inflicting fatal injury. ***Held:*** Even though insured was the aggressor in a simple assault, the circumstances were not such as to charge him with anticipating the felonious assault and therefore nonsuit was properly denied in plaintiff's action to recover under the provisions of the policy for benefits if insured died as a result of violent, external and accidental means.

APPEAL by defendant from *Bone, E.J.,* February 1967 Session of BEAUFORT.

Civil action by beneficiary to recover death benefits on accident insurance policy No. 20841058 issued by defendant insuring the life of James F. Sawyer.

Defendant's pleadings admit that plaintiff was the beneficiary named in said policy and that the policy was in full force and effect on the date of James F. Sawyer's death. The pleadings also admit that plaintiff filed proof of loss with defendant.

Policy No. 20841058 insured James F. Sawyer against loss of life

by "drowning or bodily injury effected solely through violent, external and accidental means, . . ."

The plaintiff and beneficiary under the accident insurance policy, Mrs. Helen E. Sawyer, was the mother of the insured, James F. Sawyer. Evidence introduced by plaintiff tends to show the following:

James F. Sawyer went to the home of Mrs. Sawyer about 6:30 in the evening of September 15, 1965. Mrs. Sawyer accompanied James to his trailer, where he lived with his wife, Dorothy Leggett Sawyer, and their son. It appeared that his wife had left with her belongings and their child. From there, James Sawyer rode with his mother to the home of Mrs. Betty Leggett, mother of his wife, in an effort to find his wife and talk with her.

James Sawyer was *admitted* by the rear door into Mrs. Leggett's home. Mrs. Sawyer testified that about three minutes later she heard Mrs. Leggett shout, "Get out of my house! Get out of my house!" Upon entering the house she saw James standing near the back door. Mrs. Leggett and her son, Leonard Eugene Leggett, were "beating" James. She did not see James strike anyone. He was trying to get out, but they were holding and pushing him when he got to the door. She said: "He could not get out like magic." She told James to turn Mrs. Leggett loose and to leave, which he did. After leaving the house, James said, "Mama, I have got to go somewhere. That boy has stuck a knife in me." She took James to the hospital, where he was treated by Dr. Sam Williams. He remained in the hospital until his death on October 2, 1965.

Dr. Sam Williams, who was admitted to be a medical expert specializing in surgery, testified that James Sawyer had been stabbed in the lower right abdomen, in the right groin. The death certificate listed bronchial pneumonia secondary to stab wound in the right groin as the cause of death. Dr. Williams stated that in his opinion the pneumonia was secondary to the stab wound and due to the disability of his injury and that the complications were from his stab wound.

At the conclusion of plaintiff's evidence, defendant moved for judgment as of nonsuit, which motion was denied.

Mrs. Betty Leggett, testifying for defendant, stated, in part, that after she ordered James Sawyer to leave her house, she then took him by the arm in order to show him out. She further said that James hit her on the face and on the arm and that she did not strike him, that she could handle James because he had never given her any trouble, but when Mrs. Sawyer came into the house she then called her son Leonard to her aid.

Defendant's witness Leonard Eugene Leggett testified, in sub-

stance, that James Sawyer was about at the arch between the living room and the kitchen when he first came out of the bathroom; that Mrs. Leggett had worked James over to the door leading to the outside from the kitchen; that James struck Mrs. Leggett and then struck him, whereupon he picked up a knife from the table and stabbed James. Mrs. Leggett still had hold of James when he stabbed him. James immediately left the house. Leonard Leggett further testified that he did not see anything in James' hand.

Mrs. Dorothy Sawyer, also testifying for defendant, said, *inter alia,* that she saw James Sawyer hit her mother one time but did not see him strike any other blow.

At the close of all the evidence, defendant renewed its motion for judgment as of nonsuit. The motion was denied.

Defendant requested the court to charge the jury as follows:

> "If you believe the evidence and find the facts to be as all the evidence tends to show, you will answer the first issue No."

The court refused defendant's request and defendant excepted.

The jury returned a verdict in favor of plaintiff. Defendant appealed.

Carter & Ross for plaintiff.
Rodman and Rodman for defendant.

BRANCH, J. Appellant's assignments of error as to denial of motions for nonsuit and denial of its request for peremptory instruction challenge the sufficiency of the evidence to go to the jury.

Appellant contends that the death of insured resulted directly from insured's voluntary act and aggressive misconduct and therefore did not come within the policy provision of death resulting from "bodily injury effected solely through violent, external and accidental means."

In the case of *Fallins v. Insurance Co.,* 247 N.C. 72, 100 S.E. 2d 214, the Court, considering an insurance policy which insured deceased against death by external, violent and accidental means, and speaking through Higgins, J., stated:

> "An injury is 'effected by accidental means' if in the line of proximate causation the act, event, or condition from the standpoint of the insured person is unintended, unexpected, unusual, or unknown. The unintended acts of the insured are deemed accidental. Injuries caused to the insured by the acts of another person, without the consent of the insured, are held due to accidental means unless the injurious acts are provoked and should

have been expected by the insured. (Citing numerous authorities)."

Appellant relies heavily on *Scarborough v. Insurance Company,* 244 N.C. 502, 94 S.E. 2d 558, and points with particularity to that portion of the opinion which states:

"Where the policy insures against loss of life through accidental means, the principle seems generally upheld that if the death of the insured, although in a sense unforeseen and unexpected, results directly from the insured's voluntary act and aggressive misconduct, or where the insured culpably provokes the act which causes the injury and death, it is not death by accidental means, even though the result may be such as to constitute an accidental injury.

"Where the insured is the aggressor in a personal encounter and commits an assault upon another with demonstration of violence and knows, or under the circumstances should reasonably anticipate, that he will be in danger of great bodily harm as the natural and probable consequence of his act or course of conduct, his injury or death may not be regarded as caused by accidental means."

This Court quoted with approval the above language from *Scarborough* in the recent case of *Mills v. Insurance Company,* 261 N.C. 546, 135 S.E. 2d 586, and further stated:

". . . This excerpt from the opinion of Hoke, J. (Later C.J.), in *Clay* is quoted with approval in *Scarborough* and in *Gray:* '. . . in case of death by "external, violent and accidental means," without more, we hold that the true test of liability in cases of this character is whether the insured, being in the wrong, was the aggressor, under circumstances that would render a homicide likely as a result of his own misconduct.' "

See also *Clay v. Insurance Co.,* 174 N.C. 642, 94 S.E. 289.

It is well established in this jurisdiction that upon motion to nonsuit the plaintiff's evidence is taken as true and considered in the light most favorable to him, giving him the benefit of every fact and inference of fact pertaining to the issues which may be reasonably deduced from the evidence, and defendant's evidence which tends to impeach or contradict plaintiff's evidence is not considered. *Green v. Meredith,* 264 N.C. 178, 141 S.E. 2d 287.

Applying these recognized rules of law to the instant case, we hold that plaintiff's evidence is sufficient for the jury to infer that the insured was not the aggressor and in the wrong under such cir-

cumstances as would render his injury and resulting death the natural and probable consequences of his conduct. The trial judge properly overruled defendant's motion for judgment as of nonsuit.

Nor does the uncontradicted evidence establish facts precluding recovery so as to allow the court to give a peremptory instruction against defendant. *Wesley v. Lea,* 252 N.C. 540, 114 S.E. 2d 350.

No error.

STATE OF NORTH CAROLINA v. GOLDEN E. PARKER.

(Filed 20 September, 1967.)

1. Criminal Law § 10—

An indictment charging the defendant with being an accessory before the fact in the slaying of a named person is not rendered invalid in carrying, in addition to the requirements of G.S. 14-5, the words "did incite, move, aid, counsel, hire", since such words do not contradict the essential averments of the indictment.

2. Criminal Law § 92—

Indictments charging defendants as accessories before the fact in the slaying of the same person, the defendants being present together at the time of the offense, *held* to authorize the consolidation of the indictments for trial.

3. Jury § 3—

Objection to the manner in which the jury was selected, *held* without merit, when defendant offered no objection to the jury at the trial and consented, through his counsel, to the manner of selection.

ON *certiorari* to review a criminal action tried before *Bailey, J.*, at the March 1966 Mixed Session, JOHNSTON Superior Court.

The defendant, Golden E. Parker, and Gene Elwood Parker, were indicted in separate bills as accessories before the fact, in that each incited, aided, counseled, hired, and commanded one Joseph McNeil to kill and murder Junius Young Parker.

The evidence disclosed that the defendant and his wife, Evelyn, had been separated almost one year. Evelyn is the daughter of Junius Young Parker. The defendant stated that Junius Parker was responsible for the separation and had stated unless she returned to live with him he would kill her and her father and mother.

The evidence further disclosed that Golden E. Parker agreed to pay his employee, Joseph McNeil, $500 to kill Junius Young Parker. On the night of February 19, 1966, the defendant, Golden E. Parker,

with Joseph McNeil and Gene Elwood Parker, in the latter's automobile, drove to a place near the Junius Parker home; Golden E. Parker gave the appellant a 22 repeating rifle with a number of live cartridges, and instructed him to shoot and kill Junius Young Parker. Both Golden Parker and Gene Parker left in the automobile. McNeil hid behind a tree near the house waiting for an opportunity to carry out his mission. A dog barked and Junius Parker walked out in the yard, apparently to ascertain what was disturbing the dog. McNeil, from ambush, shot Junius Parker 7 or 8 times with the rifle, killing him instantly.

The State's evidence further disclosed that Joseph McNeil was indicted for the murder of Junius Young Parker and at his trial he entered a plea of guilty to the charge of murder in the first degree, for which he was given a life sentence in the State's prison. The State offered other evidence and exhibits strongly corroborating the direct evidence. The defendant neither testified nor offered evidence on the question of his guilt or innocence. The jury returned a verdict of guilty as charged. The court imposed a life sentence. *Certiorari* brought the case here for review.

T. W. Bruton, Attorney General; Harry W. McGalliard, Deputy Attorney General; James F. Bullock, Deputy Attorney General; Andrew A. Vanore, Jr., Staff Attorney, for the State.

Wallace Ashley, Jr., for petitioner defendant.

HIGGINS, J. The defendant has raised a number of objections to the indictment. The indictment contains all necessary averments. The fact that it carries, in addition to the requirements of G.S. 14-5, the words "did incite, move, aid, counsel, hire" neither contradicts nor invalidates the charge which is otherwise in the wording of the statute. The crime charged is a common law offense. The essential elements necessary to be charged are described in *State v. Bass,* 255 N.C. 42, 120 S.E. 2d 580 and *State v. Williams,* 208 N.C. 707, 182 S.E. 131. The indictment is valid.

The defendant objected to the court's order consolidating his case with a similar charge against Gene Elwood Parker as an accessory before the fact. " 'The court is expressly authorized by statute in this State to order the consolidation for trial of two or more indictments in which the defendant or defendants are charged with crimes of the same class, which are so connected in time or place as that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others. . . . *State v. Combs,* 200 N.C. 671, 158 S.E. 252; *State v. Arsad,* 269 N.C. 184, 152 S.E.

2d 99; *State v. Cooper,* 190 N.C. 528, 130 S.E. 180; *State v. Malpass,* 189 N.C. 349, 127 S.E. 248.' "

The facts in this case fully meet the requirements of consolidation. The two defendants were charged with being accessories before the fact in the murder of Junius Young Parker and were so connected in time and place that the evidence of the trial of one would be competent and admissible at the trial of the other. No conflict in interest appears between the two defendants.

The objection to the manner in which the jurors were selected and summoned is not sustained and, in addition, not only was there no objection to the jury raised at the trial, but actually the defendant, through his counsel, consented to the manner of selection. *State v. Doughtie,* 238 N.C. 228, 77 S.E. 2d 642; *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513.

The counsel of record appointed by the court has been diligent both in preparing and presenting the defendant's appeal. Careful review fails to disclose error of law.

No error.

ARTHUR LEE YORK, OLIVER LEE YORK AND WIFE, MARGARET YORK, PETITIONERS, v. FLOYD C. YORK AND WIFE, BETTY YORK, RESPONDENTS, AND C. W. RANDOLPH AND WIFE, LOCKIE RANDOLPH, ADDITIONAL PARTIES.

(Filed 20 September, 1967.)

1. Appeal and Error § 36—

A court has an inherent power to correct its records to make them speak the truth, and therefore the clerk of the Superior Court upon findings based on testimony before him that he had signed an order for publication and had made a certificate, that he had addressed and mailed the notice of publication, and placed the certificate in the file, are conclusive even though the original record failed to so show, and are sufficient to support the clerk's denial of a motion to set aside the judgment in the proceeding for want of proper service.

2. Evidence § 4—

Where a person under duty to mail a letter entrusts it to a person having an interest in the mailing of the letter, who testifies that he duly mailed it and that the letter was properly addressed, there is a presumption that the letter was delivered to the addressee.

APPEAL by Respondents Floyd C. York and wife, Betty York, from *Martin, S.J.,* 13 March 1967, Civil Session, BUNCOMBE Superior Court.

The petitioner, Oliver Lee York, and the respondent, Floyd C. York, are brothers and in 1962 lived on the same street in Washington, D. C. The other petitioner, Arthur Lee York, is the nephew of the two brothers, being the only son of a deceased third brother. He is a resident of Buncombe County, N. C.

The three brothers were tenants in common of certain real estate located in Buncombe County, N. C.; and upon the death of his father, Arthur Lee York became one of the tenants in common.

In October 1962 the petitioners instituted the special proceedings in Buncombe County against the respondents, Floyd C. York and wife, to partition the lands owned by the parties as tenants in common. Upon the return of the sheriff that the respondents, Floyd C. York and wife, Betty, were not to be found, the petitioners complied with the statutory requirements of service by publication; and the land was sold after due advertisement and purchased by C. W. Randolph and wife, Lockie Randolph, who have since been made additional parties. All of the statutory requirements for report, confirmation by the clerk, and by the judge, were met, the respondents having failed to appear. In July 1965, the respondents moved to set aside the judgment and confirmation of sale for the reason that they had not received notice of the pendency of the proceedings or the sale; that the "petitioners failed to have the Clerk of Superior Court mail a copy of the Notice of Service of Process by Publication and no such Notice was ever received by these movents; that there is no certificate at the bottom of the Order for Service of Process by Publication or by separate certificate filed with the Order certified by the Clerk that a copy of said Notice was mailed to said respondents or either of them as provided by N. C. General Statutes 1-99.2"; and that Arthur Lee York lived on the same street in Washington and knew their address. The respondents also filed affidavits to the effect that they had been living for the past fifteen years at 5419 Boulder Drive, Washington, D. C., and that they had received no notice of the publication. In response to the motion and affidavits, petitioners offered the affidavit of Don C. Young, attorney for petitioners; and upon a hearing, Mr. Young testified that he had been practicing law in Asheville for more than forty years, and had instituted the 1962 proceedings. That when the sheriff returned the summons for the respondents unserved, Mrs. Edna C. Turnbull, Assistant Clerk of the Superior Court, upon proper affidavit and motion, signed an order for service of publication and signed a copy of it to be mailed to the respondents. Mrs. Turnbull got what they called a "blue slip" and made the entry on it, signed it, attached it, and put it among the papers in the order of publication and notice and then gave a copy of the

papers to Mr. Young in an envelope correctly addressed to the respondents, and that she "put a stamp on it and gave it to me [Mr. Young] to mail, and I took it down to the Post Office and mailed it. I noticed the address and it was correct, and that was done the same day the publication was."

The clerk, after hearing the parties, found as a fact that Mrs. Turnbull ordered service of process by publication, and notice of publication was signed by her on the same date; that she then addressed a proper envelope to the respondents, stamped it and "the same was properly and immediately placed in the United States mail for transportation and delivery to the respondents." That on the same date, Mrs. Turnbull prepared and signed a certificate to the effect that she had addressed and mailed to the respondents a notice of publication and placed the same in the file. That the sale of the land was later held, which was in all respects regular and all the statutes complied with, and that the sale had been properly reported and confirmed by the clerk and approved by a judge of the superior court on 13 August 1964. The clerk further held:

> "For some unexplainable reason, unknown to the Court, the said certificate made by Edna C. Turnbull, Assistant Clerk of the Superior Court, on or about the 5th day of November, 1962, was lost, destroyed or misplaced during the period of time before said papers were recorded and when said proceedings was recorded in the Office of the Clerk of the Superior Court in Special Proceedings, Volume 91 at page 231, under the title of Case No. 62-82, the said certificate of the mailing of said Notice of Publication was not included and is not in said file or in said book, and the Court finds as a fact that the minutes and records of said proceeding therein do not speak the truth in that the said certificate having, for some unknown reason, disappeared or was lost, was not placed on said records of said court."

The clerk then held "that said records and said minutes of said proceeding should be corrected to speak the truth by the insertion therein showing the certificate of said date and that the record of this order and judgment shall constitute and be a correction of said minutes and records to that effect." The clerk further held:

> "That every provision of the law regarding the Service of Publication and the notification of the respondents has been carefully complied with and that on the date of said confirmation and judgment confirming said sale by the Court, that said

respondents were proper parties to said action and were subject to the jurisdiction of the Court.

"That the respondents C. W. Randolph and wife, Lockie Randolph, were innocent purchasers of said property under the confirmation and judgment of the Court, and that they have fully complied with the terms and conditions on which the same was purchased by them.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

"That the motion of the said Floyd C. York and wife, Betty York, by and through their attorney Bruce J. Brown, to set aside said judgment be, and the same is hereby denied.

"That the costs of this proceeding be taxed against said respondents Floyd C. York and wife Betty York."

The respondents appealed, and the matter was then heard before Judge Martin of the Superior Court who in every respect affirmed and approved the order of the clerk and ordered the correction of the records "to speak the truth by the insertion therein showing the certificate of said date and that the recording of this order and judgment shall constitute and be a correction of said matters and records to that effect."

From Judge Martin's judgment, the respondents appealed.

Bruce J. Brown, Attorney for Respondent Appellants, Floyd C. York and wife, Betty York.

Don C. Young, Attorney for Arthur Lee York, Oliver Lee York and wife, Margaret York, Petitioner Appellees.

Cecil C. Jackson, Jr., Attorney for C. W. Randolph and wife, Lockie Randolph, Additional Parties, Appellees.

PER CURIAM: The respondents attacked the validity of the sale of the lands for three reasons: first, that they received no notice of the pendency of the action or the sale of the lands; second, that the alleged certificate of Mrs. Turnbull was not in the files, and the orders of the clerk and the judge adding them and correcting the record was error; and, third, that notice of the proceedings was not mailed by the clerk as required by G.S. 1-99.2, and specifically that he did not comply with subsection (c) which requires "The clerk shall mail a copy of the notice of service of process by publication . . ."

We are of the opinion that the respondents' positions are not well taken. Upon competent evidence, the clerk found as a fact that the notice and certificates had been signed but had been lost from the files. This was a matter to be determined by him. In *Creed v.*

Marshall, 160 N.C. 394, 76 S.E. 270, the Court said that in matters of this kind the clerk "is the sole judge of the weight and credibility of the evidence, and his findings thereon are conclusive and are not reviewable by this Court."

"The power of a court upon a proper showing to correct its records and supply an inadvertent omission cannot be doubted." *Philbrick v. Young,* 255 N.C. 737, 122 S.E. 2d 725, and many cases there cited. See also *Trust Co. v. Toms,* 244 N.C. 645, 94 S.E. 2d 806; and *S. v. Cannon,* 244 N.C. 399, 94 S.E. 2d 339, in which case the Court, speaking through Denny, J., later C.J., approved the amendment to the minutes of the superior court some fifteen years after the omission occurred. This involved a serious criminal charge, and it could hardly be argued that if corrections can be made affecting the liberty of a defendant, that in matters of much smaller consequence they couldn't be corrected.

The other contention of the respondents that the clerk did not mail the papers cannot be seriously considered. The clerk of court in Mecklenburg County would be able to do little except carry letters to the post office if he were physically and personally required to mail them. It goes without saying that when he, or one in his office, authorizes the mailing of a notice, and there is proof by the person to whom the mailing is entrusted that it was mailed, that this constitutes compliance with the statute.

There are many rulings to the effect that the mailing of a letter properly addressed presumes a delivery to the addressee. *Mill Co. v. Webb,* 164 N.C. 87, 80 S.E. 232; *Bank v. Hall,* 174 N.C. 477, 93 S.E. 981; *Trust Co. v. Bank,* 166 N.C. 112, 81 S.E. 1074; *White v. Insurance Co.,* 226 N.C. 119, 36 S.E. 2d 923; *Holloman v. R. R.,* 172 N.C. 372, 90 S.E. 292.

The judgment of the court below is

Affirmed.

ALICE VAN DEUSEN POWELL v. DR. WILLIAM F. POWELL.

(Filed 20 September, 1967.)

1. Pleadings § 30—

Judgment on the pleadings is proper only when the pleadings fail to present any issue of fact for the determination of a jury.

2. Divorce and Alimony § 21—

Allegations in the amended answer admitting that plaintiff and defendant signed a separation agreement but denying that defendant promised

to pay plaintiff for her support monthly periodic payments as stipulated in the agreement, and denying plaintiff's allegations that defendant had defaulted in making such payments, raises an issue of fact for the determination of the jury in plaintiff's action to recover the amounts alleged to be in default, irrespective of whether defendant's further answer and defense sufficiently alleged that the signing of the agreement was induced by coercion, threats and intimidations.

APPEAL from *Bryson, J.*, 22 May 1967 Civil Session of BUNCOMBE.

This is a civil action based on a separation agreement and an agreement on a property settlement entered into by plaintiff and defendant prior to divorce decree granted them on or about 10 July 1962.

The complaint, in substance, alleges: Plaintiff and defendant, a doctor of medicine, were married to each other on 21 April 1934. On 10 July 1962, in a divorce proceeding brought in the General County Court of Buncombe County by Dr. Powell, a judgment was entered dissolving the marriage of plaintiff and defendant on the grounds of two years' separation. Prior to said divorce proceedings and on 1 September 1960, plaintiff and defendant entered into a separation agreement and agreement on a property settlement. Prior to said separation agreement and property settlement agreement, defendant here, in consideration of agreement of plaintiff to enter into said separation agreement and property settlement agreement, promised to pay to plaintiff here, for her separate support and maintenance, monthly periodic payments payable on or before the 10th day of each month, commencing with the month of September, 1960. Commencing in September, 1960, and including June, 1964, defendant paid to the plaintiff the sum of $1000 each month. During the months of July and August, 1964, defendant did not pay all of the $1000 due each month; but on or about 1 November 1965, defendant paid to the plaintiff the $1000 for the months of July and August, 1964, for which he was delinquent. Defendant has defaulted in the monthly payments due for the months of September, 1964, through 1 November 1965, and he is now delinquent in the sum of $500 for each month commencing 1 September 1964 and including 1 November 1965, and defendant is justly due plaintiff on said property settlement agreement the sum of $7500 to and including 1 November 1965; but, notwithstanding repeated demands made of the defendant, he has failed and still refuses to pay the plaintiff here the amounts due under said contract. Wherefore, plaintiff prays that she recover judgment from the defendant in the sum of $7500.

Defendant filed an answer in which he admits that he and plaintiff signed a purported separation agreement on 1 September 1960, but he denies that he promised to pay her for her separate support

and maintenance monthly periodic payments, payable on or before the 10th day of each month, commencing with the month of September, 1960. In his answer he admits that on or about 1 November 1965 he paid plaintiff the sum of $1000. He admits in his answer that plaintiff has made demands on him for the sum of $7500 which he has failed to pay, but he avers that he is not indebted to plaintiff in that amount because of any default in monthly payments under the property settlement agreement. In a further answer and defense defendant alleges that the purported separation agreement between plaintiff and himself was not valid but was the product of coercion, threats and intimidations on the part of plaintiff.

Upon motion of the plaintiff that defendant be made to make his further answer and defense more definite in respect to the alleged coercion, threats and intimidations on the part of plaintiff, defendant filed an amended answer. The amended answer is a verbatim copy of the original answer except he attempts to state with particularity the coercion, threats and intimidations on the part of plaintiff that induced him to sign the purported separation and property settlement agreement.

Plaintiff filed a reply to the amended answer denying that the separation and property settlement agreement was entered into as the result of any coercion, threats and intimidations on her part.

From a judgment entered upon the pleadings upon motion of the plaintiff, defendant appeals to the Supreme Court.

Williams, Williams and Morris by William C. Morris, Jr., and James F. Blue, III, for defendant appellant.
Loftin & Loftin for plaintiff appellee.

PER CURIAM. A judgment on the pleadings is proper only when the pleadings fail to present any issue of fact for the determination of a jury. *Reidsville v. Burton,* 269 N.C. 206, 152 S.E. 2d 147, and cases cited. In *Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384, the Court said: "When a party moves for judgment on the pleadings, he admits these two things for the purpose of his motion, namely: (1) The truth of all well-pleaded facts in the pleading of his adversary, together with all fair inferences to be drawn from such facts; and (2) the untruth of his own allegations in so far as they are controverted by the pleading of his adversary."

In *Edwards v. Edwards,* 261 N.C. 445, 135 S.E. 2d 18, the Court said: "G.S. 1-151 requires that the allegations of a pleading shall be liberally construed for the purpose of determining their effect and with a view to substantial justice between the parties. A motion for judgment on the pleadings 'is not favored by the courts;

pleadings alleged to state no cause of action or defense will be liberally construed in favor of the pleader.' 51 Am. Jur., Pleadings, sec. 336."

The separation and property settlement agreement is not attached to the complaint, nor made a part thereof, and the allegation in the complaint as to its contents are meager and not definite as to the length of time the monthly payments to plaintiff should continue. The answer and the amended answer admit that plaintiff and defendant signed the purported separation agreement on 1 September 1960, but the amended answer denies that defendant promised to pay to plaintiff for her separate support and maintenance monthly periodic payments payable on or before the 10th day of each month commencing with the month of September, 1960. The amended answer further denies that defendant has defaulted in any monthly payments, and specifically denies that he is indebted to plaintiff in the sum of $7500 because of any default in monthly payments under the property settlement agreement. On these material questions the amended answer raises issues of fact, and this is true even if the allegations of alleged coercion, threats and intimidations on the part of the plaintiff, contained in defendant's further answer and defense, are conclusions of law and raise no issue of fact as contended by plaintiff, which question is not necessary for us to decide on this appeal. Such being the case, the judgment on the pleadings was improvidently entered, and is

Reversed.

STATE OF NORTH CAROLINA v. ROBERT A. BENNETT.

(Filed 20 September, 1967.)

1. **Indictment and Warrant § 9—**

Where defendant waives preliminary hearing in the general county court on the warrant upon which defendant was arrested, and is bound over to the Superior Court, the trial in the Superior Court is upon the indictment there found and not the warrant.

2. **Same—**

Neither the caption nor extraneous words on the front or back of an indictment is a part of the indictment, and the words on the back of an indictment "Indictment Third Escape" cannot enlarge nor diminish the offense charged in the body of the instrument.

3. **Escape § 1—**

In order for an indictment for an escape to support punishment for the felony of a third escape, it is required that the indictment allege facts

showing with particularity the prior escapes, and an indictment having the words "Indictment Third Escape" on the back of the indictment, without any allegations as to the prior escapes, is insufficient to support a felony sentence. G.S. 15-147.

4. **Criminal Law § 23—**

A plea of guilty can relate only to an offense charged in the indictment, and the sentence may not exceed the sentence prescribed by law for such offense.

APPEAL by defendant from *Bryson, J.*, at the 8 May 1967 Criminal Session of BUNCOMBE.

The defendant was arrested under a warrant charging him with felonious escape from the lawful custody of the State Prison Department while serving sentences for the crimes of nonsupport, which is a misdemeanor, escape and second escape. In the general county court of Buncombe, he waived a preliminary hearing and was bound over to the superior court.

A bill of indictment was submitted to the grand jury, which returned it a true bill. Beneath the caption of the case, on the back of the bill of indictment, the words "INDICTMENT Third Escape" appear. However, the body of the bill merely charges that the defendant "while then and there serving a sentence for the crime of Non-Support, which is a misdemeanor * * * then and there unlawfully, wilfully, and feloniously did attempt to escape and escaped from the said State Prison Department," without any reference to any former escape.

The record before us states that when the case was called for trial, the defendant, through his court appointed counsel, "tendered a plea of guilty to the felony of a third escape." The defendant then took the stand and "upon being asked by the Honorable Court as to the reason for his third escape," stated that it was due to a death in his family. Thereupon, the court imposed "an additional sentence of two years."

The Minute Docket, as quoted in the record, recites that the defendant, "charged with a third escape from lawful confinement, a felony," entered a "plea of guilty to said charge, as set out in the bill of indictment."

The commitment of the defendant to the State's Prison, as quoted in the record, recites that the defendant was brought to trial "upon one charge of second escape," and having entered a plea of guilty to that charge was sentenced to imprisonment in the State's Prison for two years.

From the judgment imposed the defendant appeals. His only exception is to the judgment.

Attorney General Bruton and Deputy Attorney General McGalliard for the State.
Melvin K. Elias for defendant appellant.

PER CURIAM. The defendant was called upon in the superior court to plead to the bill of indictment, not to the warrant under which he was arrested. The caption of an indictment, whether on the front or the back thereof, is not a part of it and the designation therein of the offense sought to be charged can neither enlarge nor diminish the offense charged in the body of the instrument. *State v. Davis,* 225 N.C. 117, 33 S.E. 2d 623; *State v. Brickell,* 8 N.C. 354. Furthermore, the words, "Third Offense," even if included in the body of the indictment are not sufficient to charge the offense of felonious escape, it being necessary also to allege in the indictment facts showing that at a certain time and place the defendant was convicted of the previous offense or offenses. G.S. 15-147; *State v. Lawrence,* 264 N.C. 220, 141 S.E. 2d 264. Consequently, the indictment in the present case charges the defendant with the offense of escape from the lawful custody of the State Prison Department while serving a sentence imposed for the commission of a misdemeanor, without any allegation that he had previously committed the offense of escape.

Obviously, a defendant, called upon to plead to an indictment, cannot plead guilty to an offense which the indictment does not charge him with having committed. 22 C.J.S., Criminal Law, § 423(1). Consequently, upon a plea of guilty he may not be given a sentence in excess of the maximum provided by the statute for the offense charged in the indictment. G.S. 148-45(a) provides that a prisoner who escapes while serving a sentence imposed upon conviction of a misdemeanor "shall for the first such offense be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not less than three months nor more than one year."

It follows that the judgment from which the defendant appeals imposes upon him a sentence in excess of that which the court was authorized to impose for the offense to which he must be deemed to have pled guilty. The judgment of the court below is, therefore, reversed and the cause remanded to the Superior Court of Buncombe County for the imposition of a sentence within the limits prescribed for a first offense of escape while serving a sentence for a misdemeanor.

Reversed and remanded.

GEORGE F. WING, BY HIS NEXT FRIEND, VIRGINIA S. WING, PETITIONER, v. A. P. GODWIN, JR., COMMISSIONER MOTOR VEHICLES, STATE OF NORTH CAROLINA.

(Filed 20 September, 1967.)

1. **Evidence § 1—**

The courts will take judicial notice of the amendment of a statute.

2. **Automobiles § 2—**

Conviction of failing to yield the right of way, resulting in injury to persons and property, requires mandatory suspension of the provisional license of a driver under 18 years of age without right of review (prior to the amendment to G.S. 20-13), and therefore the driver's petition for review of the suspension is correctly denied.

ON *certiorari* to review (in Chambers) order of *Riddle, S.J.*, January, 1967, HENDERSON Superior Court.

The record discloses that on "9/20/66" the petitioner, a provisional licensee (under 18 years of age) was involved in a moving violation while operating a motor vehicle on the public highway, in which he inflicted personal injury on Zina Wright and caused damage of $150 to the automobile of Charles Richard Wright. On "10/3/66" he was "convicted of fail to yield right of way" in the City Police Court of Hendersonville and for the offense paid a fine of $10 and costs. On "10/24/66" the clerk of the court reported the conviction to the State Department of Motor Vehicles. On December 5, effective December 10, 1966, the petitioner's operator's license was suspended by the Commissioner.

On December 6, 1966 the petitioner filed in the Superior Court of Henderson County an application for the review of the suspension order and obtained a temporary stay pending a hearing. The Attorney General, on behalf of the Commissioner, filed a motion to dismiss the petition upon the ground the same does not state facts sufficient to support the demand for review, for that the suspension order was mandatory and no review by the Superior Court is authorized. On January 17, 1967, Judge Riddle entered an order that suspension, without a finding of fact as to the personal injury and the amount of the property damage, was not authorized. Judge Riddle remanded the case to the City Police Court for a new trial. The Commissioner of Motor Vehicles excepted to the order entered by Judge Riddle and applied for and obtained from this Court a writ of *certiorari* to review the order.

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

Prince, Youngblood & Massagee by L. B. Prince for petitioner appellee.

PER CURIAM. We take notice of the fact that G.S. 20-13 (effective May 5, 1967) was amended by Chapter 295, Session Laws of 1967 (now G.S. 20-13.1). However, at the time the petitioner was tried in the City Police Court of Hendersonville and his provisional operator's license was revoked, the revocation was mandatory and not subject to court review. *Fox v. Scheidt,* 241 N.C. 31, 84 S.E. 2d 58. The court should have dismissed the petition. Judge Riddle was without authority to award a new trial in the Police Court of Hendersonville. If the judgment was erroneous, the error could only be corrected by a direct appeal to the Superior Court. The motion to dismiss should have been allowed.

Reversed.

APPLIANCE BUYERS CREDIT CORPORATION v. JOSEPH HERBERT MASON, GEORGE D. LEWIS AND ROSALIE S. LEWIS.

(Filed 20 September, 1967.)

APPEAL by defendants from *Hubbard, J.*, June 12, 1967 Session of CARTERET.

At Spring Term 1967, this Court reversed the judgment of involuntary nonsuit entered in the (first) trial of this cause at October 1966 Session of Carteret Superior Court. The facts disclosed by the record on said former appeal and the law applicable thereto are set forth in the preliminary statement and opinion of Sharp, J., in *Credit Corp. v. Mason,* 269 N.C. 567, 153 S.E. 2d 3.

Upon retrial at June 12, 1967 Session, evidence was offered by plaintiff and by defendants.

Uncontradicted evidence tends to show defendant Mason was obligated to plaintiff on his $5,609.39 note and conditional sale contract and defendants Lewis were obligated to plaintiff on their guaranty agreement in the amount of $4,199.39 on or about October 15, 1963, when Mason surrendered the eight Nassau golf carts to plaintiff and waived in writing "advertisement and sale as required by law"; that, when possession was surrendered to plaintiff, Mason was in default in respect of five payments of $470.00 each, a total of $2,350.00; that plaintiff, on November 4, 1963, sold the eight golf carts at private sale to B. & H. Auction and Salvage Company, Ra-

leigh, North Carolina, for $2,045.00; that, after deducting expenses incidental to repossession and sale, Mason's account was credited with $1,922.00, leaving a balance of $2,277.39; and that the B. & H. Auction and Salvage Company, shortly after purchasing the eight golf carts, after newspaper advertisement, conducted a public auction sale thereof, which was attended by approximately thirty-five people who were interested in golf or played golf or ran golf shops, and that the total sale price for the eight golf carts "came to some $2,500 to $2,600."

Opinion evidence offered by plaintiff and opinion evidence offered by defendants as to the fair market value of the eight golf carts when surrendered by Mason to plaintiff was in sharp conflict. Too, there was conflicting evidence (1) as to the condition of the golf carts after being used "approximately 13 months," and (2) as to whether plaintiff, through its agent, agreed to accept the golf carts in full settlement and discharge of their claim of debt against defendants.

The court submitted, and the jury answered, the following issues: "1. At the time the golf carts were returned did their fair market value equal or exceed the amount due on the note? Answer: No. 2. Did the plaintiff accept the return of the golf carts in full satisfaction of the debt? Answer: No. 3. Did the plaintiff in disposing of the eight golf carts sell the same at a fair and reasonable value? Answer: No. 4. In what amount, if any, are the defendants indebted to the plaintiff? Answer: $1200.00."

In accordance with said verdict, the court entered judgment "that the plaintiff have and recover of the defendants, jointly and severally, the sum of One Thousand, Two Hundred ($1,200.00) Dollars, and that the costs of this action be taxed against the defendants."

Defendants excepted and appealed.

Hamilton, Boshamer & Graham for plaintiff appellee.
Wheatly & Bennett for defendant appellants.

PER CURIAM. Although the record shows twenty-eight exceptions and assignments of error, defendants' brief brings forward and discusses only two questions, *viz.:* "1. Did the Court err in permitting the plaintiff's witnesses Gene Francis and I. U. Holmes to give their opinions as to the fair market value of the golf carts at the time of repossession in October, 1963? 2. Did the Court err in failing to peremptorily instruct the jury to answer the second issue, 'Yes'?"

Consideration of the testimony of Francis and of Holmes leaves

the impression that defendants' attack upon their qualifications to testify to their opinions as to the fair market value of the golf carts when surrendered by Mason to plaintiff about October 15, 1963, goes to the weight rather than to the competency of their testimony; and in the admission thereof we perceive no error of sufficient prejudicial nature to warrant a new trial.

With reference to the second question presented by defendants, it is sufficient to say: The record does not show defendants requested that such peremptory instruction be given. See G.S. 1-181; 2 McIntosh, N. C. Practice and Procedure (Second Edition, Wilson), § 1517. Nor does the record show defendants excepted to or assigned as error the court's failure to give such peremptory instruction.

It is noteworthy that the jury, by answering the fourth issue $1,200.00, allowed defendants a credit of $2,999.39 rather than $1,922.00 on account of plaintiff's repossession and sale of the golf carts.

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

No error.

STATE v. CLARENCE PUGH.

(Filed 20 September, 1967.)

APPEAL by defendant from *Anglin, J.*, June 1967 Session of McDOWELL.

Defendant was tried on an indictment charging that he, on September 14, 1966, "unlawfully, wilfully and feloniously did commit the abominable and detestable crime against nature with Kester Waits Buchanan by taking the private parts of the said Kester Waits Buchanan and putting same into his mouth." The jury returned a verdict of guilty as charged; and judgment, imposing a prison sentence of not less than four nor more than six years, was pronounced. Defendant excepted and appealed.

Attorney General Bruton, Assistant Attorney General Rich and Deputy Attorney General McGalliard for the State.

Everette C. Carnes for defendant appellant.

PER CURIAM. The State's evidence, which includes (1) the unequivocal direct testimony of Buchanan and testimony corroborative thereof, and (2) evidence as to circumstances under which offi-

cers found Buchanan and defendant in a parked car on a public highway, was amply sufficient to support the verdict. Hence, the motions for judgment as in case of nonsuit were properly overruled.

Defendant did not testify. Defendant offered evidence which, he contended, tended to show Buchanan was not a credible witness.

At trial, defendant was represented by able and experienced counsel. On this appeal, his counsel has overlooked no contention that might be made in defendant's behalf. However, the assignments do not disclose prejudicial error or present questions of sufficient substance to warrant detailed discussion. Hence, the verdict and judgment will not be disturbed.

No error.

IN RE: THE CLAIM OF MILDRED LUNSFORD DUCKETT, WIDOW OF LT. ARTHUR WALTER DUCKETT, FOR PAYMENT OF PENSION BY BOARD OF EXAMINERS OF ASHEVILLE FIREMEN'S PENSION AND DISABILITY FUND.

(Filed 27 September, 1967.)

1. **Retirement Systems § 5—**

The right to a pension depends upon the provisions of the statute providing the benefits and must be determined primarily from the terms of the statute.

2. **Statutes § 5—**

The words of a statute must be given their natural and ordinary meaning, and when the meaning of a statute is plain and unambiguous, the courts must construe the act as written and do not have the power to insert provisions not contained therein or to delete provisions there appearing.

3. **Same—**

Where a statute provides benefits upon conditions joined by the disjunctive "or", one alternative may not be made a part of the other, and a person is entitled to its benefits if he comes within either condition.

4. **Retirement Systems § 5—**

A statute providing benefits if a member of a retirement system should become disabled "while acting in line of his duty" or if he should die as a result of such disability, *held* not to require a causal relation between disability of a member and his work, but only that the disability occur while the member is in the discharge of his duties.

5. **Same—**

The evidence tending to show that a fireman, after helping extinguish a brush fire with a pine branch during the course of some 15 minutes, complained of pain in his chest, and that minutes after returning to the

fire station died of a myocardial infarction, *held* to disclose death from a disability occurring in line of duty, entitling his widow to the benefits provided by the act. Chapter 320, Session Laws of 1955.

6. Same—

The determination by a pension board that a member's death or disability was not received in line of duty is a legal conclusion and reviewable, notwithstanding it is denominated a finding of fact.

APPEAL by Board of Examiners from *Martin, S.J.*, 8 May 1967 Session of BUNCOMBE.

Civil action arising from a claim filed by the widow of Lt. Arthur Walter Duckett for an increase of pension benefits. The claim was first heard by the Board of Examiners of Asheville Firemen's Pension and Disability Fund, where evidence was offered substantially as follows:

Mildred Lunsford Duckett stated, in substance, that her husband had worked for the Asheville Fire Department continuously from 1924 or 1925 to the time of his death; her husband was and had been in good health and had given no indication of any heart condition or other serious physical disability.

James R. Peterson testified that he was a fireman employed by the City of Asheville on 7 March 1966. On that day he, Lt. Arthur Walter Duckett, the officer-in-charge, and fireman Ray Rathbone went to a brush fire on Chapel Park Place. Upon arrival, and after giving necessary instructions to the firemen, Lt. Duckett began to beat the fire out with a pine branch. After about fifteen minutes and when the fire was under control, Peterson observed the Lieutenant walk up to and lean on the engine. Lt. Duckett remarked that his chest was hurting and he thought he had indigestion. He told the firemen to hurry back to the Station. Traffic delayed the parking of the engine when they approached the Station about five minutes later, so Lt. Duckett left the engine and walked a distance of about 50 feet into the Station while Peterson and Rathbone parked the engine. Upon entering the Station, Rathbone found Lt. Duckett lying near the bathroom door. An ambulance was called and first aid administered, but in the opinion of Peterson, Lt. Duckett was dead when he was carried away in the ambulance. Peterson said: "There was no indication that he (Duckett) was overcome with smoke or anything of that sort."

The testimony of fireman Rathbone, in essence, corroborated the testimony of fireman Peterson.

The death certificate listed coronary occlusion due to coronary thrombosis as the cause of death.

Dr. Zebulon Weaver, III, admitted as a medical expert, testified that he did not know Lt. Arthur Walter Duckett. In response to a

hypothetical question, he testified that in his opinion the symptoms presented "are rather typical of myocardial infarction, or layman's terms of a heart attack." He also stated, "But, as far as coronary occlusion itself causing the infarction, we do not have any real evidence that the exertion itself will cause the infarction itself." He further testified in generalities as to heart disease.

Thereafter, on 11 October 1966, the Board met and found, *inter alia:*

> "That as the fire-fighting was being concluded Lt. Duckett suffered a heart attack, and which resulted in his death a few minutes later at the Fire Station;
>
> "That said heart attack was not caused and did not result from exertion or exhaustion related directly or indirectly to fire fighting, or line of duty, but rather resulted from some disease or condition or infirmity not caused by his work and duties as a fireman, and his death or disability was not received in line of duty.
>
> . . .
>
> "The Board thereupon agreed unanimously that Mrs. Duckett was entitled to receive one-half of the pension, which is the amount which she has been receiving, and that she was not entitled to receive 70% of Lt. Duckett's monthly salary as requested."

The claimant excepted and objected to findings of fact and conclusions set forth in the second and third unnumbered paragraphs set out above. Petitioner further objected to the failure of the Board of Examiners to find the following facts and conclusions therefrom as conforming to the facts, evidence and law in said matter:

> "1. That Lieutenant Arthur Walter Duckett was an employee of the City Fire Department and had been for several years and had attained the rank of Lieutenant in said Department.
>
> "2. That Lieutenant Duckett on March 7, 1966, was stationed at Biltmore Fire Station and on said date he was on duty from 7:30 o'clock A.M. to ....
>
> "3. That Lieutenant Duckett was in charge of said Fire Station on said date and Fireman Peterson and Rathbone were under his charge and that his line of duties on said date was to assist in and oversee the extermination of fires in that area.
>
> "4. That about 3:30 o'clock P.M. they were summoned to a fire on Chapel Park Place, 2 or 3 miles from said Station,

and the call was answered by Lt. Duckett and Firemen Peterson and Rathbone using a fire truck for transportation; that said fire was what is known as a brush-fire and Lt. Duckett, after instructing his helpers, got a pine brush about 3 feet long and fought said fire with said pine brush for about 15 minutes and until the same was put under control.

"5. That, immediately after fighting said fire as aforesaid, Lt. Duckett was leaning up against the fire truck and on inquiry by Fireman Rathbone stated that he was sick and expressed a desire to return immediately to said Station.

"6. That when they arrived at the Station Lt. Duckett got out of the truck and went into the Station and in a few minutes he was found lying unconscious near the entrance to the bathroom. He was taken immediately to a hospital, but was pronounced dead upon arrival.

"7. That Lt. Duckett worked regularly and was never off because of sickness; that he had no personal physician and had not needed the services of a physician for years, with two minor exceptions; that he had never suffered from or complained about any heart affliction and his wife, who was his constant companion except when working, had never heard of any heart condition.

"8. From the foregoing facts the Board of Examiners finds that Lt. Duckett became disabled and died while acting in the line of his duties as a member of the Asheville Fire Department.

"9. The Board therefore concludes and finds that under the provisions of Section 7, Chapter 320, of Laws of 1955, that because of said disability while acting in the line of his duties Lt. Duckett would have been entitled to a monthly sum equal to 70% of his monthly salary then paid him by the City of Asheville, and consequently upon his death his widow is entitled to the same sum as long as she remains unmarried."

The claimant petitioned the Superior Court for a writ of *certiorari,* which was allowed. The matter was heard before Judge Martin, who sustained the pertinent objections and exceptions of the petitioner, reversed the order of the Board of Examiners, and ordered the cause remanded to the Board of Examiners for entry of an order awarding the pension in accordance with his judgment. The Board appealed.

O. E. Starnes, Jr., for appellant Board of Examiners.

Don C. Young and Lee, Lee & Cogburn for appellee.

BRANCH, J. "The right to a pension depends upon statutory provision therefor, and the existence of such right in particular instances is determinable primarily from the terms of the statute under which the right or privilege is granted." 40 Am. Jur., Pensions, Sec. 23, p. 980.

Chapter 320 of the 1955 Session Laws of North Carolina provides in pertinent part:

> "Sec. 7. Payment for Disability in Line of Duty. — That if and in the event any member of the Asheville Fire Department qualifying under this Act shall become disabled while acting in line of his duties, and is unable to work, he shall receive monthly a sum equal to seventy (70%) per cent of his monthly salary as then paid by the City of Asheville, said seventy (70%) per cent of said monthly salary shall be paid in monthly installments by the Custodian of the Firemen's Pension Fund; . . . Provided, further, that if such member of the Asheville Fire Department shall be killed in the line of his duties, or shall die as a result of a disability as defined in this Section, his widow, if he be married, shall receive, so long as she remains unmarried, the same monthly installments as he would have received under this Section."

It is not controverted that deceased died as a result of a disability. Thus, the crucial question is whether there is sufficient, competent, material, substantial evidence to support the Board's finding that decedent was not disabled "while acting in line of his duties." In order to answer this question we must determine the meaning of "while acting in the line of his duties" as used in the statute amending the Act establishing the pension fund for members of the Asheville Fire Department. We are unable to find a North Carolina case which has decisively interpreted the phrase, "while acting in the line of his duties." Neither do we find much help or guidance from the many cases arising under our Workmen's Compensation Act, since there, compensation is only allowed when there is an injury by accident arising out of and in the course of employment. *Wilson v. Mooresville,* 222 N.C. 283, 22 S.E. 2d 907. Thus, without these additional requirements in the controlling statute, we must readily concede that "while acting in line of his duties" as used in the instant case has a much broader meaning than the language used in the Workmen's Compensation Act.

Appellant contends that there must be causation, *i.e.,* the disability or death must be produced by or arise from the employment, and that to hold otherwise would contravene the purpose of the leg-

islature and lead to an absurd result. In support of this contention it cites *In re Hickerson,* 235 N.C. 716, 71 S.E. 2d 129, which holds:

> "In this connection, in *S. v. Barksdale,* 181 N.C. 621, 107 S.E. 505, this Court, in opinion by Hoke, J., stated that parts of the same statute, and dealing with the same subject, are 'to be considered and interpreted as a whole, and in such case it is the accepted principle of statutory construction that every part of the law shall be given effect if this can be done by any fair and reasonable intendment, and it is further and fully established that where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded,' . . ."

The case of *Hutchens v. Covert,* 39 Ind. App. 382, 78 N.E. 1061, represents a line of authority which would seem to sustain appellant's position. Here the statute authorized a pension to the widow and children of a policeman on his death, and "while in line of his duty or from natural causes." The court held that a pension under this act was not authorized where a policeman while at his place of duty committed suicide because of insanity without a showing that the insanity was the result of the performance of his duty. This case is factually distinguishable from the instant case, in that in *Hutchens* the deceased died because of self-destruction or his own wrongdoing and while he was not acting in the line of his duty.

In *State, ex Rel. v. Board of Trustees,* 192 Mo. App. 583, 184 S.W. 929, the Missouri Court considered a pension statute which provided, "If any member of such fire department shall, while in the performance of his duty, be killed or die as the result of an injury received in the line of his duty, or of any disease contracted by reason of his occupation as fireman, or shall die from any cause whatever while in such service." Holding that the widow of a fireman who died as a result of being shot during a quarrel in a saloon and at a time when he had been granted a special leave of absence should not recover pension under this act, the court stated: "So that the phrase 'while in such service' is not synonymous with 'while a member of the fire department.' But the word 'service' means the 'same service' referred to in the three preceding clauses, that is to say, a service rendered 'in the line of his duty' or 'by reason of his occupation as a fireman.' The word 'service' as here used means the act of serving, the labor performed or the duties required of a fireman, and is not used to refer to or designate a department of the city's activities." . . .

"And so on throughout the Act, the disability, injury, incapacity, or whatever it is, must arise from, or be connected in some way with, the performance of the duties of a fireman."

The phrase "while in line of duty" was discussed in the case of *Allen v. B., C. R. & N. Ry. Co.*, 57 Iowa 623, 11 N.W. 614, in an action for personal injuries sustained by a brakeman while getting off a moving train at a switch when a witness was allowed to testify that it was "in the line of his duty" for a brakeman to so do while the train was in motion. In pertinent part, the court stated:

> "The duty of a brakeman may be prescribed by rule of the company employing him, or by custom prevailing in the operation of railroads. It pertains to the particular services performed and the purposes to be accomplished.
>
> "The expression in the evidence just quoted 'in the line of duty,' was doubtless used in its correct meaning as synonymous with the words 'in the discharge of duty.' The court, in the instructions, used the expression in this sense. The jury understood the witnesses, when they declared an act of the brakeman to be 'in the line of duty,' to express the opinion that the duty of the brakeman required him to perform the act. . . ."

In the case of *Mook v. City of Lincoln,* 146 Neb. 779, 21 N.W. 2d 743, a widow was granted a pension under a statute which provided for a pension in case of the death of a fireman "while in the line of duty, *or* death is caused by or is the result of injuries received while in the line of duty, . . ." The plaintiff's decedent collapsed while on the roof of a building fighting a fire, and died within an hour, the cause of his death being angina pectoris. In this case the defendant contended, as does the defendant here, that in order for the plaintiff to recover she must prove not only that death was in the line of duty, but also that death was the result of the duty and not merely coincident with it. The court, in deciding for the plaintiff, stated:

> "'"* * * where the words of a statute are plain, direct and unambiguous, no interpretation is needed to ascertain their meaning * * *."' In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read plain, direct, and unambiguous language out of a statute. If possible, the entire statute is to be applied as written. We think this statute meets the test of being plain, direct, and unambiguous."

It is obvious in this case that the court considered "while in line of duty" a plain, direct and unambiguous phrase which required no judicial interpretation. Further, the disjunctive participle "or" is used to indicate a clear alternative. The second alternative is not a part of the first, and its provisions cannot be read into the first.

Recognizing the rule that the words of a statute must be given their natural or ordinary meaning (*Seminary, Inc. v. Wake County*, 251 N.C. 775, 112 S.E. 2d 528), we turn to Webster's Third New International Dictionary for the following definitions:

> Line of duty—"all that is authorized, required, or normally associated with some field of responsibility (as a policeman, fireman, or soldier)—used esp. in connection with assessment of responsibility for or classification of sickness, injury, or death of persons subject to a line of duty. (it is now customary to consider any sickness or injury of a member of an armed service that is suffered while on active duty to have been incurred in the line of duty in the absence of personal fault or neglect or of existence of the condition prior to entry into service)."
>
> While—"a period of time . . . the time during which an action takes place or a condition exists . . . the time marked by the occurrence of an action or a condition."

Thus, we hold that a person is acting "while in the line of duty" when he acts at the time and place he is required to be at work and when he is engaged in the performance of his duties or is engaged in activities incidental to his duties. The term "while in line of duty" is synonymous with "while in the course of employment" or "while in discharge of duty."

The statute before us is clear, positive and understandable, and expresses a sensible meaning.

In order for appellant to prevail, we would have to read into the statute a requirement that there be a causal relation between his disability and his duties. This we cannot do.

> ". . . the court must construe the act as written. The legislature has power to change the law. The Court does not have that power." *Jenkins v. Dept. of Motor Vehicles*, 244 N.C. 560, 565, 94 S.E. 2d 577.

Appellant further contends that the Superior Court is bound by the Pension Board's finding of fact. The finding of fact by the Board that decedent's death or disability was not received in line of duty was in reality a legal conclusion determinative of the parties' rights and as such is reviewable by the Superior Court, although

it was denominated as a finding of fact. *Casualty Co. v. Funderburg,* 264 N.C. 131, 140 S.E. 2d 750; *Warner v. W. & O., Inc.,* 263 N.C. 37, 138 S.E. 2d 782.

There was not sufficient, competent, material substantial evidence to support the Board's conclusion that decedent was not disabled while acting in line of his duties.

Affirmed.

STATE v. JOHN EDWARD GEORGE.

(Filed 27 September, 1967.)

1. Criminal Law §§ 34, 89, 169—

In a prosecution for armed robbery, testimony elicited on cross-examination of defendant that he had been arrested for a similar offense in another state is not prejudicial, when defendant had testified earlier on direct examination as to the prior offense, and when the questioning was for the purpose of impeaching defendant's credibility as a witness.

2. Criminal Law § 8—

Where a statute provides for the dismissal of charges against a defendant if he is not tried within a specified time, the defendant is not entitled to relief when a trial is held within the statutory time but results in a mistrial upon the failure of the jury to reach a verdict, since, under such circumstances the State is not responsible for the delay.

3. Same— Where trial within period prescribed by Interstate Agreement on Detainers Act results in mistrial, defendant is not entitled to discharge at later trial had with due diligence.

Defendant's trial in this State upon his return under the Interstate Agreement on Detainers, G.S. 148-89, resulted in a mistrial. At the second trial defendant's motion for change of venue was granted, and on the following day he was removed to a third county pursuant to a writ of *habeas corpus ad prosequendum.* Thereafter, defendant moved that the charge against him be dismissed because more than 180 days had elapsed since he had been returned to the State. *Held:* The first trial having been held within the 180 day period, the motion was correctly denied, the delays subsequent thereto being in the nature of reasonable continuances and the ruling of the lower court that the State had used due diligence in bringing the case to trial is affirmed.

4. Same—

G.S. 148-89, Art. IV(c), requiring a prisoner to be tried within 120 days after the solicitor requests his return to this State, does not apply when the prisoner is returned at his own request. G.S. 148-89, Art. III.

APPEAL by defendant from *McLean, J.,* 30 January 1967, Regular Criminal Session of GASTON Superior Court.

The defendant was charged with violating G.S. 14-87. The Bill of Indictment alleges that on the 9th day of September 1963 with the threatened use of a pistol whereby the life of L. W. Greene, Jr. was endangered, he robbed Greene of $623.00 belonging to Carolina Finance Company (Greene being the manager of the company).

From the record it appears that the defendant was not immediately apprehended, and that on 28 April, 1964 he began service in the California State Prison at San Quentin of a term of five years to life imprisonment upon a charge of armed robbery in California in December 1963, to which the defendant plead guilty.

On 15 June 1966 the defendant wrote a letter to the Governor of California in which he stated that North Carolina had placed a detainer against him upon the charge of robbing Carolina Finance Company; that he was not guilty of the offense, and that pursuant to the "Interstate Agreement on Detainers" (G.S. 148-89), he wished to be brought back to North Carolina to stand trial on the charge. On 11 July 1966, he was surrendered to the North Carolina authorities and arrived in Charlotte on 16 July 1966. On 15 August the defendant was placed on trial in Charlotte, and after two and a half days a mistrial was declared because the jury could not agree upon a verdict. On 3 October 1966 his case was again called for trial at which time the defendant moved for a change of venue from Mecklenburg to Gaston County, and the motion was allowed. On the following day the defendant was delivered to the authorities of New Hanover County pursuant to a writ of *habeas corpus ad prosequendum* signed by Hon. Henry L. Stevens, Jr., Judge Presiding in New Hanover County. He was kept in Wilmington until the early part of December at which time he was returned to Mecklenburg County. On 2 February 1967, the defendant moved that he be discharged because he had not been brought to trial within one hundred eighty (180) days from the date of his request for a trial in violation of G.S. 148-89, Article III (a), and also that he had not been tried within one hundred twenty (120) days after his arrival in North Carolina as required by G.S. 148-89, Article IV (c). The Presiding Judge made full findings of facts, found that "the State has used due diligence in the trial, or attempted trial, of the defendant" and denied his motion. On 8 February 1967, the trial of the case began, which lasted some three days and resulted in the defendant's conviction.

Since the defendant's primary contention is that he is entitled to release upon the grounds that he was not tried within the time set forth in the above statutes, we find it unnecessary to go into a detailed statement of the evidence. As a brief synopsis of it, it may be said that the State's evidence tended to show that on 9 September

1963 the defendant went to the offices of Carolina Finance Company in Charlotte and, with a pistol, forced L. W. Greene, Jr., the manager of the company, to turn over all the cash on hand, which amounted to $623.00. He was definitely identified by Mr. Greene and two other employees of the company, as well as a customer who was present.

The defendant denied his guilt and offered as an alibi that his neck had been broken in an automobile wreck in Wilmington on 3 September 1963, and he had been required to wear a neck brace at all times for the next several weeks; that on the date in question he was wearing the brace; that he could not get around by himself; that he didn't know for sure where he was on 9 September but that wherever he was he was wearing the brace. He offered the evidence of the parents of the young lady whom he was dating and of two other witnesses, whose testimony was that at all times and for many weeks following 3 September the defendant wore the neck brace; that he could not get along without it, could not get around by himself, and that he wore it so much that his neck had become chafed and sore.

In rebuttal, the State offered the testimony of Mrs Howard Stephens who said that her husband was the manager of the Holiday Inn on Wilkinson Boulevard between Belmont and Charlotte; that he (George) stayed at the Inn for two or three days about the 8th or 9th of September; that he had on a neck brace part of that time but not all of that time. Mrs. Betty Goodwin testified that she was working at the Holiday Inn at the time and saw the defendant "with this brace and without the brace"; that she asked him "why he could be without the brace and he said that his doctor had told him that he could take it off for a while, but if his neck or his head got tired to put the brace back on. . . . I understood that if a person's neck was broken, they had to wear the brace . . . (H)e said, 'My doctor told me that I could take my brace off at different times,' or that he could take it off and if his neck got tired, to put the brace back on then."

The jury returned a verdict of guilty, and the Court ordered George imprisoned for not less than twelve (12) nor more than fifteen (15) years, from which the defendant appealed.

T. O. Stennett, Attorney for defendant appellant.

T. W. Bruton, Attorney General, and James F. Bullock, Deputy Attorney General, for the State.

PLESS, J. Upon cross examination, the Solicitor asked the defendant about his neck brace when he was arrested in California in

the early part of December 1963 and charged with armed robbery. It appears that the Solicitor's object was to show that at that time he was not using the neck brace, but the defendant contends that to permit the Solicitor to ask questions which related to the California charge was prejudicial error. We cannot so hold. In the first place, the defendant had testified earlier that he was guilty of armed robbery and that he had plead guilty in the California courts. Also, in two motions he had filed he referred to his imprisonment in California on this charge; therefore, information about it was already before the jury, and no prejudice could result from the questions asked. Further, the questions were competent for the purpose of impeachment. The California charge was the same kind as the one for which the defendant was then being tried, and the questions were competent for the purpose of impeaching him. *State v. Broom,* 222 N.C. 324, 22 S.E. 2d 926. There it is said that the solicitor may ask the defendant, when on the stand as a witness, questions about collateral matters, including charges of other criminal offenses and degrading actions, for the purpose of impeaching his credibility. There is no merit in these exceptions, and they are overruled.

The defendant's principal contention is that the State did not comply with G.S. 148-89, Article III (a) which provides:

> "Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

It is to be noted that the statute requires that the defendant *be brought to trial* within one hundred eighty (180) days after he has given the appropriate notice to the solicitor. He was actually brought to trial twice within less than four months. The first trial occurred the week of 15 August 1966 and resulted in a mistrial. The State, of course, cannot control the fact that a jury is unable to agree upon a verdict and is not chargeable with responsibility under these condi-

tions. In 22A C.J.S. 60, Criminal Law, § 472(3), it is said: "If accused is tried within the statutory time . . . and such trial results in a mistrial, as when the jury failed to agree, accused cannot ignore the mistrial and claim a discharge or dismissal upon the ground that he was not tried within the time fixed by the statute providing for that relief. . . . (W)hile accused is entitled to a speedy retrial by virtue of the constitutional or statutory guaranty of a speedy trial, the statute providing for a discharge or dismissal if accused is not tried within a stated time does not govern the time within which a retrial must be had, and the time for a retrial is a matter of judicial discretion."

On 3 October 1966, the State commenced the second trial of the defendant, this being less than three months after his return to the State. The trial was not had because at that time the defendant moved for a change of venue from Mecklenburg to Gaston County. His motion was allowed. Had he not made it, or had it been denied, the case would probably have been determined at that time; and the defendant cannot complain of delay in his trial when caused by his own motion.

The next day, upon the writ of Superior Court Judge Henry L. Stevens, Jr., the Mecklenburg officers surrendered the defendant to the authorities of New Hanover County; he was taken to Wilmington and remained there for some two months without being tried, at the end of which time he was returned to Mecklenburg County. The record does not reveal the nature or seriousness of the charges in New Hanover County, nor why he was not tried there, but Judge Stevens' order had to be obeyed by the Mecklenburg authorities, and the solicitor was powerless to start another trial in Gaston County until the defendant's return in December.

Some sixty days later the defendant was placed on trial in Gaston County after the defendant had sought his release because of the delay in trying him. This later period could not be held to be an unreasonable delay for several reasons. First, it is generally known that the courts are usually closed for two weeks or more in December on account of Christmas; and we must also recognize that in both Mecklenburg and Gaston Counties the criminal dockets are congested, and that regardless of the efforts of the judge and the solicitor, it is impossible to grant every defendant an immediate trial. The following quotations, omitting citations, from the well-written opinion of Sharp, J., in *State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309, are pertinent:

> "*Speedy* is a word of indefinite meaning . . . Neither the constitution nor the legislature has attempted to fix the exact time within which a trial must be had. 'Whether a speedy trial

is afforded must be determined in the light of the circumstances of each particular case. . . . "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. . . . These factors are to be considered together because they are interrelated. . . .'' '

"The burden is on the accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or wilfulness of the State's prosecution. The right to a speedy trial is not violated by unavoidable delay nor by delays caused or requested by defendants. . . . (T)he right to a speedy trial 'is not designed as a sword for defendant's escape but rather as a shield for his protection.'

"We must note . . . that the ever-increasing number of criminal cases is putting a heavy strain upon speedy trial. The flood of post conviction petitions . . . and the retrials which some of the petitions . . . have necessitated, have further burdened courts which were even then struggling to keep abreast of congested dockets."

Also, in 21 Am. Jur. 2d, Criminal Law, § 251, *et seq.*, we find the following excerpts:

"The burden is on the accused who asserts denial of the constitutional right to speedy trial to show that the delay was the fault of the state. . . . (T)he presumption is that any continuance was for a lawful cause. . . . A delay made necessary by the usual and ordinary procedure provided by law in criminal cases is of course permissible. And the right to speedy trial is not violated by unavoidable delays. . . . Docket congestion has been held a sufficient ground for delay.

"A defendant's rights . . . are not violated by a delay caused by his own condition or conduct. . . . An accused cannot take advantage of a delay for which he was responsible, whether caused by action or inaction on his part.

"In many jurisdictions, the right to speedy trial is waived unless defendant demands trial, . . . or makes some effort to secure a speedier trial than the State accorded him."

The statute under which the defendant makes his claim provides "that for good cause shown . . . the court having jurisdiction of the matter may grant any necessary or reasonable continuance." The record does not show that the defendant moved for a trial at any time. His motion for release was the first time the court had occa-

sion to rule upon the delay; and upon Judge McLean's finding "that the State has used due diligence in the trial, or attempted trial," together with the other facts found, which are stated in this opinion, we hold that to be the equivalent of granting a reasonable continuance.

The defendant also invokes the failure of the Solicitor to try him within one hundred twenty (120) days after his arrival in North Carolina as is required in G.S. 148-89, Article IV. However, this statute is not applicable here, since it can be invoked only when the prisoner has been returned to the State at the request of the solicitor. The defendant does not make the latter contention, and the record clearly shows that the defendant was brought back to North Carolina upon his own request and not that of the solicitor.

There was ample evidence to submit to the jury and to sustain a verdict of guilty. The defendant brings forth no exceptions to the sufficiency of the evidence nor to the charge of the Court. For the reasons stated, we are of the opinion that Judge McLean was correct in denying defendant's motion to dismiss, and that in his trial there was

No error.

NORTH CAROLINA NATIONAL BANK v. ALVA V. CORBETT, ADMINISTRATRIX OF THE ESTATE OF J. N. CORBETT, AND ALVA V. CORBETT, INDIVIDUALLY.

(Filed 27 September, 1967.)

1. **Husband and Wife § 15—**

Land owned by husband and wife as tenants by the entirety may not be charged with the individual debts of either spouse.

2. **Contracts § 12—**

A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates.

3. **Contracts § 1; Signatures—**

Evidence that the plaintiff bank extended a line of credit to the defendant's husband, who was in the home construction business, in reliance upon a guaranty purporting to bear defendant's signature, and that the defendant and her husband owned some, if not all, of their realty as tenants by the entireties, *held* sufficient to support a finding by the court that the defendant had executed the guaranty, despite her testimony that she did not sign the instrument.

4. Guaranty—

Plaintiff bank sued upon a guaranty executed by defendant in consideration of a line of credit extended to her husband. The instrument contained this provision: "The amount of principal at any one time outstanding for which the undersigned shall be liable as herein set forth shall not exceed the sum of $................" No insertion was made in the blank space. *Held:* The guarantor's failure to limit her liability, upon being provided an opportunity to do so, does not render the guaranty void.

5. Contracts § 12—

Where the terms of a contract are clear and unambiguous, the construction of the agreement is a matter of law for the court.

APPEAL by the individual defendant from *Parker, J.*, January 1967 Civil Session, NEW HANOVER Superior Court.

The plaintiff instituted this civil action on July 5, 1966 against Alva V. Corbett, Administratrix of J. N. Corbett and Alva V. Corbett, individually, to recover the sum of $2,000 due by note dated "7/14/65" and payable 90 days after date, with interest at 6% after maturity. The note, under seal, was executed by J. N. Corbett and delivered to the North Carolina National Bank. At the time the note was accepted, the Bank held an instrument of guaranty, of which the following provisions are material to this controversy:

GUARANTY

December 1, 1963

North Carolina National Bank
Wil., N. C.
Dear Sirs:

As an inducement to you to extend credit to J. N. Corbett (hereinafter called Borrower), and in consideration thereof, the undersigned hereby guarantees to you and your successors and assigns the due and punctual payment of any and all notes, drafts, obligations and indebtednesses of Borrower, at any time, now or hereafter, incurred with or held by you, together with interest, as and when the same become due and payable, whether by acceleration or otherwise, in accordance with the terms of any such notes, drafts, obligations or agreements evidencing such indebtednesses.

* * *

The amount of principal at any one time outstanding for which the undersigned shall be liable as herein set forth shall not exceed the sum of $..................

This guaranty is purported to have been executed by Alva V. Corbett and witnessed by Lionel Stevenson.

Alva V. Corbett, Administratrix, filed an answer denying information sufficient to form a belief as to the truth of the allegations with respect to the execution of the note by her intestate, J. N. Corbett. However, she did not deny the allegation that the estate of J. N. Corbett was indebted to the plaintiff in the sum of $2,000, and interest thereon.

Alva V. Corbett, as an individual defendant, filed answer in which she denied that she executed the guaranty referred to in the complaint and demanded that the action against her in her individual capacity be dismissed. The Court entered judgment on the pleadings against the defendant administratrix. From that judgment, there was no appeal. The parties waived a jury trial and consented that the Court might find the facts and render judgment accordingly in the action against Mrs. Corbett.

There was evidence the Bank made the loan to J. N. Corbett in reliance on the guaranty of his wife, the individual defendant. The evidence disclosed that on the date the guaranty purports to have been executed by Mrs. Corbett, Mr. Corbett was in the business of constructing homes on contract. At that time, she and Mr. Corbett held title to certain real estate as tenants by the entireties and the Bank advanced $2,000 to Mr. Corbett, relying on Mrs. Corbett's guaranty.

The Court answered issues, finding facts, as follows:

> "1. Did the defendant Alva V. Corbett execute a guarantee for a line of credit to J. N. Corbett, as alleged in the Complaint?
>
> ANSWER: Yes.
>
> 2. If so, did the plaintiff, in reliance on the guarantee, make a loan to J. N. Corbett, as alleged in the Complaint?
>
> ANSWER: Yes.
>
> 3. If so, in what amount, if any, is the plaintiff entitled to recover of the defendant Alva V. Corbett?
>
> ANSWER: $2,000.00."

From judgment in accordance with the verdict, the defendant appealed, assigning as error: (1) The evidence was insufficient to support the findings and the judgment; (2) The findings were against the greater weight of the evidence and should be set aside; and (3) The guarantee was a nullity and insufficient to warrant a judgment against the individual defendant.

Robert Calder for defendant appellant.
Marshall & Williams by Lonnie B. Williams for plaintiff appellee.

HIGGINS, J. The sole question discussed in appellant's brief and on the oral argument is this: Does the failure to insert in the guaranty a limitation on the guarantor's liability render the instrument void? In this instance the borrower was the husband of the guarantor. He was in the business of building houses. From time to time he needed advancements from his bank. Mr. and Mrs. Corbett held some, if not all, of their real estate as tenants by the entireties. Such real estate may not be held liable for the individual debts of either husband or wife. However, it is liable for the obligations of both. *Air Conditioning Co. v. Douglass*, 241 N.C. 170, 84 S.E. 2d 828. A contract may be understood and interpreted in the light of the relationship of the parties, and the purpose they sought to accomplish. "A contract may be explained by referring to the circumstances under which it was made and the matter to which it relates." *Chew v. Leonard*, 228 N.C. 181, 44 S.E. 2d 869.

The guarantor in this action instructed the bank: "As an inducement to you to extend credit to J. N. Corbett . . . and in consideration thereof, the undersigned hereby guarantees to you . . . the due and punctual payment of any and all notes, drafts, obligations, and indebtednesses of Borrower at any time, now or hereafter incurred with, or held by you with interest. . . . (T)he amount of principal at any one time outstanding for which the undersigned shall be liable as herein set forth shall not exceed the sum of $................" The blank space and the antecedent wording provided the guarantor opportunity to limit her liability for her husband's debts. She executed the agreement without inserting any limitation. She cannot, thereafter, *ex parte*, alter the terms of the agreement. The guaranty is to pay the notes, etc. and in this particular instance only the one note of $2,000 appears to have been involved. The Court found on competent evidence the individual defendant had signed the guaranty. Its terms are clear, free of ambiguity. Consequently, there is nothing for the Court to construe. The meaning becomes a question of law. *Parks v. Oil Co.*, 255 N.C. 498, 121 S.E. 2d 850; *Muncie v. Ins. Co.*, 253 N.C. 74, 116 S.E. 2d 474; *Suits v. Ins. Co.*, 249 N.C. 383, 106 S.E. 2d 579.

In the record before us, we find

No error.

STATE OF NORTH CAROLINA v. JAMES ROBINSON.

(Filed 27 September, 1967.)

1. **Burglary and Unlawful Breakings § 8—**

Under G.S. 14-54 the maximum sentence for breaking and entering is 10 years.

2. **Larceny § 10—**

Under G.S. 14-72 the maximum sentence for larceny of property by breaking and entering a storehouse is 10 years.

3. **Constitutional Law § 36—**

Punishment within the statutory maximum cannot be cruel or unusual in the constitutional sense.

4. **Same; Criminal Law § 138—**

The imposition of a sentence of imprisonment of seven to nine years upon plea of *nolo contendere* to the offenses of breaking and entering and larceny is not cruel or unusual punishment in a constitutional sense.

APPEAL by defendant from *Mintz, J.*, 24 April 1967 Regular Criminal Session, SAMPSON Superior Court.

James Robinson and Larry Simmons were indicted for breaking and entering a store of one James Ezzell on 28 January 1967 and for the larceny of ten (10) chickens and sixty (60) cartons of cigarettes of the value of $50.00. The Court appointed John D. Williams, Jr., to act as counsel for the defendant. A jury was empaneled, and the State began offering evidence.

Larry Simmons testified, in substance, that he and Robinson had been to the home of Sadie Spell; that he, Simmons, started home about 1:30 A.M. and was called by Robinson, who said that he planned to break into the Ezzell store and asked him (Simmons) to act as lookout. He said Robinson took out the front window, carried it behind the store, and threw it into a field. Robinson then crawled in the window, unlocked the back door from the inside, and handed a box of dressed chickens to Simmons. Robinson brought out about sixty cartons of cigarettes. They took the property to a big vacant house across the street and left it there for the night.

The State also offered evidence that fingerprints were found on the glass window and that a comparison of them with Robinson's showed them to be his.

At the conclusion of the State's evidence, the defendant's attorney announced that the defendant wished to change his plea from not guilty to *nolo contendere*. The Court thereupon fully questioned the defendant to ascertain that the plea was being made with his consent; and while the defendant was somewhat equivocal, he said

several times that he approved Mr. Williams' action in entering the plea of *nolo contendere.*

The defendant has a long criminal record and was on parole for a breaking and entering charge at the time of the trial.

The Court pronounced a prison sentence of not less than seven (7) nor more than nine (9) years. While no notice of appeal was given at that time, the defendant wrote a letter to Judge Mintz within a few days in which he said he wanted to appeal; and it has been treated as notice of appeal. Mr. Williams was appointed by the Court to perfect the appeal for the defendant, and the County was required to furnish a transcript of the evidence.

Williams & Williams by Jno. B. Williams, Jr., Attorneys for defendant appellant.

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

PLESS, J. G.S. 14-54 provides that the penalty for breaking and entering shall be imprisonment for not more than ten (10) years. Under G.S. 14-72, the larceny of property taken by breaking and entering a storehouse shall be a felony, and the punishment therefor could be as much as ten (10) years' imprisonment; thus, the Court could have pronounced sentences totaling twenty (20) years. The sole exception presented by the defendant is that the prison sentence of not less than seven (7) nor more than nine (9) years constitutes cruel and unusual punishment.

In *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216, Chief Justice Parker, with his usual thoroughness, discussed this question. He said: "We have held in case after case that when the punishment does not exceed the limits fixed by the statute, it cannot be considered cruel and unusual punishment in a constitutional sense." He then quoted from *State v. McNally,* 152 Conn. 598, 211 A. 2d 162, cert. den., 382 U.S. 948; 15 L. Ed. 2d 356: " 'When the objection is to the sentence and not to the statute under which the sentence was imposed, the sentence is not cruel or unusual if it is in conformity with the limit fixed by statute. When the statute does not violate the constitution, any punishment which conforms to it cannot be adjudged excessive since it is within the power of the legislature and not the judiciary to determine the extent of punishment which may be imposed on those convicted of crime. . . . As the sentences imposed did not exceed the permissible statutory penalties, the punishment cannot be held to be cruel and unusual as a matter of law.' "

The defendant told the Court that he had been in prison almost constantly for the past ten years, that he had "pulled time" for about twenty cases of breaking and entering, for two cases of larceny, for receiving stolen property one time, for forgery, and for escape. With this kind of record, the Court was entirely justified in feeling that society should be protected from the defendant for a substantial period of time. The sentence imposed was entirely reasonable, and could not be construed as cruel and unusual in a constitutional sense.

No error.

GLADYS M. THOMSON v. HARRY DOYLE THOMAS, SR., AND HARRY DOYLE THOMAS, JR., A MINOR, BY HIS GUARDIAN AD LITEM HARRY DOYLE THOMAS, SR., AND MRS. HARRY DOYLE THOMAS, SR.

(Filed 27 September, 1967.)

1. **Automobiles § 54—**

Evidence tending to show that defendant, driving in a heavy rain, maintained a speed of some 55 miles per hour to within five or six car lengths of an automobile standing on the highway immediately behind a stopped school bus, the brake lights of the car being on and the school bus lights flashing, with another vehicle approaching from the opposite direction, so that defendant crashed into the rear of the stationary car, *held* sufficient to be submitted to the jury on the issue of negligence.

2. **Automobiles § 108—**

Admission in the answer that the additional defendants were persons in whose names the vehicle in question was registered and that it was being operated at the time in question by their son, living in the household, with the consent, permission and knowledge of the additional defendants, is sufficient to be submitted to the jury on the question of the additional defendants' liability under the family purpose doctrine.

3. **Trial § 21—**

Discrepancies and contradictions in plaintiff's evidence are for the jury to resolve and do not justify nonsuit.

APPEAL by defendants from *Parker, J.,* January 1967 Session of NEW HANOVER.

Action *ex delicto.*

Plaintiff offered evidence; defendant offered none. The following issues were submitted to the jury and answered as follows:

"1. Was the plaintiff injured by the negligence of Harry Doyle Thomas, Jr., as alleged in the Complaint?

"ANSWER: Yes.

"2. Was the automobile involved in the collision, subject of this action, provided, maintained and kept for the use and benefit of all members of said family, including the defendant Harry Doyle Thomas, Jr.?

"ANSWER: Yes.

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

"ANSWER: $17,000.00."

From a judgment entered in accordance with the verdict, defendants appeal.

W. G. Smith for defendant appellants.

Stevens, Burgwin, McGhee & Ryals by Karl W. McGhee and Ellis L. Aycock for plaintiff appellee.

PER CURIAM. Defendants Harry Doyle Thomas, Sr., and Mrs. Harry Doyle Thomas, Sr., assign as error the denial of their motion for judgment of compulsory nonsuit at the close of plaintiff's evidence, on the ground, *inter alia,* that "there was not sufficient evidence of the agency of Thomas, Jr., under the family purpose doctrine as applied in North Carolina upon which the jury could have found that the car involved in this accident was a 'family purpose' vehicle."

A brief summary of the evidence favorable to plaintiff tends to show the following facts: About 8 a.m. on 7 October 1965, the day of the accident, plaintiff was riding as a guest passenger in a 1961 Ford automobile being driven by defendant Harry Doyle Thomas, Jr., at a point some two or three miles south of the town of Burgaw, traveling in the direction of Wilmington, North Carolina, on U. S. Highway #117. It was raining quite hard, and the highway was very wet. The highway was straight between half a mile and a quarter of a mile in the direction of Wilmington. The highway was paved, with two lanes. There was a car and a school bus in front of them, and there was a school bus meeting them on the other side of the road. The car and school bus in front of them were stopped. The car in front of them had its lights on, and the school bus had its flashing lights on. Plaintiff was looking out of the window at the fields and thinking about how much rain they had been having. It was really raining quite hard, and she did not look at the traffic ahead until Harry put on the brakes quite quickly. When she first looked up and saw these vehicles, the car she was riding in was several car lengths from them, five or six car lengths. Thomas, Jr., was driving between 50 and 60 miles per hour, 55 probably. Plaintiff

testified as follows: "As soon as I saw the cars ahead of us, Harry had applied the brakes and he swerved off the road to avoid hitting the car in front of us and immediately the car went into a skid and finally hit the ditch. It threw me up very hard and I knew that my back was broken. I hit the seat and finally the car hit the ditch and the impact threw me down into the front of the car, half down in the car and half in the seat, and of course I was in just terrible pain and I immediately said to Harry, 'My back is broken,' . . ."

At the time of the collision plaintiff was a 50-year-old woman who was working in Belk's in Wilmington at a salary and bonus of about $300 a month. In the accident plaintiff's injury was a compression fracture of the 12th dorsal vertebra, which reduced said vertebra to one-fourth of its former size, resulting in permanent disability and extreme pain and suffering. It was stipulated by counsel that as a result of the accident plaintiff sustained medical, hospital, and doctors' bills in the total sum of $921.50.

Paragraph three of the amended complaint reads as follows:

> "That on or about the 7th day of October, 1965, the defendants Mr. and Mrs. Harry Doyle Thomas, Sr. were the owners of a 1961 Ford automobile, at which times hereinafter stated, was being driven by their son Harry Doyle Thomas, Jr., and with the consent, permission and knowledge of the said owners and for one of the purposes for which the automobile was owned, maintained and intended; that the son, Harry Doyle Thomas, Jr., was a member of the family and household of the owners, and was then living at home with his mother and father, codefendants; that the automobile aforesaid was a family car and was owned, provided and maintained for the general use, pleasure and convenience of the family, and was at all times mentioned in this complaint being so used."

Plaintiff introduced in evidence paragraph three of the answer to the amended complaint filed by all three defendants, which reads as follows:

> "Answering paragraph Three of the Amended Complaint, it is admitted that on October 7, 1965, the defendants Mr. and Mrs. Harry Doyle Thomas, Sr. were the persons in whose name the 1961 Ford automobile was registered, which automobile was at the times and places mentioned in the Amended Complaint being driven by the defendant Harry Doyle Thomas, Jr., the son of Mr. and Mrs. Harry Doyle Thomas, Sr., with the consent, permission and knowledge of Mr. and Mrs. Harry Doyle Thomas, Sr.; that the said Harry Doyle Thomas, Jr. was a

member of the family and household of Mr. and Mrs. Harry Doyle Thomas, Sr. and was living at home with his mother and father at that time, but all other allegations of said paragraph are denied."

Plaintiff testified as follows:

"Back before the accident occurred, I had been riding with Mr. Thomas approximately three weeks, something like that. I went to New York one week in between, so I think about three weeks really riding, sharing rides. He would drive one day and I would drive the other. On the day of the accident, I had been in his car not many minutes. . . . His mother and father owned that automobile. . . ."

In response to a question as to whether plaintiff knew where the gasoline that went into that automobile came from, she testified as follows:

"Mrs. Thomas had told me that when she—when she was riding with me, they used farm gas. They have a pump at their farm of their gasoline. I swap rides about every other day. Harry Thomas, Jr., at this time, did not have an occupation; he was coming to the Technical School here in Wilmington . . . I had seen Mr. Thomas, Sr., drive the car that was in the accident prior to the accident. I think I had seen Mrs. Thomas driving that car prior to the accident. I have at times seen Harry Thomas, Jr., drive it. I have seen each of those three members of the family use it."

Plaintiff testified on cross-examination:

"With reference to the automobile I was riding in when this accident occurred in October, 1965, and whether to my knowledge Harry had been driving that car back and forth to Wilmington to the Cape Fear Technical Institute for about three weeks, I say he had driven another car. There was more than one car involved. That particular car was the only one involved in this accident, but I mean he had driven more than just this one car. I cannot recall about how long he had been driving that car. He had been driving two or three weeks. But I can't say that particular car because I believe I told you that he was driving, they had another car they drove part of the time too. We live about six miles from the Thomases.

"Before this accident occurred and before I started riding back and forth with young Harry Thomas I had ridden back

and forth with Mrs. Harry Thomas, who also worked at Belk's. She and I swapped rides. As to whether I did know, and do now know that they had just recently acquired this particular car for Harry's purpose in going back and forth to Cape Fear Technical Institute, I say I am sure they acquired another car. I knew they also had another passenger car. I knew they had two cars. I can't remember exactly, but my best recollection is that they had had this car which we were involved in the accident some little time, but after we started riding together. I had been riding with Harry about two or three weeks, been swapping rides, about two or three weeks, something like that, I think it was about a month, but, as I said, I went to New York in between in there which would make us to have ridden about three weeks.

* * *

"As to where I saw Mrs. Thomas driving a 1961 Ford automobile that was involved in this accident, I said I wasn't quite sure if I saw her. It was when Harry rode with me and she drove the car back home, or drove the car away, put it that way. I don't know where she went, but that is where I saw her. It was not around the farm at their home, I didn't meet them on the farm, but out on the highway where we met every morning. When Harry would ride with me, she would usually bring him to the meeting place in that car, not always, but part of the time they did. As far as I remember, that is the only time I recall ever seeing Mrs. Thomas drive the car. I saw Mr. Thomas, Sr. drive it the same way, taking Harry to the meeting place and going back."

In respect to the family purpose doctrine of automobiles, this is said in 1 Strong, N. C. Index 2d, Automobiles, § 108, p. 592:

"The doctrine is predicated upon the principle of *respondeat superior,* and imposes liability on the parent for the negligent operation of the car by a member of the family when the parent owns the automobile for the convenience and pleasure of the family and permits a member of the family to use the car with the parent's consent and approval. Consent of the parent may be implied from the circumstances, such as the habitual or customary use of the car by the member of the family."

The evidence, when considered in the light most favorable to the plaintiff and giving her the benefit of every reasonable inference of fact to be drawn therefrom, tends to show that Harry Doyle Thomas, Jr., was operating the automobile in which plaintiff was

riding when she was injured at an excessive and unsafe rate of speed under the hazardous driving conditions then and there existing, in that he was driving the car at about 55 miles per hour, on a slick highway, during a heavy downpour of rain, and failed to maintain a proper lookout. The evidence also clearly tends to establish this absence of a proper lookout in that he maintained this excessive speed of about 55 miles per hour to within five or six car lengths of an automobile sitting on the highway immediately behind a stopped school bus. The car had its brake lights on, and the school bus was flashing its warning lights. This evidence is manifestly sufficient to support a jury's finding that Harry Doyle Thomas, Jr., the driver of the car, was guilty of actionable negligence, as alleged in the complaint.

Continuing to view the evidence in the light most favorable to the plaintiff and giving her the benefit of every reasonable inference deducible therefrom, in our opinion, and we so hold, it would permit a jury to find that Harry Doyle Thomas, Jr., was a minor son of Mr. and Mrs. Harry Doyle Thomas, Sr., and a resident of their household; that his parents owned the automobile for the convenience and pleasure of the family; and that defendants admitted in their answer to the amended complaint that Harry Doyle Thomas, Jr., was operating the automobile "with the consent, permission and knowledge of Mr. and Mrs. Harry Doyle Thomas, Sr." Hence, the court properly denied the parents' motion for judgment of compulsory nonsuit, as well as the motion for judgment of compulsory nonsuit made by Thomas, Jr. In so holding we wish to make it clear that parental consent to the use of the automobile by Thomas, Jr., does not have to be implied here because of the defendants' admission in their answer. There are discrepancies and contradictions in the plaintiff's evidence, but "discrepancies and contradictions, even in plaintiff's evidence, are for the twelve and not for the court," *Brafford v. Cook,* 232 N.C. 699, 62 S.E. 2d 327, and do not justify a nonsuit, *Keaton v. Taxi Co.,* 241 N.C. 589, 86 S.E. 2d 93.

We have carefully examined the defendants' assignments of error as to the evidence and as to the charge of the court. The jury, under application of settled principles of law, resolved the issues of fact against the defendants. While the appellants' well-prepared brief presents contentions involving distinctions and close differentiations, a careful examination of the assignments of error discloses no new question or feature requiring extended discussion. Neither reversible nor prejudicial error has been made to appear. The verdict and judgment will be upheld.

No error.

STATE v. BARRY ROCKY HILTON.

(Filed 27 September, 1967.)

1. Criminal Law § 158—

The record imports verity and the Supreme Court can judicially know only what appears therein, and therefore defendant may not base a contention on appeal on matters which do not appear of record.

2. Criminal Law § 162—

A sole exception to the judgment presents only the face of the record proper for review.

3. Criminal Law § 138—

Where the punishment imposed is within the statutory maximum, it cannot be held cruel and unusual and will not be disturbed on appeal, although it would seem that the maximum punishment allowed by statute should be imposed only in instances of aggravation or circumstances tending to justify the more severe punishment.

APPEAL by defendant from *Bryson, J.*, March 1967 Regular Criminal Session of BUNCOMBE.

Defendant and his codefendant, Bobby Joe Johnson, were jointly indicted in and were tried under nine indictments. The indictments against Hilton charged: breaking and entering in cases Nos. 67-115, 67-117, 67-118, 67-119 and 67-120; breaking and entering, larceny and receiving in cases Nos. 67-112, 67-113 and 67-114; and larceny of an automobile, receiving and temporary larceny in case No. 67-116.

Defendant was represented by the same court-appointed attorney who represented his codefendant, Bobby Joe Johnson. After an oral and written examination by the court as to whether his pleas were voluntary, defendant through his counsel entered pleas of guilty of breaking and entering in cases Nos. 67-112, 67-113 67-114, 67-115, and a plea of larceny of an automobile of over the value of $200.00 in case No. 67-116.

State's witness Jack Richardson of the State Bureau of Investigation testified that defendant was picked up in Rowan County for questioning about an armed robbery and a stolen car. Defendant and his codefendant told the officers that they were in a stolen car and about break-ins at several places, including facts relating to the instant cases in Buncombe County. He stated that he was investigating the breaking and entering of the house of Thomas I. Wood where property was taken of the value of approximately $1500.00. All of Wood's property was recovered except a quantity of old coins and money of undisclosed value. Defendants pointed out eight other cabins that they had broken and entered. Prior to this, the witness had not known that these cabins had been entered. As to three of

these cabins, an electric blanket was taken from one, food from another, and nothing from the other. The value of all the property taken from each cabin was less than $200.00. Defendant is 19 years old and has served some time as a juvenile and had no other record prior to this series of violations, all of which were committed in one 30-day period. Agent Richardson stated: "The defendants have been cooperative and were cooperative in recovering a large quantity of Mr. Wood's stuff."

The court imposed judgment in case No. 67-112 confining defendant in State's Prison, Raleigh, North Carolina, for a period of ten years. Ten-year sentences were likewise imposed in cases Nos. 67-113, 67-114, 67-115 and 67-116, each ten-year sentence to commence at the expiration of the previous ten-year sentence. These sentences, running consecutively, totaled fifty years.

Prayer for judgment was continued in cases Nos. 67-117, 67-118, 67-119 and 67-120.

From the judgment entered, defendant appealed.

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

Joseph Schenck for defendant.

PER CURIAM. Counsel for defendant contends in his brief and oral argument that 10-year sentences were given in two additional cases to codefendant Bobby Joe Johnson after he had given notice of appeal. Subsequently, defendant was given the same sentences as his codefendant. He contends that his sentences were made more severe because Johnson exercised his legal right of appeal. This action does not appear in the record.

> "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." *State v. Duncan,* 270 N.C. 241, 246, 154 S.E. 2d 53.

The only assignment of error in the record is the exception to the judgment, which presents only the face of the record proper for review. *Dellinger v. Bollinger,* 242 N.C. 696, 89 S.E. 2d 592. We find no errors on the face of the record, and the judgment below must stand.

In the case of *State v. Lee,* 166 N.C. 250, 80 S.E. 977, the defendant contended there was error because his sentence constituted "cruel

and unusual punishment." The Court, speaking through Clark, C.J., stated:

> "While we will not hold, therefore, that as a matter of law the punishment was in excess of the powers of the judge, we are frank to say that it does not commend itself to us as being at all commensurate with the offense, even if the defendant was properly found guilty upon the facts. There were neither aggravation nor circumstances which tended to show that the punishment should approximate the highest limit allowed by the law in such cases. It was evidently intended that where there was no aggravation that the punishment should approximate the lower limit allowed, and only when aggravation was shown should the highest degree of punishment authorized by the statute be inflicted."

In the instant case the sentences imposed do not exceed the maximum prescribed by the applicable statute, so as to violate defendant's constitutional rights (*State v. LePard,* 270 N.C. 157, 153 S.E. 2d 875). While we do not hold that as a matter of law the punishment was in excess of the powers of the judge, we must note that the sentences were imposed under circumstances which would seem to warrant prompt review by the Board of Paroles.

No error.

STATE v. BOBBY JOE JOHNSON.

(Filed 27 September, 1967.)

APPEAL by defendant from *Bryson, J.,* March 1967 Regular Criminal Session of BUNCOMBE.

Defendant and his codefendant, Barry Rocky Hilton, were jointly indicted in and were tried under nine indictments. The decisive facts and the law applicable on appeal in the instant case and in *State v. Barry Rocky Hilton* are identical. The defendant in each case entered pleas of guilty to the same charges contained in the same bills of indictment, and the defendant in each case was represented by the same court-appointed attorney. Identical sentences were imposed on Barry Rocky Hilton and Bobby Joe Johnson.

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

Joseph Schenck for defendant.

PER CURIAM. Upon authority of *State v. Barry Rocky Hilton, ante,* 456, and the cases therein cited, we hold that in the trial of the case below there was

No error.

STATE v. SHELBY EUGENE TOLLEY.

(Filed 27 September, 1967.)

1. Criminal Law §§ 18, 138—

Upon trial *de novo* in the Superior Court upon appeal from an inferior court, the Superior Court may impose a punishment in excess of that imposed in the inferior court provided the punishment does not exceed the statutory maximum.

2. Automobiles § 117; Criminal Law § 138—

The punishment for speeding in violation of G.S. 20-141, where the speed is not in excess of 80 miles per hour, is limited to a fine of $100 or imprisonment for not more than 60 days, or both. G.S. 20-180, G.S. 20-176(b).

3. Automobiles § 119; Criminal Law § 138—

The punishment for reckless driving is limited to a fine not exceeding $500 or imprisonment not to exceed six months, or both, in the discretion of the court. G.S. 20-140(c).

4. Automobiles § 3; Criminal Law § 138—

G.S. 20-7 and G.S. 20-35 must be construed *in pari materia,* and the provision of G.S. 20-7(n) that a person convicted of driving a motor vehicle on the highways of this State without having first been licensed as required by the statute should be guilty of a misdemeanor and punished in the discretion of the court is limited by G.S. 20-35(b) so that punishment for violation of G.S. 20-7 may not exceed a fine of $500 or imprisonment for six months.

5. Criminal Law § 138—

Where convictions on several warrants or indictments are consolidated for judgment, the judgment cannot exceed that prescribed by the most severe statutory penalty for any one of the offenses.

6. Same—

Where the sentence imposed by the lower court is in excess of the statutory maximum and the prisoner has already served more than such maximum, the opinion of the Supreme Court will be certified immediately to the end that the prisoner be discharged from custody forthwith.

CERTIORARI to review order of *Bryson, J.,* entered May 18, 1967, in BUNCOMBE Superior Court, in *habeas corpus* proceeding upon petition of Shelby Eugene Tolley.

The answer of the Attorney General to the petition of Shelby Eugene Tolley (Tolley) for *certiorari* discloses the facts set forth below.

Two warrants, each containing two counts, were issued March 2, 1966, out of the Police Court of the City of Asheville, charging offenses alleged to have been committed on February 28, 1966. The warrant in No. 8474 charged that defendant operated a motor vehicle upon the public streets and highways (1) at a speed of 70 miles per hour in a 35-mile per hour speed zone, and (2) "in a dangerous and reckless manner, and with wanton disregard for safety of life and/or person and/or property of others." The warrant in No. 8475 charged that defendant operated an automobile upon the public streets and highways (1) with an improper license tag, to wit, a South Carolina license plate, and (2) "without having first obtained an operator's license in violation of N. C. Motor Vehicle Law 20-7."

Defendant was tried on both warrants in the Police Court of Asheville on March 3, 1966, and adjudged guilty. In No. 8475, defendant was sentenced to a prison term of 60 days, "to be assigned to a 1st offender's camp." In No. 8474, defendant was sentenced on each of the two counts of speeding and reckless driving to a prison term of 90 days. Judgment provided that these two 90-day sentences would run concurrently with each other but consecutively with reference to the sentence of 60 days in No. 8475. Defendant appealed from these judgments to the superior court.

At March 14, 1966 Session of Buncombe Superior Court before Falls, J., defendant pleaded guilty to the four counts in said warrants. The court consolidated the two cases for judgment. One judgment, imposing a prison sentence of two years, was pronounced.

Defendant served, pursuant to commitment based on said superior court judgment, from March 16, 1966, until October 25, 1966, more than six months. He was paroled October 25, 1966, but thereafter his parole was revoked and he was taken into custody on April 5, 1967, and is presently serving the remaining portion of said sentence of two (2) years imposed at said March 14, 1966 Session.

In a petition filed April 25, 1967, in Buncombe Superior Court, Tolley alleged the said superior court judgment is invalid because the punishment imposed thereby is greater than the punishment imposed by the judgment of the Police Court of Asheville. Apparently, Judge Bryson considered Tolley's petition as a petition for a writ of *habeas corpus;* and, being of the opinion the said two-year sentence pronounced by Judge Falls was lawful, denied relief.

This Court grants Tolley's petition for *certiorari* to review Judge Bryson's order and passes upon the merits thereof in the manner set forth in the opinion.

Attorney General Bruton and Staff Attorney White for the State.
Shelby Eugene Tolley in propria persona.

PER CURIAM. If the superior court judgment were valid in all other respects, the fact that it imposes a punishment greater than that imposed in the Police Court of Asheville does not afford any basis for the relief sought by petitioner. Upon petitioner's appeal from the judgments pronounced in the Police Court of Asheville, the cases were for trial *de novo* in the superior court. Private Laws of 1905, Chapter 35, Section 6. However, the superior court judgment is invalid for the reasons stated below.

Every person convicted of speeding in violation of G.S. 20-141, where the speed is not in excess of eighty miles per hour, "shall be punished by a fine of not more than one hundred dollars ($100.00) or by imprisonment in the county or municipal jail for not more than sixty days, or by both such fine and imprisonment." G.S. 20-180; G.S. 20-176(b).

"Any person convicted of reckless driving shall be punished by imprisonment not to exceed six months or by a fine, not to exceed five hundred dollars ($500.00) or by both such imprisonment and fine, in the discretion of the court." G.S. 20-140(c).

We pass, without discussion, whether the count with reference to "improper license tag" is sufficient to charge a criminal offense. Assuming it does, it is unclear whether it purports to charge a violation of G.S. 20-63 or a violation of G.S. 20-111. In either event, the maximum punishment for such violation would be that prescribed by G.S. 20-176(b), namely, "a fine of not more than one hundred dollars ($100.00) or . . . imprisonment in the county or municipal jail for not more than sixty days, or by both such fine and imprisonment."

Under G.S. 20-7(n), any person convicted of operating a motor vehicle over any highway in this State, without having first been licensed as such operator, in violation of G.S. 20-7(a) "shall be guilty of a misdemeanor and punished in the discretion of the court." However, G.S. 20-35(b) provides: "Unless another penalty is in this article or by the laws of this State provided, every person convicted of a misdemeanor for the violation of any provision of this article shall be punished by a fine of not more than five hundred ($500.00) dollars or by imprisonment for not more than six (6) months." G.S. 20-7 and G.S. 20-35 are provisions of Article 2 of Chapter 20 of the General Statutes. These statutory provisions, being *in pari materia*, must be construed together; and, if possible, they must be reconciled and harmonized. When so construed, we are of opinion, and so decide, that the explicit provisions of G.S. 20-35 establish the maxi-

mum limits of the court's discretionary power in respect of punishment for a violation of G.S. 20-7(a). Decisions which, in Chief Justice Stacy's phrase, are "obliquely relevant" include *State v. Blackmon,* 260 N.C. 352, 132 S.E. 2d 880; *State v. Adams,* 266 N.C. 406, 146 S.E. 2d 505; *State v. Thompson,* 268 N.C. 447, 150 S.E. 2d 781.

The cases having been consolidated for judgment, the court had no authority "to enter a judgment in gross in excess of the greatest statutory penalty applicable to any of the counts upon which there has been a conviction or plea of guilty." *State v. Austin,* 241 N.C. 548, 85 S.E. 2d 924. Here, no count to which defendant pleaded guilty charged a criminal offense punishable by imprisonment for a term in excess of six months. Hence, the judgment of the superior court is invalid and is vacated.

"It is the general rule in this jurisdiction that where a defendant has been properly convicted but given a sentence in excess of that authorized by law, and comes to this Court pursuant to a petition for writ of *certiorari* in a *habeas corpus* proceeding, when such defendant has not served as long under the sentence as he might have been legally imprisoned, we vacate the improper judgment and remand for proper sentence. In such case, the defendant should be given credit for the time served under the vacated judgment." *State v. Austin, supra; State v. Thompson, supra.*

Defendant having served more than six months under said superior court judgment, and all beyond six months of the sentence being excessive, he is entitled to be discharged. It is so ordered. Therefore, let this opinion be certified immediately to the Commissioner of Corrections and also to the Superior Court of Buncombe County to the end that petitioner be discharged from custody forthwith.

Judgment vacated.

STATE v. GEORGE L. BROOKS.

(Filed 27 September, 1967.)

Criminal Law § 140—

Under the provisions of G.S. 15-6.2, concurrent sentences may be imposed for separate offenses, even though one is for a misdemeanor and the other a felony, so that one must be served in the State's prison and one in the county jail.

APPEAL by defendant from *Copeland, S.J.,* 15 May 1967 Session of NEW HANOVER.

Defendant, through his attorney, Aaron Goldberg, Esquire, entered pleas of guilty to charges of breaking and entering (felony) and carrying a concealed weapon (misdemeanor). For the felony, the court imposed a sentence of not less than three nor more than four years in the State's prison. For the misdemeanor, defendant received a sentence of twelve months in the common jail of New Hanover County "to be assigned to work under the supervision of the State Prison Department." The judge ordered that this sentence "run concurrently with sentence on the count of breaking and entering." Defendant appealed from the judgment rendered.

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

Marvin J. Cowell, Jr., for defendant.

PER CURIAM. Defendant appeals because the two sentences, which the court specified should run concurrently, do not specify the same place of confinement. He argues that " '[a] sentence in the penitentiary and one adjudging that a man shall spend a certain time in the county jail cannot be served out concurrently.' *Story v. State,* 27 S.W. 2d 204." *In re Smith,* 235 N.C. 169, 172, 69 S.E. 2d 174, 176; *accord, In re Bentley,* 240 N.C. 112, 81 S.E. 2d 206. Defendant contends that this case should be remanded to the superior Court for "proper judgment" in order to effectuate the judge's stated intention that the two sentences run concurrently.

Defendant's apprehension that he might be required to serve an additional 12 months after the completion of his 3-4-year sentence in the State's prison is unfounded. After the decisions in *In re Smith* and *In re Bentley, supra,* the General Assembly of North Carolina at its 1955 Regular Session enacted G.S. 15-6.2:

> "When by a judgment of a court or by operation of law a prison sentence runs concurrently with any other sentence a prisoner shall not be required to serve any additional time in prison solely because the concurrent sentences are for different grades of offenses or that it is required that they be served in different places of confinement."

As a result of this statute, defendant's two sentences run concurrently. When he has completed the sentence in the State's prison, defendant will be entitled to his release.

No error.

STATE OF NORTH CAROLINA v. JAMES EDWIN HOPPER.

(Filed 27 September, 1967.)

Criminal Law § 138—

Punishments within the statutory maximums cannot constitute cruel and unusual punishment.

APPEAL by defendant from *McLean, J.*, 23 January 1967, Regular one-week Mixed Sessions, Superior Court of CLEVELAND County.

The defendant was charged with the forgery and uttering of two checks drawn on the account of Dr. L. Gene Yarboro with the Union Trust Co. of Shelby, N. C. One was in the sum of $87.43, the other for $78.34.

The defendant was fully apprised of his rights when arrested and then told the officers that he had bought a tire from Pendleton's Tire Store on the $87.43 check and got the balance of $72.93 in money.

He said he cashed the $78.34 check at the bank.

The State's evidence fully supported the charges.

When brought to trial, the judge carefully explained his rights to the defendant who then said that he understood the nature of the charges, that he had authorized his Court-appointed attorney N. Dixon Lackey, Jr., to enter pleas of guilty to them. He made a statement admitting his guilt in both cases, which was similar to the one previously made to the officers.

The State then offered evidence that the defendant had been convicted of forgery in 1964, and the larceny of an automobile in 1965, and was on probation for the latter charge at the time of trial.

The two cases were consolidated for judgment; and the Court pronounced prison sentences of not less than seven (7) nor more than ten (10) years for forgery, and not less than five (5) nor more than seven (7) years for uttering, to run consecutively. The defendant appealed.

N. Dixon Lackey, Jr., Attorney for defendant appellant.

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

PER CURIAM. The defendant's only assignment of error is that the prison sentences imposed constituted cruel and unusual punishment. Upon his pleas of guilty, he could have been given a total of forty years' imprisonment for the forgery and uttering of the two checks. G.S. 14-119 and G.S. 14-120.

With a record of two felony convictions in which, so far as the

present record shows, he received no active prison sentences, he could hardly hope for further slap-on-the-wrist treatment by the Court. The sentences pronounced herein, while severe, amount to only about a third of the time of imprisonment permissible under the defendant's pleas of guilty. We have held, frequently and repeatedly, that this does not constitute cruel and unusual punishment. *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330, and many cases there cited.

This being the only ground upon which the defendant seeks relief, it is hereby denied.

Affirmed.

EDMUND HUFFMAN v. ELLA HUFFMAN.

(Filed 27 September, 1967.)

Automobiles § 81—

The evidence disclosed that plaintiff voluntarily sat on the fender, astride the radiator, with one foot on the bumper and the other under the elevated hood of an automobile which was being pushed by another vehicle in an attempt to start the automobile, and that after the motor of the automobile ignited he fell therefrom to his injury. *Held:* Nonsuit for contributory negligence was properly entered, even though the evidence may have been sufficient on the issue of the operator's negligence in handling the car after the motor ignited.

APPEAL by plaintiff from *Mintz, J.,* February 1967 Session, JONES Superior Court.

The plaintiff, husband, instituted this civil action against the defendant, wife, to recover damages for the personal injuries he alleges were caused by his wife's actionable negligence. The pleadings raise issues of negligence, contributory negligence and damages.

The evidence disclosed that on November 13, 1962 the defendant was driving the family automobile, a 1953 Ford sedan, when the motor ceased to function. The plaintiff attempted to ignite the engine by pouring gasoline into the carburetor from a bottle. The plaintiff gave instruction that the driver of his pickup truck push the Ford from the rear. At the time, the defendant was under the wheel, guiding its movement. The hood was elevated. The plaintiff was astride the radiator, seated on the left front fender. He had one foot on the front bumper, the other behind the radiator, under the hood.

After the Ford had been pushed 200 or 300 yards, and after it had attained a speed of 10 to 15 miles per hour, the truck was dis-

engaged. The engine of the Ford ignited and the vehicle, with the defendant guiding it, continued for 200 or 300 yards down the highway. As the defendant changed gears, or applied the brakes, the plaintiff fell or was thrown from his perch and was injured. He offered evidence of the extent of his injuries and the costs of treatment.

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

Donald P. Brock, Jones, Reed & Griffin for plaintiff appellant.
Whitaker, Jeffress & Morris by A. H. Jeffress Attorneys for defendant appellee.

PER CURIAM. The judgment of nonsuit was proper and must be sustained. If it be conceded the defendant was negligent in the manner in which she operated the Ford sedan, nevertheless, the plaintiff's evidence shows his contributory negligence as a matter of law. He voluntarily sat on the fender, astride the radiator, of a moving automobile, with one foot on the bumper and the other under the elevated hood. He rode in that position 150 to 200 yards before the engine ignited, and 200 to 300 yards before he fell off and was injured. A clear case of contributory negligence is disclosed by the plaintiff's own evidence.

Affirmed.

GEORGIA ANN WITHERSPOON v. FRED FLOWERS, ADMINISTRATOR OF THE ESTATE OF CHARLES LEE HOPPER.

(Filed 27 September, 1967.)

APPEAL by defendant from *McLean, J.*, February 1967 Civil Session, CLEVELAND Superior Court.

The plaintiff instituted this civil action against the personal representative of Charles Lee Hopper to recover damages for injuries she sustained in an automobile accident which occurred in Shelby on July 4, 1965.

The evidence favorable to the plaintiff tended to show she was one of four passengers in a Chevrolet automobile which defendant's intestate was driving at 75 m. p. h. when he lost control of the vehicle, crashed into a tree, killing himself and two of the passengers. The plaintiff and the other passenger were seriously injured.

The defendant, by answer, denied negligence on the part of his intestate and conditionally pleaded the intoxication of the driver and all passengers in his automobile; that the plaintiff, by riding with him, knowing of his condition, was contributorily negligent and her conduct is a legal bar to her right to recovery.

The plaintiff introduced evidence tending to support the issues of negligence, injury, and damages. Her hospital and medical bills were approximately $1700. The defendant introduced evidence tending to support the issue of contributory negligence. The jury answered all issues in favor of the plaintiff and awarded her $3500.

Frank Patton Cooke for defendant appellant.
Horn, West & Horn by J. A. West for plaintiff appellee.

PER CURIAM. The plaintiff's evidence was sufficient to carry the case to the jury on the issues of the actionable negligence of defendant's intestate and the plaintiff's damages as a result thereof. The burden of proof on the contributory negligence issue was on the defendant. The jury found he did not carry that burden. The record fails to disclose any error of law in the trial.

No error.

LONNIE R. SPIVEY v. THE BABCOCK & WILCOX COMPANY.

(Filed 27 September, 1967.)

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

This civil action to recover personal injuries was before us at the Spring Term 1965, at which time we reversed the judgment of nonsuit entered at the close of plaintiff's evidence. See *Spivey v. Wilcox Company,* 264 N.C. 387, 141 S.E. 2d 808, where the facts are stated.

Upon the retrial, issues of negligence, contributory negligence, and damages were submitted to the jury and answered in favor of plaintiff. From judgment entered upon the verdict, defendant appeals.

Aaron Goldberg and James L. Nelson for plaintiff appellee.
Marshall & Williams for defendant appellant.

PER CURIAM. We have examined the records and find that the evidence in the second trial was not essentially different from that in the first. The assignments of error disclose no flaws which, in our opinion, influenced the verdict or which would warrant us in setting it aside. The case was tried in accordance with the principles laid down in the former opinion.

No error.

HOUSING AUTHORITY OF THE CITY OF DURHAM v. JOYCE C. THORPE.

(Filed 11 October, 1967.)

1. **Statutes § 8; Constitutional Law § 25—**

Ordinarily, statutes in this State are presumed to act prospectively only, and a statute which affects a constitutional right may not be construed to have a retrospective effect.

2. **Landlord and Tenant § 10—**

A directive of the Department of Housing and Urban Development relative to the termination of leases in an urban development built with the assistance of Federal funds can have no relevancy to the termination of a lease some 17 months prior to the issuance of the directive, since such directive insofar as it affects contractual constitutional rights cannot be given retrospective effect.

3. **Same—**

Where a tenant testifies that she was given notice to vacate the day after she was elected president of an organization for tenants living in the project and contends that termination of her lease was because of such activity, but in a hearing there is testimony of the manager to the effect that the lease was terminated at the expiration of the term in accordance with its provisions and that the tenant's activities in the club played no part in the decision of lessor not to renew the lease, the evidence discloses mere coincidence but no showing of causal relation between the termination of the lease and the tenant's activities, and the court's findings to this effect support its order that the tenant surrender the premises.

APPEAL by defendant from *Bickett, J.*, October 1965 Civil Session, DURHAM Superior Court.

M. C. Burt, Jr., and Jack Greenberg, James M. Nabrit, III, Michael Meltsner, Charles H. Jones, Jr., and Charles Stephen Ralston for defendant appellant.

Daniel K. Edwards for plaintiff appellee.

HIGGINS, J. The plaintiff, a North Carolina corporation with federal assistance, built, owned, maintained, and managed the McDougald Terrace, a low-rent public housing project in the City of

Durham. On November 11, 1964 the Housing Authority, as owner, and Joyce C. Thorpe, as tenant, entered in a written agreement whereby the Authority leased to Mrs. Thorpe Apartment No. 38-G for a term of 30 days. The agreement provided: ". . . This lease may be terminated by the Tenant by giving to Management notice in writing of such termination *15* days prior to the last day of the term. The Management may terminate this lease by giving to the Tenant notice in writing of such termination fifteen (15) days prior to the last day of the term. . . ." Each party had equal right to terminate the lease. The limitations as to time or terms were lawful. *Chicago Housing Authority v. Blackman,* 4 Ill. 2d 319, 122 N.E. 2d 522; *Housing Authority of Los Angeles v. Cordova,* 130 Cal. App. 2d Supp. 883, 279 P. 2d 215, cert. denied, 350 U.S. 969; *Lawson v. Housing Authority of Milwaukee,* 270 Wis. 269, 70 N.W. 2d 605.

On August 11, 1965 the Housing Authority gave the tenant notice it was terminating the lease and gave direction that she vacate the apartment. On August 20, and again on September 1, the tenant requested a hearing. The Manager of the Authority conferred with tenant's counsel but did not give the tenant a hearing nor disclose any reason for refusing to extend the lease.

After the term expired and the tenant refused to vacate, the Authority instituted ejectment proceedings. The tenant testified that the day before the notice to terminate was served, she was elected President of the Parents' Club, an organization for tenants living in the project. She testified, in her opinion, she was being ejected because of her club activities. In support of her belief, she offered nothing except the timing between her election and the service of the notice. She neither offered evidence of the purposes of the club nor any reason why the Authority should object to it. The Manager testified at the hearing before the Justice, and, by affidavit, before the Superior Court that the tenant's activities in connection with the club played no part whatever in the decision of the Authority not to renew the lease.

After hearing, the Justice of the Peace entered judgment of eviction. Mrs. Thorpe appealed to the Superior Court. The parties waived a jury trial and consented that Judge Bickett hear the evidence, find the facts, and render judgment without the intervention of a jury. Judge Bickett found the Authority had terminated the lease in the manner provided by the agreement of the parties and that the tenant's activities in the Parents' Club played no part in the decision of the Authority not to renew the lease. The timing of the club election and the service of the ejection notice might arouse suspicion if the activities of the club were shown to have been hostile to the Authority. Without such showing and in the face

of positive testimony of the Manager to the contrary, the charge is based altogether on coincidence. The timing may arouse suspicion, but to the judicial mind, suspicion is never a proper substitute for evidence. From Judge Bickett's findings against her, and his order that she surrender the premises, Mrs. Thorpe appealed. Pending our consideration of the appeal, we ordered a stay of execution.

On May 25, 1966 this Court, by opinion reported in 267 N.C. 431, found no error in the decision of the Superior Court. On December 5, 1966 the Supreme Court of the United States granted *certiorari,* 385 U.S. 967, to review our decision. On February 7, 1967, the Department of Housing and Urban Development issued this directive to local housing authorities:

> "Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish."

On April 9, 1967 the Supreme Court of the United States vacated our judgment and remanded the case to us "for such further proceedings as may be appropriate in the light of the February 7 Circular of the Department of Housing and Urban Development."

At the beginning of our reconsideration, we note that the circular was issued two years after the lease was executed; 17 months after the notice of termination was given; 16 months after the eviction order was entered in the Justice's court; 15 months after the eviction order was entered in the *de novo* hearing in the Superior Court; and 8 months after this Court found no error in the Superior Court judgment. The rights of the parties had matured and had been determined before the directive was issued. We quote from *Greene v. U. S.*, 376 U.S. 149:

> "The first rule of construction is that legislation [and directives] must be considered as addressed to the future, not the past. . . . (A) retrospective operation will not be given to a statute [or directive] which interferes with antecedent rights unless such be 'the unequivocal and inflexible import of its terms, and the manifest intention of the legislature. . . . (S)ince regulations of the type involved in this case are to be viewed as if they were statutes, this "first rule" of statutory construction appropriately applies. . . .' " See also *Greene v. McElroy,* 360 U.S. 474.

The North Carolina decisions are to the effect statutes are presumed to act prospectively only. *Wilson v. Anderson,* 232 N.C. 212,

59 S.E. 2d 836; *Hospital v. Guilford County,* 221 N.C. 308, 20 S.E. 2d 332; *Hicks v. Kearney,* 189 N.C. 316, 127 S.E. 205. The rules against retrospective construction have rigid application where the rights of the parties depend upon contract. *Moody v. Transylvania County,* 271 N.C. 384, 156 S.E. 2d 716; *Rostan v. Huggins,* 216 N.C. 386, 5 S.E. 2d 162. This rule is general in its application. 25 R.C.L. 787; 20 Minn. L. Rev. 775.

As directed by the order of the Supreme Court (386 U.S. 670), we have reconsidered our former decision (267 N.C. 341) in the light of the February 7, 1967 DHUD directive. After review, we conclude that 15 days prior to the expiration date of the lease, the Housing Authority, without explanation, notified the tenant that her lease would not be renewed. That procedure followed the terms of the lease. Before the expiration date the defendant demanded a hearing. The Manager of the Authority conferred with her counsel but not with her. She refused to vacate, charging her lease was being vacated because of her having been elected President of the Parents' Club. No evidence was offered as to the purposes of the club or that its activities conflicted with the interests of the Authority. The Manager of the Authority stated unequivocally under oath that the termination of the lease had no connection whatever with the tenant's activities in connection with the Parents' Club. Judge Bickett so found. The finding was supported by competent evidence and should be conclusive. The directive of February 7, 1967 has no retroactive force. All critical events took place months before that date. This view does not require us to consider the directive on any basis except that it has no application to this case.

The judgment entered by Judge Bickett in the Superior Court of Durham County is supported by the record. Our original decision stands. The re-examination discloses

No error.

GERALD PARIS AND WIFE, MYRTLE FAYE PARIS, v. CAROLINA PORTABLE AGGREGATES, INC.

(Filed 11 October, 1967.)

1. Courts § 7—

Appeals in civil actions from the general county courts to the Superior Court are governed by G.S. 7-295, and the statute makes no provision for the filing of a case on appeal or the docketing of the record in the Superior Court until settlement of the case, and therefore when appellant timely serves his case on appeal and appellee files exceptions thereto with request that the judge settle the case, appellee is not entitled to

dismissal for any delay of the judge of the general court in filing the case as settled by him.

2. Pleadings § 34—

The test of a right to have allegations stricken from the pleadings is whether the pleader has the right to introduce evidence to support such allegations.

3. Appeal and Error § 55—

The denial of a motion to strike will not be disturbed on appeal unless the record affirmatively reveals that the matter sought to be stricken is irrelevant or redundant and that its retention in the pleading will cause harm or injustice if not deleted prior to trial.

4. Pleadings § 34—

In an action to recover damages to plaintiff's house from a particular blasting operation, allegations that defendant, in the course of its business in operating its quarry, blasted with dynamite and that such blasting on each occasion seriously shook plaintiff's house, and that a particular explosion was "tremendous," *held* not to warrant defendant's motion to strike.

5. Appeal and Error § 48—

The admission in evidence of unsigned carbon copies of letters without evidence that they were made at the same time and by the same mechanical operation as the originals, or evidence that the other party received the originals, while erroneous, cannot be held prejudicial when the contents of the letters were collateral and amounted to mere notice which did not directly concern the issues in the case, and it further appears from the record that the subject matter of the letters was later proved by competent evidence.

6. Evidence § 43—

Where a witness is shown to be a building inspector with many years experience relating to damage from dynamite blasts, it will be presumed, in the absence of objection by the opposing party, that the court, in admitting his testimony as to his opinion that the damage to plaintiff's dwelling was caused by dynamite blasting, found that the witness was an expert in the field, even though there is no specific finding by the court that the witness was an expert.

7. Evidence § 55—

Where a witness has testified to a certain fact, his testimony that another had made a statement to like effect is competent for the purpose of corroboration.

8. Trial § 10—

In admitting expert testimony, a statement of the court to the effect that the witness was experienced and to let him testify amounts to nothing more than a holding that the witness was qualified to give opinion evidence and cannot be held prejudicial as an expression of opinion by the court on the credibility of the witness. G.S. 1-180.

9. Trial § 13—

Whether the court will allow a jury view of the premises in question rests in the court's sound discretion, and the court's refusal to allow such jury view will not ordinarily be disturbed.

10. Negligence § 4; Trespass § 1—

Allegations sufficient to allege that plaintiff's dwelling was damaged by concussion and vibrations proximately caused by defendant's use of explosives in blasting operations at defendant's quarry are sufficient to state a cause of action, and the fact that plaintiff alleges in other portions of the complaint that defendant was negligent in certain respects does not constitute an election to proceed upon the theory of negligence rather than absolute liability.

11. Pleadings § 2—

Where a pleading is sufficient to state a cause of action upon one theory of liability, the fact that it contains other averments pertinent to a different theory of liability is not fatal, and such other allegations may be treated merely as surplusage not requiring proof.

12. Trespass § 1; Negligence § 4; Trial § 40—

Where plaintiff's allegations and evidence are sufficient to be submitted to the jury on the issue of liability for damage to plaintiff's dwelling from vibrations from blasting operations, and the complaint also contains allegations with respect to negligence unsupported by evidence, the submission of issues relating solely to absolute liability for blasting operations is proper, since only such issues as are raised by the pleadings and are supported by sufficient competent evidence need be submitted to the jury.

13. Trial § 34—

Where the court properly places the burden of proof and correctly states the intensity of proof required, and further instructs the jury that if the weight of the evidence tips the scales in favor of plaintiff to answer the issue in the affirmative, and if the jury were not satisfied from the evidence and by its greater weight to answer the issue in favor of defendant, the instruction will not be held for prejudicial error.

14. Damages § 4—

Where plaintiff's allegations and evidence are to the effect that damages to his dwelling resulted from a particular dynamite blast at defendant's quarry, the proper measure of damages is the difference in the market value of the property immediately before and immediately after the explosion complained of, and the court properly instructs the jury that it should consider the evidence offered by plaintiff in regard to the value of the property before the alleged damage by blasting and evidence of such value immediately after the blasting.

15. Damages § 15—

The failure of the court to place the burden of proof upon plaintiff to prove the amount of his damages must be held for prejudicial error.

16. Appeal and Error § 62—

Where the Supreme Court finds error relating to a single issue, it is discretionary with it whether to order a new trial limited to such issue or a general new trial, and when the assignments of error as to all the issues are so intertwined that the ends of justice will best be met by a new trial on both issues, it will be so ordered.

APPEAL by defendant from *Riddle, S.J.*, 16 January 1967 Special Civil Session of HENDERSON.

Civil action to recover for damages to plaintiffs' house allegedly caused by blasting operations conducted by defendant.

The case originally came on for trial before W. R. Sheppard, Judge of the General County Court of Henderson County, and a jury, at the April 1966 Civil Session. The material portions of plaintiffs' evidence is summarized as follows:

Myrtle Faye Paris, *feme* plaintiff, testified that in 1960 she and her husband moved into their newly constructed home which was located about 1200 or 1300 feet from defendant's quarry. She described the house and stated that on 13 March 1964, at 4:09 P.M. she was standing in the house when it began to shake. She ran to the window and saw reddish-orange smoke coming up from the quarry after the blast. Thereafter, she observed cracks in the wall, ceiling, basement and outside brick wall.

Donies Justus, an experienced building contractor, testified that he was familiar with the Paris house, having roofed it about a year before the alleged damage, and that the house was then in good condition inside and out. In his opinion the house was worth about $18,000 before the damage, and the reasonable market value immediately after the damage would be about $6,000 or $7,000. He said he had repaired buildings damaged by dynamite blast, and in his opinion the damage to the Paris house was caused by dynamite.

Ned Wells, a building contractor with about eighteen years' experience, stated that he had built the Paris house; that he visited the house after the blasting in March 1964 and found many cracks which differed from normal construction cracks. In his opinion the reasonable market value of the house before the blasting in March 1964 was $19,000, and the reasonable market value immediately after the blasting was approximately $8,000.

Plaintiffs introduced other evidence concerning the blasting and damages to their home.

Witnesses for defendant testified in substance as follows:

Ben Treece, a civil engineer and manager of Buncombe Construction Company, testified that he had observed the Paris house after the March 13, 1964 blast and that in his opinion a variety of factors as well as blasting could have been the cause of the cracks in the house.

Robert T. Wall, a geologist working for defendant, testified that he had observed the cracks in the Paris house and that he had no way of knowing whether dynamite caused them, but that in his opinion dynamite did not cause them.

Lloyd L. Graves testified that he was plant superintendant at

the Dana Quarry; that four blasts were conducted during December 1963 and January 1964. The amount of dynamite then used ranged from 6,040 pounds to 12,360 pounds. On 8 March 1964 13,300 pounds were used and on 13 March 1964, 8,750 pounds of dynamite were used in blasting.

Alby Jones testified that he was in construction work and had inspected the Paris house after March 1964. In his opinion it would cost about $3,850 to repair the house with the exception of the basement floor.

Vernon Cox, a registered professional mining engineer and an expert in seismic measurement of ground disturbances, testified that seismic tests were conducted at the Dana Quarry on 8 March 1964. On that date a seismograph reading was recorded at a location 1600 feet from the quarry and 200 feet east of the Paris house. The amount of seismic energy measured was less than that required to damage a building.

Defendant moved the court to permit a jury-view of plaintiffs' property. The motion was denied. Defendant moved for judgment as of nonsuit at the close of plaintiffs' evidence and at the close of all the evidence. Both motions were denied.

The following issues were submitted to the jury:

> 1. Was plaintiffs' property damaged from concussion or vibrations created by defendant's blasting operations, as alleged in the complaint?
>
> 2. If so, what amount are plaintiffs entitled to recover of the defendant for damages to their property proximately caused by said blasting operations?

The jury answered the issues in favor of plaintiffs, and from judgment entered thereon defendant appealed to the Superior Court of Henderson County. Defendant was allowed 60 days within which to make up and serve its statement of case on appeal and plaintiffs were allowed 30 days after service of case on appeal within which to serve countercase or exceptions. Counsel for plaintiffs accepted service of defendant's statement of case on appeal on 18 June 1966, and on 6 July 1966 plaintiffs filed exceptions to the statement of case on appeal. On 18 July 1966 defendant's statement of case on appeal and plaintiffs' exceptions were mailed to Judge Sheppard, with request that he settle the case on appeal and notify counsel when and where to appear before him for that purpose. On 31 August 1966 Judge Sheppard suggested that September 15 or 16 would be a suitable time for settlement of the case on appeal. Counsel for plaintiffs stated to defendant's counsel that he would not be

available at that time, but stated that they could later agree upon a convenient date.

On 28 November 1966 plaintiffs filed a motion to dismiss defendant's appeal in the General County Court on the ground that the case on appeal had not been docketed within the time required by law.

Defendant filed answer, and a hearing was held on the motion to dismiss defendant's appeal. By order dated December 12, 1966, the motion to dismiss was denied and the court set 16 December 1966 as the date for the parties to appear in Henderson County General County Court, when the court would settle the case on appeal. To this ruling and signing of the order, plaintiffs gave notice of appeal to the Superior Court of Henderson County.

Judge Sheppard filed the case on appeal as settled by him on 19 December 1966, and it was transmitted to the Henderson County Superior Court.

The case was heard by Judge Riddle at the January 1967 Special Session of Henderson County Superior Court. It was agreed that judgment might be signed subsequently out of the county and out of the district, and that it should have the same force and effect as if signed at the Special Session.

By judgment dated 2 February 1967 and filed 27 February 1967 Judge Riddle overruled all of defendant's exceptions and assignments of error and affirmed the judgment of the General County Court in all respects.

An order dated 26 January 1967, and forming a part of the foregoing judgment, was filed on January 31, 1967. This order declared the defendant's appeal abandoned, dismissed the appeal and remanded the cause to the General County Court, for further action as provided by law.

Defendant appealed to the Supreme Court.

Redden, Redden & Redden for plaintiffs.
Lee, Lee & Cogburn for defendant.

BRANCH, J. The General County Court of Henderson County was established under the chapter now codified as G.S. Chap. 7, Article 30. The court has jurisdiction concurrent with the Superior Court in tort actions.

At the threshold of this appeal we are faced with the question of whether the superior court judge erred in signing the order dismissing defendant's appeal to the superior court of Henderson County from the General County Court.

Rule 17 of the Rules of Practice in the Supreme Court, *inter alia,* provides:

> "If the appellant in a civil action, or the defendant in a criminal prosecution, shall fail to bring up and file a transcript of the record twenty-eight days before the Court begins the call of cases from the district from which it comes at the term of this Court at which such transcript is required to be filed the appellee may file with the clerk of the Court the certificate of the clerk of the court from which the appeal comes, showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been settled, with his motion to docket and dismiss at appellant's cost said appeal, which motion shall be allowed at the first session of the Court thereafter, with leave to the appellant, during the term, and after notice to the appellee, to apply for the redocketing of the cause; . . ."

To avoid dismissal, the appellant must get his appeal docketed within time, but the Court may in its discretion grant further time for filing the record if appellant filed the record proper in time and then moves for *certiorari,* showing delay was not attributable to him. *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126; *State v. Walker,* 245 N.C. 658, 97 S.E. 2d 219.

However, appeals in civil actions from the General County Courts to the Superior Courts are governed by G.S. 7-295 which, in part, provides:

> "Appeals in civil actions may be taken from the general county court to the superior court of the county in term time for errors assigned in matters of law in the same manner as is now provided for appeals from the superior court to the Supreme Court, except that appellant shall file in duplicate statement of case on appeal, *as settled,* containing the exceptions and assignments of error, which, together with the original record, shall be transmitted by the clerk of the general county court to the superior court, as the complete record on appeal in said court; that briefs shall not be required to be filed on said appeal, by either party, unless requested by the judge of the superior court; the record on appeal to the superior court shall be docketed before the next term of the superior court ensuing after the case on appeal *shall have been settled* by the agreement of the parties or by order of the court, and the case shall stand for argument at the next term of the superior court en-

suing after the record on appeal shall have been docketed ten days, unless otherwise ordered by the court." (Emphasis added.)

We note with particularity the statutory exception in G.S. 7 at page 295, which states: ". . . appellant shall file in duplicate statement of case on appeal, *as settled,* . . . The record on appeal to the superior court shall be docketed before the next term of the superior court ensuing *after the case on appeal shall have been settled* by agreement of the parties . . ." (Emphasis added). It is clear from the record that the case on appeal had not been *settled* by agreement or by order of the court. G.S. 7-295 makes no provision for the filing of a case on appeal or for the docketing of the record on appeal from the general county court in the superior court until settlement of the case on appeal. Nor is there any provision that the case on appeal shall be transmitted by the clerk of the general county court to the superior court until after the case on appeal has been settled. That part of Judge Riddle's judgment designated as "Order Forming Part of Foregoing Judgment", dated 26 January 1967 and filed 31 January 1967, was erroneously entered.

The superior court sitting as an appellate court overruled defendant's assignments of error, and affirmed the judgment of the general county court of Henderson County. Defendant appealed from the judgment of the superior court of Henderson County, assigning numerous errors. Assignments of error meriting review are hereinafter considered.

Defendant challenges the correctness of the ruling of the superior court in overruling the exception and assignment of error of defendant directed to the trial court's failure to strike out portions of plaintiff's complaint. The paragraphs pertinent to this assignment of error are as follows:

"4. That during the course of the defendant's business operation of its quarry as above referred to, said defendant, through its agents, blasts with dynamite or other combustible substances the rock located at said quarry; that, in the blasting, the defendant uses tremendous amounts of said combustible items which causes the earth to shake and tremble for many miles from the point where said rock quarry is located.

"5. That on Friday, March 13, 1964, at approximately 4:00 P.M., the defendant, through its agents, caused to be set off a tremendous explosion, far greater than that theretofore, at the quarry herein referred to, causing the damages to the plaintiffs' home as hereinafter set forth.

"6. That, as a resulting of said blasting on the part of the defendant, plaintiffs' home is, on each occasion of the blast and particularly at the time and date referred to in paragraph 5 above, severely shaken, causing said home to be cracked and broken in many hundreds of places, both inside and out; that the walls and ceiling on the inside have been shattered and torn loose from their foundation and the brick and mortar exterior have also been broken and cracked and torn away from its foundation; that on each occasion of the blasting on the part of the defendant, plaintiffs' home receives and suffers additional damage."

Defendant contends that all of paragraph 4 should be stricken, and that portion of paragraph 5 reading as follows: "tremendous," "far greater than that theretofore," and that portion of paragraph 6 reading as follows: "on each occasion of the blast and particularly. . . ." The test to be applied upon a motion to strike portions of the complaint is: Does the pleader have the right to introduce evidence tending to establish the ultimate facts? If so, the motion should be denied; if not, it should be allowed. The denial of this motion is not ground for reversal unless the record affirmatively reveals that the matter is irrelevant or redundant and that its retention in the pleading will cause harm or injustice to the moving party. *Batts v. Batts,* 248 N.C. 243, 102 S.E. 2d 862. Allegations should be stricken only when they are clearly improper, impertinent, irrelevant, immaterial, or unduly repetitious. Mere scenery and stage decoration contained in a pleading do not warrant a conclusion that such may form the basis for the introduction of incompetent evidence at the trial. *Rhodes v. Jones,* 232 N.C. 547, 61 S.E. 2d 725. From a perusal of plaintiffs' complaint, we find that they have alleged damages on previous occasions, and particularly on 13 March 1964. They would therefore have the right to introduce evidence concerning the previous occasions. The descriptive word "tremendous" referring to the explosion and the fact that it describes one explosion as being greater than the other, could be proved by competent evidence. In any event, the retention of these pleadings will not cause injustice to defendant. We hold there was no prejudicial error in the denial of defendant's motion to strike.

Defendant attacks the ruling of the superior court in overruling its assignment of error to the ruling of the trial court in admitting into evidence over the objection of the defendant, copies of two letters. Contents of the challenged copies are as follows:

(1) "Flat Rock, North Carolina, April the 4th, 1964. Carolina Portable Aggregates, Incorporated. Dear Sirs: An explosion set off at the quarry at Dana, North Carolina, on Friday, March the 13th, 1964, did serious damages to the foundation and basement, exterior brick, and interior plastering of my home. I immediately reported of damages to Mr. Gray. My contractor is working on an estimate of cost to repair these damages. This matter is of deepest concern to me and I shall appreciate your interest and cooperation. Sincerely yours, Gerald Paris."

(2) "Flat Rock, North Carolina, April 20, 1964. Carolina Portable Aggregates, Inc. Dear Sirs: On April 4, 1964, I mailed you a letter concerning an explosion set off at the quarry at Dana, North Carolina, on March 13, 1964, which did serious damages to my home. On Friday, April 10, a Mr. Wall brought his contractor to my home. My contractor and I were also there. Mr. Wall was given my contractors estimate for fixing these damages. I understood Mr. Wall to say he would contact me the following week. The week has passed and I have not seen or heard from him. This matter remains of the very deepest concern to me and I do request your immediate attention. Sincerely, Gerald Paris."

These copies of letters were not signed; neither was evidence introduced that they were made at the same time and by the same mechanical operation as the original, nor that defendant had received the originals. There was no notice to defendant to produce the originals. There was not sufficient identification of the carbon copies. *Chair Co. v. Crawford,* 193 N.C. 531, 137 S.E. 577. The better practice would have been to exclude these copies from evidence; however, the contents of the "copies" were collateral and amounted to a mere notice which did not directly concern the issues of the case, *McMillan v. Baxley,* 112 N.C. 578, 16 S.E. 845, and the record shows that the subject matter of the letters was later proved by competent evidence. Thus, the introduction of the copies was manifestly not prejudicial error.

The defendant's assignment of error that the trial judge erred in allowing Donies Justus to state that in his opinion the damage to plaintiffs' dwelling was caused by dynamiting is overruled.

"Whether a witness has the requisite skill to qualify him as an expert is chiefly a question of fact, the determination of which is within the exclusive province of the trial judge. To be an expert the witness need not be a specialist or have a license from an examining board or have had experience with the exact

type of subject matter under investigation, nor need he be engaged in any particular profession or other calling. It is enough that, through study or experience, or both, he has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject." Stansbury, North Carolina Evidence, § 133, p. 314. See also *Hopkins v. Comer,* 240 N.C. 143, 81 S.E. 2d 368.

Objection to a witness' qualifications as an expert is waived if not made in apt time on this special ground, even though general objection is taken. Absent this special objection, the court need not specifically find the witness to be an expert, since when it admits his testimony it is presumed the court so found. *Brewer v. Ring & Valk,* 177 N.C. 476, 99 S.E. 358; *State v. De Mai,* 227 N.C. 657, 44 S.E. 2d 218. Defendant failed to enter an objection as to the witness' qualifications in apt time. According to the record, the witness was a building inspector with many years' experience, including experience in repairing buildings which were damaged by blast of dynamite. Certainly, he was better qualified than the jury to form an opinion on this particular subject. His statement that Mrs. Paris told him the damage was caused by a blast over at the mine was offered for the purpose of corroboration, and was in fact consistent with the witness' testimony. This was not error. See Stansbury, North Carolina Evidence, 2d Ed., Witnesses, § 52, p. 105.

For the reasons above stated, the testimony of Ned Wells, an experienced builder, was likewise competent to show that he observed the cracks in the plaster of plaintiffs' dwelling and that normally construction cracks "don't operate that way." While this witness was on the witness stand, the following colloquy occurred:

> "Q. If your Honor please, I admit I am leading him a little, but how can I get it out otherwise, and in your discretion, your Honor, I hope you will let me get it out so the jury can understand what I am talking about.
>
> COURT: Well, let him tell it. He's an experienced builder. Let him describe it. Exception. To the foregoing statement of the Court expressing an opinion as to the weight to be given the testimony of the witness Wells, the defendant excepts.

Defendant contends this is prejudicial error and violates G.S. 1-180, as an expression of opinion by the judge. The record shows that through experience the witness was better qualified than the jury to form an opinion on this particular subject. Thus, the statement of the court was no more than a statement holding that the witness

was qualified to give opinion evidence. This statement was not prejudicial error to defendant.

The trial court did not commit error in refusing to allow defendant's motion for a jury-view of plaintiffs' property. Whether the court will allow a jury to view the premises is within the court's discretion. *Highway Com. v. Hartley,* 218 N.C. 438, 11 S.E. 2d 314. Here, no abuse of discretion is shown.

Defendant assigns error that the superior court erred in overruling defendant's assignment of error directed to the trial court's overruling the defendant's motion for judgment as of nonsuit made at the conclusion of all the evidence. In this connection defendant contends that when the plaintiffs alleged negligence, they elected not to proceed upon the theory of absolute liability.

Plaintiffs' complaint sufficiently alleged facts showing damage to their dwelling by concussion and vibration proximately caused by defendant's use of explosives in blasting. This is sufficient to state a cause of action. *Insurance Co. v. Blythe Bros.,* 260 N.C. 69, 131 S.E. 2d 900. The fact that plaintiffs alleged that defendant was negligent in other portions of the complaint is not necessarily an election to proceed upon the theory of negligence rather than absolute liability.

G.S. 1-151 states: "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."

We find in 71 C.J.S., Pleadings, Sec. 521, the following: "Where a single count contains distinct averments, each of which presents a substantive cause of action, proof of either will authorize a recovery," and 71 C.J.S., Pleadings, Sec. 522, states: "Surplusage.—As a general rule no more need be proved, even though more be alleged, than enough to sustain the cause of action or defense relied on. In other words, only those allegations necessary to a recovery need be supported by proof. Surplusages in a pleading need not be proved. Thus, as a general rule, no proof is required of allegations which are irrelevant, immaterial, or unnecessary." The trial judge correctly overruled defendant's motions for nonsuit.

At this point we will also consider defendant's contention that improper issues were submitted to the jury, in that no issue was submitted on negligence. ". . . only such issues as are raised by the pleadings and supported by sufficient competent evidence should be submitted to the jury." 4 Strong: N. C. Index, Trial, § 40, p. 348. The evidence in the record does not show negligence on the part of defendant which proximately caused damage to plaintiffs. The issues submitted were sufficient to dispose of the controversies arising on the pleadings and support a final judgment.

In charging on the first issue, the trial judge stated:

> "Now, in a civil case that issue is determined by the weight of the evidence. You will weigh the evidence in this case. You are the sole judges of the facts. This case is yours and yours only to decide. If after you have weighed the evidence in this case the weight of the evidence tips the scales in favor of the plaintiffs, it would be your duty to answer the first issue YES. If you are not satisfied from the evidence in this case and by the greater weight thereof, you would answer that issue No."

Defendant contends that this is prejudicial error as being incomplete, misleading, and particularly relies on the failure of the court to instruct the jury that it could answer the first issue No if the evidence of the plaintiffs and defendant were found to be of equal weight. It is not prejudicial to illustrate the burden of proof by analogy to a set of scales. *Tarkington v. Printing Co.; Dunston v. Printing Co.,* 230 N.C. 354, 53 S.E. 2d 269. In the case of *Hardee v. York,* 262 N.C. 237, 136 S.E. 2d 582, this Court said:

> ". . . In the charge proper the court said: 'Now the burden of proof is upon the plaintiff on both of those questions (issues), that is, the burden of satisfying you by the greater weight of the evidence that those questions should be answered in her favor.' This was sufficient. The burden of proof is a substantial right, and the failure of the charge to properly place the burden of proof is reversible error. *Tippite v. R. R.,* 234 N.C. 641, 68 S.E. 2d 285; *Crain v. Hutchins,* 226 N.C. 642, 39 S.E. 2d 831; *Haywood v. Insurance Co.,* 218 N.C. 736, 12 S.E. 2d 221. But when the court correctly places the burden of proof and states the proper intensity of the proof required, the court is not required to define the term "greater weight of the evidence" in the absence of a prayer for special instructions."

In the instant case the court properly placed the burden of proof on the first issue and correctly stated the proper intensity of proof required. Although the court did not continue with his illustration as to the burden of proof, the court's statement, "if you are not satisfied from the evidence of this case and by the greater weight thereof, you would answer that issue No," the court thereby eliminated any confusion about the burden of proof. We do not think that this portion of the charge would have misled or confused the jury so as to prejudicially affect the defendant.

The defendant strongly contends that the superior court committed error when it overruled its exception and assignment of error to that portion of the court's charge which stated: "You will con-

sider the evidence offered by the witnesses for the plaintiffs in regard to the value of this property before this alleged damage by the blasting. You will consider the condition of the property at this time, after the blasting."

In cases where the injury is completed or by a single act becomes a *fait accompli*, and which do not involve a continuing wrong or intermittent or recurring damages, the correct rule for the measurement of damages is the difference between the market value of the property before and after the injury. *Broadhurst v. Blythe Bros. Co.*, 220 N.C. 464, 17 S.E. 2d 646; *Casstevens v. Casstevens*, 231 N.C. 572, 58 S.E. 2d 368. In reading the entire charge, we find that the trial judge again referred to the measure of damages at a later period in his charge, stating:

> "I thought I told them that. Now, the rule of law in determining this damage — I thought that I had made that clear. Evidently I had not. Is the difference between the fair market value of this property — what was the fair market value immediately before this damage, if you find it was damaged by the defendant, and that was the reasonable fair market value after the damage, . . ."

All of the evidence in the case was directed so as to show the reasonable market value of the property immediately before the damage and the reasonable market value immediately after the damage. The instruction as to the measure of damages was sufficiently definite to guide the jury to an intelligent determination of this portion of the issue of damages.

This brings us to the consideration of defendant's exception to the failure of the court to charge the jury as to the burden of proof upon the second issue submitted to the jury.

In the case of *Lieb v. Mayer*, 244 N.C. 613, 94 S.E. 2d 658, Parker, J. (now C.J.) speaking for the Court, said: "Damages are never presumed. The burden is always upon the complaining party to establish by evidence such facts as will furnish a basis for their assessment, according to some definite and legal rule. *Berry v. Lumber Co.*, 183 N.C. 384, 111 S.E. 707; *Rice v. Hill*, 315 Pa. 166, 172 A. 289." And Denny, C.J., speaking for the Court in the case of *Watt v. Crews*, 261 N.C. 143, 134 S.E. 2d 199, stated:

> "In *Tippite v. R. R.*, 234 N.C. 641, 68 S.E. 2d 285, this Court said: 'G.S. 1-180, as amended, requires that the judge "shall declare and explain the law arising on the evidence given in the case." This places a duty upon the presiding judge to instruct the jury as to the burden of proof upon each issue arising upon

the pleadings. It is said that " 'the rule as to the burden of proof is important and indispensable in the administration of justice. It constitutes a substantial right of the party upon whose adversary and burden rests; and, therefore, it should be carefully guarded and rigidly enforced by the court. *S. v. Falkner,* 182 N.C. 793 and cases cited.' *Hosiery Co. v. Express Co.,* 184 N.C. 478." *Coach Co. v. Lee,* 218 N.C. 320, 11 S.E. 2d 341; *Crain v. Hutchins,* 226 N.C. 642, 39 S.E. 2d 831.' "

The trial court did not give an instruction as to the burden of proof on the second issue. This omission violates a substantial right of defendant, and we hold that this was prejudicial error.

"It is settled beyond controversy that it is entirely discretionary with the Court, Superior or Supreme, whether it will grant a partial new trial. It will generally do so when the error, or reason for the new trial, is confined to one issue, which is entirely separable from the others and it is perfectly clear that there is no danger of complication." *Lumber Co. v. Branch,* 158 N.C. 251, 73 S.E. 164.

In the instant case the decisions on assignments of error relating to the first issue were, in several instances, very close. The assignments of error as to both issues are so intertwined that the ends of justice will be best met by a new trial on both issues.

In our discretion the judgment below is vacated and the cause is remanded to the Superior Court of Henderson County, with direction that it remand the cause to the General County Court of Henderson County for a new trial on both issues.

Error and remanded.

JOHN H. CORPREW v. GEIGY CHEMICAL CORPORATION AND GEIGY AGRICULTURAL CHEMICALS.

(Filed 11 October, 1967.)

1. Pleadings § 12—

Upon demurrer, the allegations of a complaint shall be liberally construed with a view to substantial justice between the parties, G.S. 1-151, and the demurrer will not be sustained unless the complaint is fatally and wholly defective.

2. Same—

A demurrer admits, for the purpose of testing the sufficiency of the pleadings, the truth of factual averments well stated, and all relevant

inferences of fact reasonably deducible therefrom, but it does not admit inferences or conclusions of law.

3. **Sales §§ 6, 8— Complaint held to state causes of action for negligence and breach of implied warranty, despite lack of privity between consumer and manufacturer.**

The complaint alleged that the plaintiff purchased from a retailer a chemical weed killer in its original, sealed container as manufactured by the defendants, that the only warning given by the defendants was a recommendation not to plant another crop of corn or small grain on the same land in the same year following initial use of the chemical, that, in reliance upon this warranty, plaintiff planted peanuts and soybeans upon land treated the previous year with the chemical and that the yield of the crops was greatly impaired as a result of the chemical's noxious qualities. *Held:* The complaint stated a cause of action both for negligence and for breach of implied warranty for fitness of use, notwithstanding the lack of privity of contract between the plaintiff and the defendant manufacturer.

4. **Sales § 6—**

The manufacturer of a chattel is under a duty to the ultimate purchaser, irrespective of contract, to use reasonable care in its manufacture, and when reasonable care so requires, to give adequate directions for its use, and he is liable to the purchaser for injury resulting to persons or property from a failure to perform this duty.

5. **Sales §§ 6, 8—**

An express warning by the manufacturer of a chemical weed killer that a subsequent crop should not be grown in the same year upon land treated with the chemical constitutes an unqualified warranty to the ultimate consumer that no injury would result to crops grown on the same land the following year, and the consumer may maintain an action against the manufacturer for breach of such warranty.

6. **Pleadings §§ 2, 18—**

In this action to recover damages resulting from the use of a chemical weed killer, plaintiff incorporated into a single cause of action allegations constituting an action for negligence as well as allegations constituting action for breach of warranty. *Held:* While demurrer was properly sustained on the ground of improper joinder of causes of action, G.S. 1-123, G.S. 1-127, the plaintiff should have been given leave to plead separately the two causes of action.

APPEAL by plaintiff from *Peel, J.*, January 1967 Regular Session of PERQUIMANS.

This is a civil action instituted by plaintiff, a farmer, against Geigy Chemical Corporation, a foreign corporation domesticated in and doing business in North Carolina, and Geigy Agricultural Chemicals, a division of Geigy Chemical Corporation, to recover a judgment for $10,000 because of damage to his peanut and soybean crops, which allegedly resulted from the application of Atrazine 20 G, a chemical weed killer manufactured by the defendants, which

he had used during the year 1964 on the same land upon which these crops were planted the following year, 1965, heard upon a demurrer to the complaint.

Plaintiff's complaint in substance, except when quoted, is as follows: At the times complained of, Daly Herring Company, with a place of business at Ahoskie, North Carolina, was a distributor of certain products manufactured and sold by the defendants, particularly a chemical weed killer known as Atrazine 20 G; that said product was sold by Daly Herring Company, a representative of the defendants, in the original containers of the defendants and packaged by defendants for ultimate sale to the consumer in said closed containers, said containers being in the form of bags and containing Atrazine 20 G in granular form and approximately fifty pounds per container. These containers showed Atrazine 20 G as being recommended as a weed killer for use in the growing of corn, in particular; and defendants had instructions regarding its use on the container. The only warning given by the defendants in the use of said product was that the manufacturer and original seller did not recommend that the crop of corn for which said product was used be followed the same year with another planting of corn or followed after its initial use by a crop or crops of small grain the same year. On or about the ...... day of April, 1964, plaintiff purchased through J. F. Hollowell & Son, Inc., Winfall, North Carolina, a quantity of said Atrazine 20 G manufactured by defendants for use on his 1964 crop of corn; that the said J. F. Hollowell & Son, Inc., had purchased the Atrazine 20 G it sold to plaintiff from and through defendants' distributor and representative, Daly Herring Company, and this Atrazine 20 G, until opened and used by the plaintiff, was in the original, closed containers of the manufacturer, the defendants. Plaintiff used and applied said Atrazine on his 1964 corn crop according to the directions of the defendants and in reliance upon their representations as advertised on the original containers. The lands upon which plaintiff grew his 1964 crop of corn, on which he had used the said Atrazine, were planted by plaintiff for the year 1965 in peanuts and soybeans. In the same year, plaintiff planted and cultivated peanuts and soybeans on other lands on which for the previous year the said Atrazine had not been used. Plaintiff's peanut and soybean crops in 1965 were planted, cultivated and harvested uniformly and according to good husbandry. The crops of peanuts and soybeans harvested for the year 1965 upon his lands upon which he had used Atrazine the previous year were far less in quantity and substantially lower in quality than his crops of peanuts and soybeans for said year grown on similar lands upon which said Atrazine had not been used. Plaintiff is in-

formed, believes and alleges that the reduction in quantity and quality of said peanuts and soybeans grown on the land upon which he had used Atrazine the previous year was due to the noxious and deleterious qualities and effect of said Atrazine.

Plaintiff is informed, believes and alleges that the defendants knew, or in the exercise of due care should have known, and should have warned the buying public, including plaintiff, of said potential bad effects from the use of Atrazine upon succeeding crops, other than corn and small grain, in ample time to have warned him in regard to his 1964 and 1965 crops; and negligently failed to give or make available to plaintiff this warning or notice.

"(P)laintiff is presently advised [that] defendants, because of the injurious effects of Atrazine upon succeeding crops, theoretically withdrew said Atrazine 20 G from the market in the Fall of 1963, but carelessly and negligently failed to physically and actually withdraw the same from the market, and carelessly and negligently permitted plaintiff or made it possible for plaintiff, in total ignorance of possible or probable injurious effects upon crops, to purchase the aforesaid Atrazine from defendants' distributor. . . . That, as plaintiff is informed, believes and alleges, the defendants in theory discontinued the sale of granular Atrazine in the Fall of 1963, but carelessly and negligently permitted said product to be available to the public and to purchasers, including the plaintiff, at the period of time when plaintiff in fact made and used his said purchase."

Defendants negligently failed to label the containers in which its product Atrazine was sold to the public, including the plaintiff, to the effect that it would be or might be noxious or detrimental to crops other than corn or small grain grown or planted the following year on land to which Atrazine had been applied; and negligently failed to put the ultimate consumer of said product, including the plaintiff, on notice that the product had been purportedly withdrawn by defendants from the market in the fall of 1963 because of its potentially detrimental effect upon successive crops; and negligently failed to withdraw from the market said product, including the shipment or shipments on hand at Daly Herring Company, prior to the time when plaintiff's immediate vendor, J. F. Hollowell & Son, Inc., purchased it, when defendants well knew that harmful effects from its use would or might result to succeeding crops; and that plaintiff, without such knowledge or information, was allowed to purchase and use said Atrazine without any warning whatsoever in respect thereto, other than a warning contained on the original container regarding a succeeding corn or small grain crop.

The notice, warning and instructions of the defendants as contained on the original package constituted a material representation

and warranty in its use by the ultimate purchaser that the product was not and would not be detrimental to subsequent crops of the nature of those planted by the plaintiff as aforesaid, and that there was an implied warranty by defendants to the plaintiff that said product was reasonably fit for use upon the lands and upon the crops planted and cultivated by plaintiff. Plaintiff relied upon said warranty in the purchase and use of said Atrazine 20 G, and was induced to purchase and use the same by virtue of said warranty, all to his great damage.

During the crop year of 1965, plaintiff planted 12 acres in peanuts, and also 44.5 acres in peanuts upon which 44.5 acres of land plaintiff had used Atrazine during the previous year on a corn crop, and in the same year plaintiff planted soybeans on 20 acres upon which plaintiff had used Atrazine the previous year on a corn crop, and because and by virtue of the noxious and deleterious effect of said Atrazine upon the soil the yield and quality of said crops in 1965 were greatly impaired.

Wherefore, plaintiff prayed that he recover from the defendants $10,000 in damages.

Defendants demurred to the complaint of the plaintiff upon two grounds as follows:

> "1. There is improper joinder of causes of action. The plaintiff attempts to state more than one cause of action, including actions in tort and on contract in one complaint, without stating each purported cause of action separately, as required by Supreme Court Rule 20(2) and the decisions thereunder.
>
> "2. The Complaint does not state facts sufficient to constitute a cause of action in that: (a) The plaintiff fails to state a cause of action on warranty, either expressed or implied, as the Complaint affirmatively shows there was and is no privity of contract as between the plaintiff and the defendants; and (b) the plaintiff fails to state a cause of action in tort as (1) the Complaint fails to allege a breach by the defendants of any legal duty owed to plaintiff as a member of the public having no contractual relationship with the defendants, (2) the allegations purporting to state a cause of action in tort are actually in the nature of warranty, for which no action will lie, and (3) the Complaint fails to allege that any act or omission by the defendants was a proximate cause of any damage sustained by the plaintiff."

The demurrer to the complaint was sustained upon each of the grounds asserted in the demurrer, the court finding that the com-

plaint contained allegations of two defective causes of action, and the court ordered the action to be dismissed.

From the judgment entered, plaintiff appeals to the Supreme Court.

Hall & Hall by John H. Hall for plaintiff appellant.

Leroy, Wells, Shaw & Hornthal by Dewey W. Wells for defendant appellees.

PARKER, C.J. Do the averments in the complaint disclose a cause of action? In determining the effects of its allegations, G.S. 1-151 requires "for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties." Defendants' demurrer admits, for the purpose of testing the sufficiency of the pleadings, the truth of factual averments well stated and all relevant inferences of fact reasonably deducible therefrom. It admits facts stated on information and belief as well as facts alleged on personal knowledge. *Reynolds v. Murph,* 241 N.C. 60, 84 S.E. 2d 273. A demurrer does not admit inferences or conclusions of law. 3 Strong, N. C. Index, Pleadings § 12. A complaint must be fatally and wholly defective before it will be rejected as insufficient. *Guerry v. Trust Co.,* 234 N.C. 644, 68 S.E. 2d 272; 3 Strong, *ibid.*

The responsibility of a contracting party to a third person with whom he has made no contract has a long history and has presented many perplexing problems. The first obstacle which arose is the fact that there has been no direct transaction between the plaintiff and the defendant which usually is expressed by saying that they are not in "privity" of contract. We are writing a court opinion and not an article in a law magazine or in a textbook. Anyone who desires to read in minute detail the recent developments in this field can see Professor William L. Prosser's article, "The Assault Upon the Citadel (Strict Liability to the Consumer)," 69 Yale L. J. 1099 (1960); Prosser, "The Fall of the Citadel (Strict Liability to the Consumer)," 50 Minn. L. Rev. 791 (1966); Dillard and Harris, "Product Liability: Directions and the Duty to Warn," 41 Va. L. Rev. 145 (1955); Prosser, Law of Torts, 658-96 (3rd Ed. 1964), which is Ch. 19, "Liability of Contracting Parties to Third Persons."

The case of *Winterbottom v. Wright,* 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842), laid down "horse and buggy" law for a "horse and buggy" age — the law that one furnishing chattels to another owes no duty of care to a third person with whom he is not in privity of contract. Such a rule does not conform to modern conditions.

Under modern marketing conditions a manufacturer places its goods upon the market in sealed containers, and the container without substantial change is sold to the ultimate purchaser in the condition in which it is placed by the manufacturer on the market for sale. By placing its goods upon the market, the manufacturer represents to the public that they are suitable and safe for use, and by packaging, advertising, and otherwise, frequently upon a national scale, it does everything it can to induce that belief. The middleman is no more than a conduit, a mere mechanical device through which the thing is to reach the ultimate consumer. The manufacturer has invited and solicited the use of its product, and when it leads to disaster it should not be permitted to avoid the responsibility by saying that it made no contract with the consumer. The manufacturer should be held liable because it is in a position to insure against liability and add the cost to the product.

Construing the complaint liberally with a view to substantial justice between the parties, it is manifest that it alleges facts sufficient to constitute a cause of action for liability based on negligence. In Prosser, Law of Torts 665 (3rd Ed. 1964), it is said:

> "Since the liability is to be based on negligence, the defendant is required to exercise the care of a reasonable man under the circumstances. His negligence may be found over an area quite as broad as his whole activity in preparing and selling the product. He may be negligent first of all in designing it, so that it becomes unsafe for the intended use. He may be negligent in failing to inspect or test his materials, or the work itself, to discover possible defects, or dangerous propensities. He may fail to use proper care to give adequate warning to the user, not only as to dangers arising from unsafe design, or other negligence, but also as to dangers inseparable from a properly made product. The warning must be sufficient to protect third persons who may reasonably be expected to come in contact with the product and be harmed by it; and the duty continues even after the sale, when the seller first discovers that the product is dangerous. He is also required to give adequate directions for use, when reasonable care calls for them."

See also to the same effect: 2 Harper and James, The Law of Torts, §§ 28.3 through 28.14, "Liability of Maker for Negligence"; Annot. 81 A.L.R. 2d 138, "Liability of manufacturer or seller for injury caused by animal feed or medicines, crop sprays, fertilizers, insecticides, rodenticides, and similar products."

This is said in 65 C.J.S., Negligence, § 100(3), at 1094:

> "As a general rule a manufacturer is under a duty to make an article carefully where its nature is such that it is reasonably certain to place life and limb in peril when negligently made, and he is liable to a third person for an injury resulting from a failure to perform this duty."

In 65 C.J.S., *ibid,* at 1097-99, it is said:

> "The manufacturer is liable for an injury to a third person resulting from a failure to perform this duty, provided that such injuries could reasonably be anticipated; and this is the rule even though there is no contract or privity between the parties."

A manufacturer of products, such as the one with which we are concerned in this case, has the duty of reasonable or due care. The status of the manufacturer of such products is not that of an insurer. Annot. 81 A.L.R. 2d 146-47.

This is said in 2 Harper and James, The Law of Torts, § 28.1, at 1535: "This older restrictive doctrine [non-liability in case of no privity] was well adapted to protect the manufacturer from burdens on his activity, but it did so at the expense of the victims of his mistakes. The citadel of privity has crumbled, and today the ordinary tests of duty, negligence and liability are applied widely to the man who supplies a chattel for the use of another. This trend was responsive to ever-growing pressure for protection of the consumer, coupled with a realization that liability would not unduly inhibit the enterprise of manufacturers and that they were well placed both to profit from its lessons and to distribute its burdens."

This is also said in 65 C.J.S., *ibid,* at 1101-02:

> "(A)lthough a manufacturer is under a duty to foresee the probable results of normal use of the product manufactured, he does not have to foresee, and is not responsible for, the results of a use which departs from the normal, or could not reasonably have been foreseen or anticipated, or is in violation of an ordinance."

In 65 C.J.S., *ibid,* at 1107, it is said:

> "The doctrine of manufacturer's liability for damage resulting from defects in manufactured articles has been applied to damages to property as well as to personal injuries, irrespective of any privity or contractual relation between the parties."

In 65 C.J.S., *ibid,* § 104, at 1135, it is said:

"Although a person may be negligent in the performance or omission of some duty owed to the person injured, no liability attaches unless it appears that there was a causal connection between such negligence and the injury, and the negligence charged was the proximate or legal cause of the injury, rather than a remote cause, or one merely causing a condition providing an opportunity for other causal agencies to act."

We held in *Gwyn v. Motors, Inc.*, 252 N.C. 123, 113 S.E. 2d 302, that the manufacturer of a truck is under a duty to the ultimate purchaser, irrespective of contract, to use reasonable care in the manufacture of the truck and to make reasonable inspection so as not to subject the purchaser to injury from a hidden or latent defect. The Court said: " 'The overwhelming weight of authority is to the effect that the manufacturer of a truck, like the one here in question, owes a duty to the public, irrespective of contract, to use reasonable care in its manufacture and to make reasonable inspection of the construction in the plant where the truck was manufactured.' (Citing numerous authorities)." In that case we reversed a judgment of involuntary nonsuit entered in a court below as to the Ford Motor Company.

In *Tyson v. Manufacturing Co.*, 249 N.C. 557, 107 S.E. 2d 170 (1959), this Court held a manufacturer owes to the ultimate consumer the duty not to construct the article with hidden defects which might result in injury, and to give notice of any concealed dangers, but ordinarily the manufacturer is not liable for injuries from patent dangers.

In *E. I. Du Pont De Nemours & Co. v. Baridon*, 73 F. 2d 26, Baridon brought suit, alleging representations made by the Du Pont Company as to the suitability and safety of its product for disinfecting gladiolus bulbs and bulblets, its giving of directions for the use of Semesan, his reliance upon the representations and directions given, the harmful character of the Semesan when used as directed, which the Du Pont Company knew or should have known, and the loss of his bulbs and bulblets and his consequent damage. The Court in holding the Du Pont Company liable used this language:

"The defendant, however, contends that, because its product was intended to affect only plant life, and property alone was subject to injury, it owed no duty to the plaintiff, since it had no contract with him. With that contention we do not agree. Through its advertising and literature the defendant had expressly invited the plaintiff and other growers to use its product for the purpose of disinfecting bulbs and bulblets, and, since it

had undertaken to direct the manner in which it should be used, the users had a right to assume that the company had exercised such care as an ordinarily prudent manufacturing chemist would usually have used in giving the directions for the use of such a product, and had not knowingly prescribed a use which would destroy their plants."

Kolberg v. Sherwin-Williams Co., 93 Cal. App. 609, 269 P. 975, involved the destruction of orange trees by a spray known as "Citromulsion." The agents of the defendant in that case had represented that the spray would kill the scale and not injure the trees, fruit, or buds. It was also stated that the spray had been used on other groves with "good results." It was shown that Citromulsion was utterly unfit as a spray for orange trees and was inherently dangerous to them. The Court, in sustaining a judgment for the plaintiff, said at page 977 of 269 Pac.: "The liability of the defendant rests upon the sound rule that a manufacturer or seller of an article inherently dangerous to life or property is liable for injuries to the ultimate consumer who has purchased through a middleman. 17 A.L.R. 674, 683."

Ellis et al. v. Lindmark et al., 177 Minn. 390, 225 N.W. 395, involved injury to chickens caused by raw linseed oil negligently shipped by a wholesaler to a retailer as cod liver oil as ordered, and negligently sold by the retailer to chicken raisers for their chickens. The Court held that, under the law, both wholesaler and retailer were liable, saying at page 397 of 225 N.W.: "That the negligence resulted in injury to property and not to the person should not prevent recovery."

In *Murphy v. Sioux Falls Serum Co.*, 44 S.D. 421, 184 N.W. 252, the Court held that the plaintiff, who showed that hog cholera serum was properly administered by a veterinary, and that the hogs died, made out a *prima facie* case of negligence against the manufacturer of the serum.

McClanahan v. California Spray-Chemical Corp., 194 Va. 842, 75 S.E. 2d 712, was an action by apple orchard owners against the manufacturer of apple scab spores eradicant for damage to an apple orchard allegedly resulting from the application of defendant's eradicant. The jury returned a verdict for plaintiffs, but upon motion of defendant, the Circuit Court of Albemarle County set aside the verdict and rendered final judgment for defendant, and plaintiffs brought error. The Supreme Court of Appeals of Virginia, with two Justices dissenting, held, *inter alia,* that the defendant had a duty to warn of the danger to the orchard which would result from improper use of the eradicant. The judgment of the lower court was reversed, and final judgment was entered for the plaintiffs.

In *Rose v. Buffalo Air Service,* 104 N.W. 2d 431 (Neb. 1960), the court held that an insecticide manufacturer and a spraying service were liable for injury to beets sprayed with chemical compounds manufactured as a harmless insecticide, but which actually contained ingredients harmful to beets.

In the case of *McKennon v. Jones,* 244 S.W. 2d 138 (Ark. 1951), a judgment against a manufacturer of a crop spray for loss of bees and honey caused by the spray was held supported by the evidence.

In *La Plant v. E. I. Du Pont De Nemours and Co.,* 346 S.W. 2d 231 (Mo. App. 1961), an action for the death of plaintiff's cattle from consumption of foliage which had been sprayed with "Ammate X" weed killer manufactured by defendants, the court held that the evidence supported the finding that the defendant manufacturer was negligent in labeling the product as not dangerous to livestock. The Court said, at page 245:

> "(W)e have but recognized and applied the settled principle, freshly stated with copious citation of supporting authority in *Bean v. Ross Manufacturing Co.,* Mo., 344 S.W. 2d 18, 25, that: 'The supplier of a chattel is subject to liability for injury in its use by another when the supplier knows or should know that its use is or is likely to be dangerous and when there is no reason to believe that the user will realize this, if, further, he (the supplier) fails to use reasonable care to warn.'
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> * * *
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> ". . . '(T)he common law is not a static but a dynamic and growing thing. Its rules arise from the application of reason to the changing conditions of society. It inheres in the life of society, not in the decisions interpreting that life. * * *.' *Barnes Coal Corp. v. Retail Coal Merchants Ass'n.,* 4 Cir., 128 F. 2d 645, 648(5); *Roach v. Harper,* 143 W. Va. 896, 105 S.E. 2d 564, 568."

In *Smith v. Atco Co.,* 6 Wis. 2d 371, 94 N.W. 2d 697, 74 A.L.R. 2d 1095, reh. den. 7 April 1959, the Court held as correctly summarized in the A.L.R. Report:

> "In the instant tort action for negligence, the owner of a mink ranch sought damages for harm to some and death of other mink housed and bred in boxes dipped with a preparation manufactured by one defendant and sold by his codefendant. The plaintiff had been supplied with the product by one who had purchased it from the defendant seller.
>
> "On an appeal by the defendants, a judgment for the plaintiff, rendered by the Circuit Court, Milwaukee County, Wiscon-

sin, pursuant to the jury's special verdict, was affirmed, on condition of the plaintiff's acceptance of a specified remittitur of the excessive damages awarded, by the Supreme Court of Wisconsin, in an opinion by Currie, J., which, ruling that the record contained credible evidence to sustain the jury's findings that the product was dangerous to mink and caused the plaintiff's losses, rejected the rule that a manufacturer or seller of a product is not liable for an injury or damage resulting from use of the product in the absence of privity of contract between the plaintiff and the defendant, and held that the question of liability should be approached from the standpoint of the standard of care to be exercised by the reasonably prudent person in the position of the defendant manufacturer or seller."

In its opinion the Court said:

"We deem that the time has come for this court to flatly declare that in a tort action for negligence against a manufacturer, or supplier, whether or not privity exists is wholly immaterial. The question of liability should be approached from the standpoint of the standard of care to be exercised by the reasonably prudent person in the shoes of the defendant manufacturer or supplier. Such an approach will eliminate any necessity of determining whether a particular product is 'inherently dangerous.' If a manufacturer or supplier is hereafter to be relieved from liability as a matter of law by the courts, such result should be reached on the basis that there was no causal negligence established against the defendant rather than that the product was not inherently dangerous."

In *Carter v. Yardley & Co., Ltd.*, 319 Mass. 92, 64 N.E. 2d 693, 164 A.L.R. 559 (1946), the Massachusetts Court carefully reviewed the development of the law of products liability with respect to manufacturers and suppliers for negligence where no privity of contract exists. That Court came to the conclusion that the exceptions had so swallowed up the general rule of non-liability that such general rule for all practical purposes had ceased to exist. The conclusion reached was expressed as follows: "The time has come for us to recognize that that asserted general rule no longer exists. In principle it was unsound. It tended to produce unjust results. It has been abandoned by the great weight of authority elsewhere. We now abandon it in this Commonwealth." 319 Mass. at 104, 64 N.E. 2d at 700.

There is to be found in the North Carolina decisions support for the inherently and imminently dangerous product exceptions to the

privity requirement and also support for the unwholesome food, beverage and drug exception thereto, to wit:

> "*Perry v. Kelford Coca-Cola Bottling Co.* (1928), 196 N.C. 175, 145 S.E. 14 (supporting exception as applied to manufacturer); *Broadway v. Grimes* (1933), 204 N.C. 623, 169 S.E. 194 (supporting exception as to manufacturers and bottlers of beverages); *Corum v. R. J. Reynolds Tobacco Co.* (1933), 205 N.C. 213, 171 S.E. 78 (supporting exception as to manufacturer, bottler, or packer); *Thomason v. Ballard & Ballard Co.* (1935), 208 N.C. 1, 179 S.E. 30 (supporting exception as to manufacturer, bottler, or packer); *Hampton v. Thomasville Coca-Cola Bottling Co.* (1935), 208 N.C. 331, 180 S.E. 584 (supporting exception as to manufacturer, bottler, or packager)." 74 A.L.R. 2d 1221.

Paraphrasing the Massachusetts Court in *Carter v. Yardley & Co., Ltd., supra,* the time has come for us to recognize that the exceptions to the general rule of non-liability of a manufacturer for negligence because of lack of privity of contract have so swallowed up the general rule of non-liability that such general rule for all practical purposes has ceased to exist. Its principle was unsound. It tended to produce unjust results. It has been abandoned by the great weight of authority elsewhere. We have abandoned it in this jurisdiction.

Plaintiff alleges in substance in his complaint as follows: In April, 1964, he, a farmer, purchased a quantity of Atrazine 20 G for use on his 1964 corn crop through a retailer, J. F. Hollowell & Son, Inc., of Winfall, North Carolina, who in turn, had purchased plaintiff's order of the product from and through defendants' representative and distributor, Daly Herring Company of Ahoskie, North Carolina; and that this Atrazine 20 G until opened and used by the plaintiff was in the original closed containers of the manufacturer, the defendants. He used and applied this Atrazine 20 G on his 1964 corn crop according to the directions of the defendants, and in reliance upon their representations as advertised on the original containers. These original containers showed Atrazine 20 G as being recommended as a weed killer for use in the growing of corn in particular, and defendants had instructions regarding its use on the containers. The only warning given by defendants in the use of said product was that the manufacturer and original seller did not recommend that the crop of corn for which said product was used be followed in the same year with another planting of corn, or followed after its initial use by a crop or crops of small grain the same year. In 1965 he planted peanuts and soybeans upon his lands

on which he had used Atrazine 20 G the previous year; that the crop of peanuts and soybeans were planted, cultivated and harvested uniformly and according to good husbandry; that the crops of peanuts and soybeans harvested for the year 1965 upon land upon which he had used Atrazine the previous year were far less in quantity and substantially lower in quality than his crop of peanuts and soybeans for said year grown on similar lands on which Atrazine 20 G had not been used. He is informed, believes and alleges that defendants knew, or in the exercise of due care should have known, and should have warned him of the potential bad effects of Atrazine 20 G upon succeeding crops other than corn and small grain in ample time to have prevented any damage to his 1965 crops, and that defendants negligently failed to so warn him. He is presently advised that defendants, because of the injurious effects of Atrazine 20 G upon succeeding crops, theoretically withdrew Atrazine 20 G from the market in the fall of 1963, but carelessly and negligently failed to actually withdraw the same from the market, and carelessly and negligently permitted plaintiff in total ignorance of the probable injurious effect upon his crops to purchase the said Atrazine 20 G from defendants' distributor.

Construing the complaint liberally with a view to substantial justice between the parties, it is also manifest that it alleges facts sufficient to constitute a cause of action for liability based upon breach of warranty.

In *Simpson v. Oil Co.,* 217 N.C. 542, 8 S.E. 2d 813, the basis of plaintiff's cause of action against the manufacturer and distributor of "Amox" was the warranty *to the ultimate consumer* appearing on the can sold to the druggist and purchased from him by plaintiff. Seawell, J., for the Court, stated: "We know of no reason why the original manufacturer and distributor should not, for his own benefit and that, of course, of the ultimate consumer, make such assurances, nor why they should not be relied upon in good faith, nor why they should not constitute a warranty on the part of the original seller and distributor running with the product into the hands of the consumer, for whom it was intended."

As to implied warranty as between manufacturer and consumer, in the absence of immediate privity of contract, in respect to food and drink placed on the market by the manufacturer in sealed containers, see the legal principles set forth in the concurring opinion of Sharp, J., in *Terry v. Bottling Co.,* 263 N.C. 1, 138 S.E. 2d 753, and application thereof in our decision of May 10, 1967, in *Tedder v. Bottling Co.,* 270 N.C. 301, 154 S.E. 2d 337.

Defendants, by the legend on the bags, specifically directed attention to whether the use of Atrazine on a corn crop would in-

juriously affect subsequent crops on the same land. They warned the ultimate consumer of possible injurious effects to "another planting of corn" or to "a crop or crops of small grain" on the same land in the same year. This sole warning was restricted expressly to the one specific situation in which injurious effects might reasonably be anticipated. This legend on the bags constituted unqualified assurance or warranty to plaintiff, the ultimate consumer, that the use of Atrazine in connection with his 1964 corn crop would have no injurious effect in connection with the use of the same land for peanuts and soybeans in 1965.

Plaintiff has incorporated into a single cause of action allegations pertinent to (1) a cause of action for actionable negligence, and (2) a cause of action for breach of warranty.

Defendants demurred to the complaint, *inter alia,* that "there is improper joinder of causes of action." Bobbitt, J., said in *Heath v. Kirkman,* 240 N.C. 303, 306, 82 S.E. 2d 104, 106:

> "In instances where plaintiff may unite in the same complaint two or more causes of action, each cause of action must be separately stated. G.S. 1-123. Demurrer is proper when it appears upon the face of the complaint that, '5. Several causes of action have been improperly united.' G.S. 1-127. The quoted provision has been considered frequently when demurrer has been interposed on the ground that two or more *separately stated* causes of action have been improperly united in the same complaint. It is equally applicable when a complaint alleges facts sufficient to constitute two or more causes of action but fails to state separately facts sufficient to constitute each cause of action. G.S. 1-123; Rule 20(2), Rules of Practice in the Supreme Court, 221 N.C. 557; *King v. Coley,* 229 N.C. 258, 49 S.E. 2d 648; *Parker v. White,* 237 N.C. 607, 75 S.E. 2d 615; *Large v. Gardner,* 238 N.C. 288, 77 S.E. 2d 617. Too, each separately stated cause of action must be complete within itself; and it is not permissible to incorporate by reference allegations set forth in another separately stated cause of action. *Wrenn v. Graham,* 236 N.C. 719, 74 S.E. 2d 232; *Alexander v. Brown,* 236 N.C. 212, 72 S.E. 2d 522; *Guy v. Baer,* 234 N.C. 276, 67 S.E. 2d 47."

The demurrer should have been sustained on the ground of improper joinder of causes of action. However, the court erred in dismissing the action, and the case is remanded to the lower court with leave to plaintiff to plead separately his causes of action for alleged actionable negligence and for alleged breach of warranty.

Demurrer sustained.

Remanded with leave to plead separately two causes of action.

STATE OF NORTH CAROLINA v. WARREN WALTER McKISSICK, JR.

(Filed 11 October, 1967.)

1. Constitutional Law § 32; Criminal Law § 66—

The Federal decision that an accused is entitled to be represented by counsel at a pretrial lineup is not to be given retroactive effect, and testimony in this case regarding the identification of defendant at a police station lineup *is held* admissible in evidence, although at the time of the lineup the defendant was not represented by counsel.

2. Criminal Law § 43—

A photograph of a defendant in a lineup is competent in evidence for the purpose of illustrating the testimony of witnesses, and, in the absence of a request from the defendant that its admission be restricted, an instruction of the court that the picture was introduced solely for the purpose of "corroborating" a witness, while technically inexact, is not prejudicial, it appearing that the court's remarks effectively limited the jury's consideration of the picture.

3. Criminal Law § 85—

Evidence purporting to show the reputation of defendant and his mother for truth and veracity was properly excluded, the defendant being entitled to elicit testimony from his character witnesses only as to his general character and not as to particular traits.

BOBBITT and SHARP, JJ., concur in result.

APPEAL by defendant from *Bailey, J.*, 15 May 1967, Regular Schedule "B" Criminal Session of MECKLENBURG Superior Court.

The defendant was charged in a bill of indictment with the robbery of Richard Neff on 10 February 1966, the bill alleging that with the use of a pistol the defendant robbed Mr. Neff of $89.00 in violation of G.S. 14-87.

The State's evidence tended to show that at about 9:00 o'clock on the evening of 10 February 1966, Neff was operating a service station at King's Drive in Charlotte, and that the defendant and another colored man came there, got change for a dollar, and then, both of them using pistols, robbed him of all the money he had at the station, to wit, $89.00. Four days later Neff went to the city hall and from a lineup of six persons, identified the defendant as being one of the robbers. He also identified him in the courtroom during the trial.

Mrs. Neff was also at the filling station; and her evidence was practically the same as that of her husband, including the identification of the defendant in the line-up and during the trial.

The defendant testified in his own behalf, denying any connection with the robbery and offering an alibi. He said that he had gone to traffic court in the late afternoon of the day in question

and from there to the home of Mrs. Lucille King where he stayed until about 9:00 o'clock. He waited at the King home until that time to get Johnny King to drive him to his home, which was a half mile or less from the Neff service station; that upon his arrival home shortly after 9:00 o'clock, he went to bed and did not leave his home that night. The defendant's mother, Mrs. Nancy Scales McKissick, testified that she was with the defendant at the traffic court and at Mrs. King's, and that upon their arrival home sometime after 9:00 o'clock, the defendant went to bed and did not leave the house any more that night. Mrs. King testified that the McKissicks came to her home at 7:00 o'clock and stayed there until after 9:00 o'clock, and then Johnny King returned home and they left with him for the McKissick home. Larry McKissick, a brother of the defendant, gave the same evidence as had his mother and brother, saying that he was with them at all times referred to in their evidence. Mrs. Minnie Belton Scales, the grandmother of the defendant, testified that she lived with the McKissicks and that they came home about 9:15.

The defendant sought to show his reputation and that of his mother for "truth and veracity."

The State's objection to this evidence was sustained, and the record does not show the proposed answers of the witnesses.

The jury returned a verdict of guilty. A prison sentence of not less than eighteen (18) nor more than twenty-five (25) years was pronounced, and the defendant appealed.

J. Levonne Chambers, Attorney for defendant appellant.

T. W. Bruton, Attorney General; Harrison Lewis, Deputy Attorney General; Robert G. Webb, Trial Attorney; Eugene A. Smith, Trial Attorney, for the State.

PLESS, J. The defendant assigned as error the admission of evidence regarding the identification of the defendant at a line-up at the police station and his courtroom identification based thereon. He urges that his constitutional rights secured by the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 11 and 17, of the North Carolina Constitution were violated.

Mr. and Mrs. Neff went to the city hall four days after the robbery and there viewed a line-up with six persons. Both of them identified the defendant as being one of the robbers and also identified him at the trial. The defendant argues that in effect the exhibition of his person before the State's witnesses in the line-up required him to give evidence against himself.

He cites the recent case of *United States v. Wade,* 388 U.S. 218, 18 L. Ed. 2d 1149, decided 12 June 1967, in support of his position. In effect, that case held that placing the defendant in a line-up of six men several weeks after his indictment for robbery was a violation of the defendant's constitutional rights because his counsel was not present at the time of the line-up. The case did not hold that the line-up itself constituted self-incrimination, since merely exhibiting his person for observation by witnesses and using his voice as an identifying physical characteristic involved no compulsion of the accused to give evidence of a testimonial nature against himself which is prohibited by the Fifth Amendment. The decision said:

> "[I]n addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."

It also held:

> "Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid [of counsel] . . . as at the trial itself.' *Powell v. Alabama,* 287 U.S. 45, 57. Thus both Wade and his counsel should have been notified of the impending lineup, and counsel's presence should have been a requisite to conduct of the lineup, absent an 'intelligent waiver.' See *Carnley v. Cochran,* 369 U.S. 506. No substantial countervailing policy considerations have been advanced against the requirement of the presence of counsel. Concern is expressed that the requirement will forestall prompt identifications and result in obstruction of the confrontations."

While the *Wade* case was not retroactive and therefore would not be controlling in this case, since the occurrence was some five months prior to the *Wade* case, the defendant argues that the reasoning of the case should be accepted in this one.

In response, we call attention to the dissent of Justice Black who said:

> "[T]here is no constitutional provision upon which I can rely that directly or by implication gives this Court power to

establish what amounts to a constitutional rule of evidence to govern, not only the Federal Government, but the States in their trial of state crimes under state laws in state courts. See *Gilbert v. California, supra* [388 U.S. 263, decided June 12, 1967]. The Constitution deliberately reposed in States very broad power to create and to try crimes according to their own rules and policies. *Spencer v. Texas,* 385 U.S. 554. Before being deprived of this power, the least that they can ask is that we should be able to point to a federal constitutional provision that either by express language or by necessary implication grants us the power to fashion this novel rule of evidence to govern their criminal trials.

". . . I have never been able to subscribe to the dogma that the Due Process Clause empowers this Court to declare any law, including a rule of evidence, unconstitutional which it believes is contrary to tradition, decency, fundamental justice, or any of the other wide-meaning words used by judges to claim power under the Due Process Clause. See, *e.g., Rochin v. California,* 342 U.S. 165. I have an abiding idea that if the Framers had wanted to let judges write the Constitution on any such day-to-day beliefs of theirs, they would have said so instead of so carefully defining their grants and prohibitions in a written constitution. With no more authority than the Due Process Clause I am wholly unwilling to tell the state or federal courts that the United States Constitution forbids them to allow courtroom identification without the prosecution's first proving that the identification does not rest in whole or in part on an illegal lineup. Should I do so, I would feel that we are deciding what the Constitution is, not from what it says, but from what we think it would have been wise for the Framers to put in it. That to me would be 'judicial activism' at its worst. I would leave the States and Federal Government free to decide their own rules of evidence. That, I believe, is their constitutional prerogative.

Mr. Justice White also dissents, saying:

"The rule applies to any lineup, to any other techniques employed to produce an identification and *a fortiori* to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place, and whether before or after indictment or information. It matters not how well the witness knows the suspect, whether the witness is the suspect's mother, brother, or long-time associate, and no matter how long or well the witness observed the perpetrator

at the scene of the crime. The kidnap victim who has lived for days with his abductor is in the same category as the witness who has had only a fleeting glimpse of the criminal. Neither may identify the suspect without defendant's counsel being present. The same strictures apply regardless of the number of other witnesses who positively identify the defendant and regardless of the corroborative evidence showing that it was the defendant who had committed the crime."

He later says:

". . . [R]equiring counsel at pretrial identifications as an invariable rule trenches on other valid state interests. One of them is its concern with the prompt and efficient enforcement of its criminal laws. Identifications frequently take place after arrest but before indictment or information is filed. The police may have arrested a suspect on probable cause but may still have the wrong man. Both the suspect and the State have every interest in a prompt identification at that stage, the suspect in order to secure his immediate release and the State because prompt and early identification enhances *accurate* identification and because it must know whether it is on the right investigative track. Unavoidably, however, the absolute rule requiring the presence of counsel will cause significant delay and it may very well result in no pretrial identification at all. Counsel must be appointed and a time arranged convenient for him and the witnesses. Meanwhile, it may be necessary to file charges against the suspect who may then be released on bail, in the federal system very often on his own recognizance, with neither the State nor the defendant having the benefit of a properly conducted identification procedure.

"Nor do I think the witnesses themselves can be ignored. They will now be required to be present at the convenience of counsel rather than their own. Many may be much less willing to participate if the identification stage is transformed into an adversary proceeding not under the control of a judge. Others may fear for their own safety if their identity is known at an early date, especially when there is no way of knowing until the line-up occurs whether or not the police really have the right man."

The case of *Stovall v. Denno,* 388 U.S. 293, 18 L. Ed. 2d 1199 was decided June 12, 1967 by a divided Court, the same day as the *Wade* case. It deals with the identification of an accused person by

his accuser in the absence of his attorney. Recognizing the significance of the two opinions (*Wade and Denno*), it said:

> "We hold that *Wade* and *Gilbert* affect only those cases and all future cases which involve confrontations for identification purposes conducted in the absence of counsel after this date.
>
> "The law enforcement officials of the Federal Government and of all 50 States have heretofore proceeded on the premise that the Constitution did not require the presence of counsel at pretrial confrontations for identification. Today's rulings were not foreshadowed in our cases; . . . The overwhelming majority of American courts have always treated the evidence question not as one of admissibility but as one of credibility for the jury . . . Law enforcement authorities fairly relied on this virtually unanimous weight of authority, now no longer valid, in conducting pretrial confrontations in the absence of counsel. It is, therefore, very clear that retroactive application of *Wade* and *Gilbert* 'would seriously disrupt the administration of our criminal laws.' "

The Court's opinions say that while a line-up is not unconstitutional *per se,* that without the defendant's attorney present, it is —but that this wrong, illegal as it is, is only so tomorrow—not today!

A constitutional right enacted almost two centuries ago, and with no change or amendment, has been suddenly and belatedly found violated — in the future — but not in the past!

To get to the mechanics of an attorney's presence at a line-up, what is his function or authority? Is he empowered to forbid his client to appear, or to speak, or to gesture? If he does, is his client to obey, and thus to defeat the purpose of the line-up?

And if the attorney objects to any feature of the line-up, who shall rule upon it? The jailer, detective or police sergeant?

And upon an adverse ruling shall the accused, upon failure to comply, be subject to contempt proceedings? If so, when, and before what tribunal?

On the other hand, if the attorney cannot interpose objections nor instruct his client, what purpose does he serve? If he sees a wrong done his client, must he withdraw as counsel and become a witness?

The above questions are not facetious — they are just sensible and practical. But they unanswerably demonstrate the unrealistic results of the opinions in the *Wade* and *Denno* cases.

A fair line-up, composed of several men of the general appear-

ance of the suspect is as fair a way of identifying the guilty as can be devised. There is no suggestion or intimation as to which is the guilty person. And it is only natural for the victim to seek punishment of the perpetrator of the wrong. He is motivated by one of the greatest forces in human nature: to see that his wrongdoer, not somebody else, is punished.

If a line-up is fraudulently composed, the defendant can give his attorney this information for the purpose of cross examination. But if the attorney is present and has to become a witness, he can only give the information to his successor who, too, can only cross examine about it.

The *Wade* and *Denno* decisions can only be interpreted as requiring a full-time, twenty-four-hour-a-day, court-appointed lawyer on full duty to represent the rights of a suspect.

In the event of a one-man robbery where the description of the robber might fit three or four persons in the vicinity, three admittedly innocent persons of the four suspects could be arrested with probable cause at eleven o'clock on a Friday night. A judge to appoint counsel is not usually available—neither are attorneys, if they can avoid it. But under these opinions, the victim of the rape or robbery cannot release the three innocent suspects by declaring that one is the perpetrator. The remaining innocent ones must be kept in prison at least overnight, or over the weekend, until a judge can be found to appoint counsel, and counsel can be found to accept appointment — not only to identify the alleged guilty, but to release the admittedly and uncharged innocent.

The defendant further excepts to the admission of the photograph of the line-up as violative of his rights under the constitutional sections referred to earlier. The photograph was properly identified and entered into evidence for the purpose of illustrating the testimony of the witness. *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916; *State v. Chavis,* 231 N.C. 307, 56 S.E. 2d 678; *State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824; Stansbury, North Carolina Evidence § 34; 1 Strong, North Carolina Index, Criminal Law § 43; 11 A.L.R. 2d 895.

Although the defendant objected to the questions identifying the picture, he did not ask that its admission be restricted, and without such request, his exception is not good. *State v. Cade,* 215 N.C. 393, 2 S.E. 2d 7.

The defendant's interests were protected by the Court when the jury was told that the photograph was received only for the purpose of "corroborating" the witness and only to the extent that it does corroborate the witness. This instruction is not correct since photographs are competent for the purpose of illustrating the testi-

mony of the witnesses; but inasmuch as the instruction at least limited the photograph, we do not consider the use of the word "corroborate" instead of "illustrate" as constituting substantial error.

The remaining exceptions asserted by the defendant are that his questions seeking to prove the reputation of the defendant and his mother for truth and veracity were not allowed. The Court sustained the objections to them and in doing so was correct. Reputation for particular traits of character is not permissible. A witness can only testify to the *general character* of a person. 1 Strong, North Carolina Index, Criminal Law § 80; *State v. Sentelle*, 212 N.C. 386, 193 S.E. 405.

It is also noted that the answers which would have been given to these questions are not supplied. Since we have no way of knowing whether the proposed answers would have been favorable or unfavorable to the defendant, or whether they would have included incompetent and irrelevant statements, these exceptions are overruled.

With full respect for the amenities, we think it proper to voice our disagreement with the *Wade* and *Denno* decisions and to point out their fallacies. We do not question the intentions of the five justices who made them. The other four members of the Court either dissented or did not fully concur.

In our opinion, the reasoning of the dissenting opinions seems to us more practical than the opinion of the Court.

We respect and admire the wisdom of our predecessors. Our almost two-centuries-old Constitution has not been fundamentally changed — certainly not in the Bill of Rights contained in the first ten amendments, but the construction of them *has* within the past few years. When any court or justice makes an interpretation which is not in conformity with those of John Marshall, Edward Douglas White, Oliver Wendell Holmes, William Howard Taft or Charles Evans Hughes, it is subject to scrutiny.

And by whom? Is any court or group in better position to do so except the highest courts of the states with their guaranteed authority?

North Carolina was hesitant — even reluctant — to ratify the United States Constitution. It refused to do so until the Bill of Rights was added, and the most important of these was the Tenth Amendment which provides: "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

We must respectfully say that in our opinion this wise and vital provision of the Constitution has not had due consideration.

The defendant has had a fair trial in which there was
No error.

BOBBITT and SHARP, JJ., concur in result.

STATE OF NORTH CAROLINA v. CURTIS LEE DUNLAP.

(Filed 11 October, 1967.)

APPEAL by defendant from *Froneberger, J.*, January-February 1967 Criminal Session of MECKLENBURG Superior Court.

The defendant was charged in a bill of indictment with the robbery of David Eller on 8 December 1966. The bill alleged that with the threatened use of a pistol, the defendant robbed Eller of $25.00 in money. The defendant entered a plea of not guilty.

Since the defendant made no motion for judgment as of nonsuit and the evidence was amply sufficient to sustain the charge, it is only briefly summarized.

David Eller testified that he was a cab driver and that about 11:30 in the evening he delivered a passenger on Badger Court; that as he did so the defendant came to his cab and got in the front seat, "[t]hen he turned around and stuck a gun on me." Another person joined Dunlap, and the two ordered Eller to drive. When he stopped his cab at Horne Drive, Dunlap told Eller to give him his money, and Eller then handed him $25.00 in cash. The defendant and his companion then got out of the cab, and Eller immediately reported the incident to the police.

Later Eller saw the defendant in a line-up at the Charlotte Police Department and identified him as the person who robbed him. The State offered in evidence a photograph of the line-up which was admitted for the purpose of illustrating the witness' testimony and over the objection of the defendant.

The defendant offered no evidence.

The jury returned a verdict of guilty, and from a sentence of imprisonment, the defendant appealed.

Charles V. Bell, Attorney for defendant appellant.

T. W. Bruton, Attorney General; Harrison Lewis, Deputy Attorney General; Eugene A. Smith, Trial Attorney, for the State.

PLESS, J. The defendant's only exception is to the admission of the defendant's photograph during a line-up, alleging this to be a violation of his constitutional right against self-incrimination.

The same question of law is presented and determined in the case of *State v. McKissick, ante,* 500, and it would serve no useful purpose to repeat the rulings therein made.

Upon the authority of that case, the defendant's exception is overruled.

No error.

ADDIE S. BEAM v. EDMOND D. ALMOND AND WIFE, BERTHA J. ALMOND; CLEVELAND SAVINGS AND LOAN ASSOCIATION, A CORPORATION, AND LLOYD C. BOST, ADMINISTRATOR OF THE ESTATE OF BAYARD THURMAN FALLS, SR., TRUSTEE, DECEASED.

(Filed 11 October, 1967.)

1. Judgments § 5—

A judgment based on matters of practice or procedure is not a judgment on the merits.

2. Judgments § 28—

A judgment dismissing an action upon demurrer for want of necessary parties is not a judgment on the merits and cannot constitute *res judicata* barring a second action thereafter instituted upon substantially identical allegations but joining the parties necessary to a determination of the cause, even though plaintiff fails to amend the original complaint as permitted by the court within the time limited in the order sustaining the demurrer.

3. Appeal and Error § 10—

Defendant may file a demurrer *ore tenus* in the Supreme Court for failure of the complaint, together with any amendments, to state facts sufficient to constitute a cause of action.

4. Pleadings § 12—

A demurrer tests the sufficiency of a pleading, admitting for its purpose the truth of factual averments well stated and relevant inferences of fact deducible therefrom, but does not admit legal inferences or conclusions, and the complaint will be liberally construed with a view to substantial justice between the parties.

5. Cancellation and Rescission of Instruments § 3—

Allegations to the effect that grantor was 70 years old, was ill and under the influence of drugs so that she was incapable of understanding what she was doing, and that defendants fraudulently procured her signature to a deed conveying her property to them, which instrument she understood to be a contract to convey the premises to defendants in return for their promise to support plaintiff for the rest of her life, and that defendants

were attempting to sell the property, *held* sufficient to state a cause of action to cancel the deed for undue influence and mental incapacity.

6. Appeal and Error § 10—

Defendant may not demur in the Supreme Court on the ground of improper joinder. G.S. 1-127(6), G.S. 1-134.

7. Pleadings § 3—

In an action to set aside a deed for fraud and duress, lien holders in a deed of trust executed by the grantees are necessary parties, since their rights may be affected by adjudication of title, and therefore it is proper to join them in an action to rescind the deed to the grantees.

8. Cancellation and Rescission of Instruments § 11—

Where the grantor of an instrument seeks to set it aside for fraud, duress and want of mental capacity to execute the instrument, and it appears that the grantees of the instrument had executed a deed of trust thereon in favor of third parties who took without notice and who *bona fide* advanced money on the strength of the grantees' title, cancellation of the deed to the grantees does not affect the validity of the lien of the deed of trust, the duress being in the inducement to execute the deed and not duress in the actual signing of the instrument.

9. Cancellation and Rescission of Instruments § 3—

In an action by the grantor to set aside a deed executed by her on the ground of mental incapacity, it is required that she allege restoration of her mental capacity in order to enable her to maintain the suit in her own name, and want of such averment requires the sustaining of defendants' demurrer, with leave to plaintiff to amend.

APPEAL by plaintiff from a judgment rendered by *B. T. Falls, Jr., Resident Judge* of the Twenty-seventh Judicial District of North Carolina, in chambers, at Shelby, CLEVELAND County, 3 March 1967.

This is an action *in forma pauperis* to set aside a deed to the house and lot owned by plaintiff, where she resided as her home, for alleged fraud, undue influence, and mental incapacity perpetrated upon her by defendants, Edmond D. Almond and wife, Bertha J. Almond, in which action B. T. Falls, Sr., now deceased, was named as a trustee in a deed of trust upon said property executed by the defendants Almond securing a note held by the Cleveland Savings and Loan Association for the sum of $7,000, and in which action Lloyd C. Bost is named as the duly appointed, qualified and acting administrator of the estate of B. T. Falls, Sr., deceased. In the present action, plaintiff filed in the office of the clerk of the Superior Court of Cleveland County a notice of *lis pendens*.

A former action, which served as the basis for the dismissal of the present action by Falls, J., was commenced on 24 October 1965. In that action, Addie S. Beam, plaintiff, named Edmond D. Almond and wife, Bertha J. Almond, as defendants and sought to have a deed that she executed to defendants on the house and lot owned

by her, where she resided — the same house and lot which is the subject matter of the present action — set aside by reason of alleged mental incapacity, fraud and undue influence perpetrated upon her by defendants Almond. The language in the first complaint with respect to the issues in the action was substantially similar to the language in the present complaint, except for language in the present complaint making as additional parties the Cleveland Savings and Loan Association and Lloyd C. Bost, administrator of the estate of B. T. Falls, Sr., trustee, deceased. Defendants Almond demurred *ore tenus* to the complaint by reason of the fact that all parties having an interest in the subject matter of these proceedings had not been made parties to the action. The Honorable Zeb V. Nettles, judge presiding at the September-October 1966 Civil Session of Cleveland County, continued the cause for thirty days in order that the plaintiff might join such additional parties as may have an interest in the subject matter. When the thirty days had expired, defendants Almond filed a motion seeking dismissal of the suit by reason of the fact that such additional parties had not as yet been made parties to the action. On 23 December 1966, the motion of defendants Almond was heard in chambers before Falls, J., wherein the court found that such additional parties had not as of the date of said hearing been made parties to the action; that no mistake, surprise or excusable neglect had been made to appear to the court; and that notice of the motion had been properly served upon the attorneys for the plaintiff. Whereupon, Judge Falls entered an order that the cause be dismissed and the costs taxed against the plaintiff.

The present action was commenced on 13 January 1967. In addition to the defendants Almond who were named defendants in the previous action, the Cleveland Savings and Loan Association and Lloyd C. Bost, administrator of the estate of B. T. Falls, Sr., Trustee, deceased, who had been named as trustee in the deed of trust executed by the defendants Almond to secure a note of theirs in the sum of $7,000, were made parties defendant. The complaint seeks to have the deed executed by the plaintiff to the defendants Almond set aside for alleged fraud, undue influence and mental incapacity. The complaint in the instant action in substance alleges, *inter alia*, that on 28 March 1964 the defendants, Edmond D. Almond and wife, Bertha J. Almond, executed and delivered to the defendant Cleveland Savings and Loan Association a note in the sum of $7,000 secured by a deed of trust purporting to constitute a lien on the house and lot which is the subject matter of this action. The complaint further alleges that Bayard Thurman Falls, Sr., was named trustee in that deed of trust and that he died on 28 August 1966. The complaint further alleges "that this is an action to set

aside a deed to property in which the defendants Cleveland Savings & Loan Association and Lloyd C. Bost, Administrator of Estate of Bayard Thurman Falls, Sr., have an interest and whose rights may be affected and are made parties hereto so that they may defend their rights therein." The complaint prays for judgment as follows: "1. That the said purported deed from Addie S. Beam to Edmond D. Almond and wife, Bertha J. Almond, as herein alleged, be set aside and declared null and void. 2. That said deed of trust from Edmond D. Almond and wife, Bertha J. Almond, to Cleveland Savings & Loan Association of Shelby, as herein alleged, be set aside and declared null and void."

The Cleveland Savings and Loan Association demurred to the complaint in the instant action upon the following grounds: "That the complaint does not state facts sufficient to constitute a cause of action against this defendant in that the complaint contains no allegations connecting this defendant in any way with the subject matter of the action, nor is any interest therein on the part of this defendant pleaded in any form whatsoever."

Lloyd C. Bost, administrator of the estate of Bayard Thurman Falls, Sr., trustee, deceased, filed a similar demurrer.

The defendants Almond demurred to the complaint upon the following grounds: "That there is a misjoinder of causes of action herein, in that the complaint attempts to join an action for fraud against these defendants, and an action to set aside a deed to real estate on grounds of the mental incompetence of the plaintiff, and an action based on the anticipated breach by the defendants of a contract with the plaintiff."

On motion of plaintiff, the cause came on for hearing upon the demurrers at the 13 February 1967 Session of Cleveland County Superior Court. Upon this hearing, the Honorable W. K. McLean, judge presiding, entered an order overruling the demurrers and allowing the defendants thirty days to file answers. There was no exception to this order of Judge McLean.

On 15 February 1967, attorneys for the defendants Edmond D. Almond and wife, Bertha J. Almond, filed a motion to dismiss with the court which recites, in substance, as follows: The movants herein were the identical defendants in an action previously brought by plaintiff; that the complaint in this action is identical with the language of the first complaint with respect to the issues of the action, and the plaintiff in the instant action does not allege any new matter but merely repeats the form and content of her original complaint. On 23 December 1966, Judge Falls, upon motion of these defendants, dismissed the first action brought by plaintiff as of involuntary nonsuit by reason of the failure of the plaintiff to prop-

erly prosecute the action against these defendants as theretofore ordered by the court; that no appeal was perfected from the judgment of the court ending the previous action, and that said judgment is in all respects a binding judgment upon all parties to that action.

On 3 March 1967, Falls, J., Resident Judge of the Twenty-seventh Judicial District, in chambers, at Shelby, Cleveland County, heard the motion filed by the defendants Almond. He entered a judgment in which he found, in substance, the following facts: That plaintiff filed an action in the Superior Court of Cleveland County against said Edmond D. Almond and wife, Bertha J. Almond; that the defendants Almond demurred *ore tenus* to the complaint by reason of a defect in the parties defendant in said action, all persons having an interest in and to the subject matter of the action not having been made parties thereto; that Judge Zeb V. Nettles allowed the plaintiff to file amended pleadings wherein the necessary and proper parties were to have been made parties defendant, and the plaintiff was allowed thirty days in which to file such amendment; that plaintiff failed to file amended pleadings; that upon motion of defendants Almond Judge Falls entered an order on 23 December 1966 dismissing said action, finding no mistake, surprise or excusable neglect was made to appear to the court; that plaintiff appealed from this order and failed to perfect her appeal; and that the time for the prosecution of said appeal has expired, and the order of the court dismissing that action is in all respects a final judgment and is binding upon the parties thereto. The court further found as a fact that the plaintiff filed another complaint on 13 January 1967 wherein the above parties are named as parties defendant, and upon examination of the complaint herein it is found as a fact that the complaint in this action is a verbatim recital of the identical allegations contained in the first action instituted by the plaintiff; that the defendants now move the court that this action be dismissed by reason of the fact that the judgment in the former action is a bar and effectively estops her from the prosecution hereof.

Based upon his findings of fact, the court concluded as a matter of law as follows: "(1) by reason of the identity of the pleadings in this action with those filed in the previous action by the plaintiff, there are no new issues for adjudication herein and the motion of the defendants that the plaintiff is estopped to now file this action by reason of the judgment entered in her former action is well taken; (2) the Court is of the opinion that the plaintiff is now estopped by the judgment entered in her former suit as to the issue she now raises." Based upon his findings of fact and conclu-

sions of law, Judge Falls ordered and decreed that the present action be dismissed and that the costs be taxed against the plaintiff.

From this judgment dismissing the action, plaintiff appeals.

Joseph M. Wright and Reuben L. Elam for plaintiff appellant.
Falls, Hamrick & Hobbs by L. L. Hobbs for defendant appellees.

PARKER, C.J. Judge Falls erred in allowing the motion to dismiss the present action and taxing the costs against the plaintiff.

In *Hayes v. Ricard,* 251 N.C. 485, 112 S.E. 2d 123, it is said:

> "The general rule is well settled that the doctrine of *res judicata,* whereby a judgment bars a subsequent action on the same cause of action, and renders the judgment conclusive on the issues adjudicated, applies only to the parties to the action in which the judgment was rendered, and the privies of such parties. *Bennett v. Holmes,* 18 N.C. 486; *Meacham v. Larus & Bros. Co.,* 212 N.C. 646, 194 S.E. 99; *Rabil v. Farris,* 213 N.C. 414, 196 S.E. 321; *Corporation Commission v. Bank,* 220 N.C. 48, 16 S.E. 2d 473; *Cannon v. Cannon,* 223 N.C. 664, 28 S.E. 2d 240; 30A Am. Jur., Judgments, Sec. 396; 50 C.J.S., Judgments, Sec. 762.
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> * * *
>
> "A former judgment of nonsuit is *res judicata* as to a second action, only when it is made to appear that the former adjudication has been on the merits of the action, and it appears to the trial court, and is found by such court as a fact, that the second action is between the same parties in the same capacity or quality, and their privies, and is based upon substantially identical allegation and substantially identical evidence, and that the merits of the second action are identically the same. *Kelly v. Kelly,* 241 N.C. 146, 84 S.E. 2d 809; *Craver v. Spaugh,* 227 N.C. 129, 41 S.E. 2d 82; *Hampton v. Spinning Co.,* 198 N.C. 235, 151 S.E. 266; 17 Am. Jur., Dismissal, Etc., p. 162; 27 C.J.S., Dismissal and Nonsuit, p. 404; 30A Am. Jur., Judgments, Section 398."

This is said in *Walker v. Story,* 256 N.C. 453, 124 S.E. 2d 113:

> "Reference is made in *Hayes v. Ricard, supra,* to the well established rule that '(a) judgment rendered in an action estops the parties and their privies as to all issuable matters contained in the pleadings, including all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence, could and should have brought

forward.' *Bruton v. Light Co.,* 217 N.C. 1, 6 S.E. 2d 822. But this rule is applicable where, as held in *Hayes v. Ricard, supra,* the judgment in the prior action constitutes an adjudication thereof upon the merits, not to a judgment of involuntary nonsuit entered on account of the insufficiency of plaintiff's evidence. *Kelly v. Kelly, supra,* p. 150 [241 N.C. 146, 84 S.E. 2d 809].

* * *

"Whether the judgment in the prior action is a bar to the present action depends upon whether the evidence presented by plaintiff herein is substantially the same as that offered by plaintiff upon trial of the prior action. 'A plea of *res judicata* cannot be determined on the pleadings alone, but only after the evidence is presented.' *Hall v. Carroll,* 253 N.C. 220, 116 S.E. 2d 459; *Hayes v. Ricard, supra.*"

A judgment based on matters of practice or procedure is not a judgment on the merits. *Hayes v. Ricard, supra.*

In *United States v. California Bridge & C. Co.,* 245 U.S. 337, 62 L. Ed. 332, the Court said:

"The doctrine of estoppel by judgment, or *res judicata,* as a practical matter, proceeds upon the principle that one person shall not a second time litigate, with the same person or with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy, or issue which has been necessarily tried and finally determined, upon its merits, by a court of competent jurisdiction, in a judgment *in personam* in a former suit."

So far as the record before us discloses, Judge Falls heard no evidence in the former action and heard no evidence in the second action. In the present action, Cleveland Savings and Loan Association, which, according to the allegations of the complaint in the present action, holds a note executed by defendants Almond and secured by a deed of trust upon the house and lot which is the subject matter of this action, in which deed of trust B. T. Falls, Sr., now deceased, was named as trustee, and Lloyd C. Bost, administrator of the estate of B. T. Falls, Sr., trustee, deceased, have been brought in as additional parties defendant. It is manifest that there has been no adjudication on the merits. Therefore, the former judgment in the first case is not a bar to the present action, and Judge Falls erred in dismissing the present action on the ground that plaintiff is now estopped by the judgment entered in the former action to prosecute the present action.

Each party defendant in the present action filed a demurrer to the complaint in the present action, as set forth above. On motion of plaintiff, the instant action came on for hearing upon the demurrers filed by defendants at the 13 February 1967 Session of Cleveland County Superior Court. The Honorable W. K. McLean, judge presiding, entered an order overruling the demurrers and allowing defendants thirty days to file answers. According to the record before us, there was no exception taken to this order of Judge McLean.

In the Supreme Court all the defendants herein filed a demurrer *ore tenus* upon the following grounds, in substance: (1) The complaint does not state facts sufficient to constitute a cause of action against defendants Edmond D. Almond and wife, Bertha J. Almond, in that it fails to state with particularity the essential facts to constitute a cause of action for fraud, or a cause of action for undue influence, or a cause of action for mental incapacity; (2) the complaint attempts to allege an anticipatory breach of contract wherein the defendants Almond were to have possession of the land of the plaintiff in return for their promise to support her; however, no breach thereof is alleged; (3) the complaint fails to state a cause of action against the defendant Cleveland Savings and Loan Association and its trustee, since upon the face of the complaint said defendant Savings and Loan Association is the *bona fide* holder of a first lien secured by a deed of trust for purchase money on the property which is the subject matter of this action, the loan having been made to defendants Almond to furnish them purchase money and that the prayer of the plaintiff will not in any wise affect the status of this lien; (4) several causes of action have been improperly united for that the plaintiff asks to unite an alleged cause of action to rescind her deed with alleged causes of action to destroy a lien held by another defendant, and a cause of action alleging the anticipatory breach of contract between the plaintiff and the defendants Almond, which alleged causes of action are not separately stated, do not belong to one class and do not affect all parties named as defendants herein.

This is said in 1 Strong's N. C. Index 2d, Appeal and Error, § 10: "A defendant may file a demurrer *ore tenus* in the Supreme Court on the ground that the complaint, together with any amendment thereto, fails to state facts sufficient to constitute a cause of action."

On a demurrer *ore tenus* to the complaint, we take the case as made by the complaint. It is hornbook law that 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. It is also common knowledge of the Bench and the Bar that the court is 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; *Bailey v. McGill,* 247 N.C. 286, 100 S.E. 2d 860, and cases cited.

Plaintiff alleges, *inter alia,* that at the time of the transaction complained of she was 70 years old, very ill, was a patient in a home for the aged, and was under the influence of heavy stimulants and drugs and therefore incapable of understanding what she was doing, all of which was well known to the defendants Almond; that said defendants Almond had gained ascendency and domination over her will through twelve years of friendship and by their persistent domination over her affairs; that they fraudulently procured her signature to a deed which she understood to be a contract in which she agreed to give defendants Almond her house and lot, which is the subject matter of this action, at her death in return for their promise to support her in her home for the rest of her life and to pay her burial expenses upon her death; and that her deed to the defendants Almond is without consideration, fraudulent and void, and should be cancelled. During the month of August, 1965, she learned that defendants Almond were attempting to sell her property and put her out of her own home. At this time she asked defendants Almond to explain, and was told by them that they had a deed for her home and had a right to sell it.

Although fraud is not alleged in all of its elements with the particularity required by our decisions, *Davis v. Davis,* 256 N.C. 468, 124 S.E. 2d 130; *New Bern v. White,* 251 N.C. 65, 110 S.E. 2d 446, and although the complaint does not allege that the plaintiff relied on any misrepresentations and was induced thereby to act to her damage, 2 Strong's N. C. Index, Fraud, § 8, yet it is our opinion, and we so hold, that construing the complaint liberally with a view to substantial justice between the parties, G.S. 1-151, in the light of the principles of law set forth in 2 Strong's N. C. Index 2d, Cancellation of Instruments, § 3, and 13 Am. Jur. 2d, Cancellation of Instruments, §§ 13, 14, 29, and 30, it contains sufficient allegations of fact tending to show undue influence on the part of defendants Almond and mental incapacity as to plaintiff. However, plaintiff has not alleged restoration of her mental capacity as required by *Davis v. Davis,* 223 N.C. 36, 25 S.E. 2d 181. The demurrer *ore tenus* filed in this Court by the defendants Almond is sustained with leave

to plaintiff to file an amended complaint, if she so desires, as to them.

The fourth ground of the demurrer *ore tenus,* to wit, improper joinder, filed in this Court by all the defendants will not be considered, for the reason that such a question cannot be raised by demurrer *ore tenus* in the Supreme Court. *Raleigh v. Hatcher,* 220 N.C. 613, 18 S.E. 2d 207; G.S. 1-127(6); G.S. 1-134. However, it appears that there has not been an improper union of several causes. G.S. 1-123(1); *Goodson v. Lehmon,* 225 N.C. 514, 35 S.E. 2d 623, 164 A.L.R. 510.

These are the only allegations in the complaint in the present action in respect to defendants Cleveland Savings and Loan Association and Lloyd C. Bost, administrator of the estate of B. T. Falls, Sr., trustee, deceased, except in the prayer for relief which asks that the deed of trust to it be set aside and declared null and void:

> "XV. That on or about March 28th, 1964, the defendants, Edmond D. Almond and wife, Bertha J. Almond, executed and delivered to the defendant Cleveland Savings & Loan Association, a note in the original sum of Seven Thousand ($7,000.00) Dollars secured by a deed of trust purporting to constitute a lien on the property described above and the subject matter of this action.
>
> "XVI. That the defendant, Bayard Thurman Falls, Sr., was named in said deed of trust as trustee; that the said Bayard Thurman Falls, Sr., trustee, died on August 28th, 1966.
>
> "XVII. That this is an action to set aside a deed to property in which the defendants Cleveland Savings & Loan Association and Lloyd C. Bost, Administrator of Estate of Bayard Thurman Falls, Sr., have an interest and whose rights may be affected and are made parties hereto so that they may defend their rights therein."

In *Randolph v. Lewis,* 196 N.C. 51, 144 S.E. 545, the third headnote in our Reports states:

> "Where a note is given by a husband and wife, and the husband procures her execution by duress, the note is voidable only, and is good in the hands of a holder in due course for value, and without notice of the duress. The distinction between duress in the procurement of the execution and duress in the execution pointed out by Adams, J."

The Court in its opinion said:

"Duress in the inducement exists where the party subjected to the duress intends to execute the contract and such intention is caused by duress. In this event the contract is voidable. 'A contract made under duress is ordinarily voidable and not void, for the consent is present, although not such a free consent as the law requires.' 13 C.J., 398, sec. 311.

"It is well settled that as between the immediate parties — here the defendant and her husband — duress in obtaining her signature to the note would be a good defense; it would likewise be a good defense against a holder with notice. The appellant does not contend that the plaintiff, the payee in the notes, had any knowledge of the alleged duress. The notes represent the price of an automobile purchased from the plaintiff and used by the defendant and her family. The authorities uniformly support the position that where the grantee in a deed or the payee in a note has neither instigated the duress, nor connived at it, nor had knowledge of it, duress by others is not ground for avoiding the contract. *Wells Fargo Bank v. Barnett* (C. C. A.), 43 A.L.R. 916; *Meyer v. Guardian Trust Co.*, 35 A.L.R. 856; *White v. Graves,* 9 A. R. (Mass.), 38; *Green v. Scranage,* 87 A. D. (Ia.), 447. This principle is embodied in our statute law. If in a conveyance of land by a husband and his wife the private examination or acknowledgment of the wife is procured by fraud or duress exercised by the husband, the conveyance is not thereby invalidated unless it is shown that the grantee participated in the fraud or duress. C.S. 1001. In the following cases the party who had instigated the duress sought to take advantage of his own wrong: *Heath v. Cobb,* 17 N.C. 187; *Meadows v. Smith,* 42 N.C. 7; *Edwards v. Bowden,* 107 N.C. 58. See *Harshaw v. Dobson,* 64 N.C. 384; *S. c.*, 67 N.C. 203. We find no error in the conclusion that upon the verdict as returned the plaintiff is entitled to judgment."

In an annotation in 4 A.L.R. 864, at 864, it is said:

"The great weight of authority is to the effect that the validity of a contract is not affected by the fact that its execution was induced by duress, practised by a stranger thereto, where such duress was not committed with the knowledge or consent of the obligee. In other words, duress exercised by a third person does not affect the rights of an obligee who does not participate therein."

The annotation cites in support of the text cases from 25 states of the United States, and England. It cites the North Carolina cases

of *Butner v. Blevins,* 125 N.C. 585, 34 S.E. 629, and *Davis v. Davis,* 146 N.C. 163, 59 S.E. 659. See to the same effect Annot. 62 A.L.R. 1477; 36 Am. Jur., Mortgages, § 93.

This is said in 59 C.J.S., Mortgages, § 234:

> "Although a conveyance of land may be voidable for fraud in the hands of the original grantee, if he has given a mortgage on the premises to one advancing his money in good faith and without notice of the fraud, such claim of fraud cannot be set up against the mortgagee. The rule is otherwise if knowledge of the fraud can be brought home to the mortgagee or if the fraud practiced on the grantor was such as to make his conveyance absolutely void; and, in an action to set aside the conveyance for fraud, the burden of proof of want of such knowledge is on the mortgagee.
>
> "*Mental incompetency.* It has been held that *bona fide* mortgagees of a grantee whose conveyance is absolutely void by reason of the grantor's insanity do not stand in the relation of *bona fide* purchasers and are not protected. It has also been held that one who accepts a note and deed of trust to secure it from an insane maker, without knowledge of such infirmity, is not protected as an innocent purchaser."

In order to render a deed void on the ground of mental incompetency, it should appear that the grantor was laboring under such a degree of mental infirmity as to make him incapable of understanding the nature of his act. 26 C.J.S., Deeds, § 54 at 721.

This is said in *Davis v. Davis,* 223 N.C. 36, 25 S.E. 2d 181:

> "When the grantor in a deed brings an action to set aside and cancel his deed and alleges and offers evidence tending to prove that at the time of the execution of the deed he did not have sufficient mental capacity to make a deed or to know and understand the nature and extent of his acts, it is necessary in order to maintain the action in his own behalf to allege and prove a restoration of his mental capacity; otherwise, he is presumed to be incompetent to bring the action."

The demurrer *ore tenus* in this Court states that the Cleveland Savings and Loan Association "is the *bona fide* holder of a first lien secured by a deed of trust for purchase money on the property which is the subject matter of this action, the loan having been made to the defendants Almond and wife to furnish them purchase money." This is a speaking demurrer in this respect for such allegations of fact do not appear in the complaint. Construing the allegations in

the complaint against Cleveland Savings and Loan Association and the trustee named in its deed, and in connection with the complaint as a whole, it is manifest that in respect to alleged fraud and alleged undue influence the complaint does not allege that the Cleveland Savings and Loan Association in any way participated in or had knowledge of the alleged fraud and alleged undue influence perpetrated upon plaintiff by the defendants Almond; and, in respect to mental incompetency, even if we concede, construing the complaint liberally with a view to substantial justice between the parties, that it contains allegations sufficient to allege that the plaintiff was suffering under such a degree of infirmity as to make her incapable of understanding the nature of her act when she executed the deed to the Almonds, yet the complaint does not allege any restoration of her mental capacity. The demurrer *ore tenus* interposed in this Court by the Cleveland Savings and Loan Association and Bost is sustained with leave to plaintiff to file an amended complaint, if she so desires, as to them.

It is to be noted that Judge McLean overruled the demurrers to the present complaint filed by all the defendants in this action. We have taken this action in sustaining the demurrer *ore tenus* filed in this Court by all the defendants for the following reason: "If the cause of action, as stated by the plaintiff, is inherently bad, why permit him to proceed further in the case, for if he proves everything that he alleges he must eventually fail in the action." *Cotton Mills Co. v. Duplan Corp.*, 246 N.C. 88, 97 S.E. 2d 449; *Ice Cream Co. v. Ice Cream Co.*, 238 N.C. 317, 77 S.E. 2d 910.

It seems apparent from the record before us that the statutory procedure has not been followed to have a person appointed as substitute trustee in the deed of trust instead of B. T. Falls, Sr., deceased. G.S. 36-18.1.

The result is the judgment dismissing the action is reversed. The demurrer *ore tenus* filed in the Supreme Court by all the defendants is sustained with leave to plaintiff to file an amended complaint, if she so desires.

STATE v. JAMES ALFORD PRICE.

(Filed 11 October, 1967.)

1. Criminal Law § 169—

Exceptions to the exclusion of evidence cannot be sustained when the record fails to show what the witness would have testified if permitted to answer.

2. Homicide § 13—

Where the evidence establishes that the defendant intentionally assaulted another with a deadly weapon and thereby caused the death of the person assaulted, the presumption arises that the killing was unlawful and with malice.

3. Homicide § 23—

Instructions as to the presumptions arising from the intentional use of a deadly weapon *held* without error in this case.

4. Homicide § 27—

The court's charge relating to self-defense and defense of home and family held free of prejudicial error in this case.

5. Homicide § 12; Criminal Law § 24—

Under the general plea of not guilty, a defendant may rely upon more than one defense.

6. Homicide § 27—

Defendant's testimony was to the effect that he intentionally fired three shots in the immediate area where the deceased was standing in order to warn him away from defendant's premises, and that the deceased was killed by the third shot. *Held:* Defendant's evidence does not present the defense of death by accident, since it discloses that he intentionally assaulted the deceased with a deadly weapon, and it was not error for the court to fail to charge the jury upon the defense of death by accident.

7. Homicide § 26—

In this homicide prosecution the failure to charge the jury with reference to involuntary manslaughter was not error, since there was no evidence to support such instruction.

APPEAL by defendant from *Peel, J.*, March 13, 1967 Schedule "C" Criminal Session of MECKLENBURG.

Criminal prosecution on indictment charging that defendant, on November 26, 1966, "did unlawfully, wilfully, feloniously but without premeditation and deliberation kill and murder Walter Junior Wright," etc.

Evidence was offered by the State and by defendant.

The evidence, summarized except when quoted, tends to show the facts narrated below.

On November 26, 1966, defendant, standing on the porch of his trailer, fired a .38 caliber Smith and Wesson pistol three times. The third shot struck and fatally injured Wright, striking him "in the bridge of the nose, just slightly over to the side." Wright, defendant's father-in-law, when killed, was "in the front yard of the (defendant's) trailer . . . 42 feet from the front door of the trailer and approximately 33 feet from the edge of Skycrest Drive." When he fired the pistol, defendant was standing "halfway out on the 4 ft. wide porch."

Both Wright and defendant resided in the same trailer park, which was located off Highway 115, North, in Mecklenburg County. The trailer in which Wright, Wright's wife, and also Maxine Price, the fifteen-year-old daughter of defendant, resided, was across Skycrest Drive from the trailer in which defendant, his wife and other members of their family resided.

Wright was fifty-eight years of age. He had been disabled since 1961 and was constantly under a doctor's care. On November 26, 1966, and prior thereto he was unemployed. Defendant was forty-seven years of age, weighed 190 pounds, and was taller than Wright.

On November 26, 1966, about 1:00 p.m., Wright went upon the premises and into the trailer of defendant. There was evidence tending to show he had been drinking (wine) heavily. While in defendant's trailer on this occasion, Wright approached both defendant and Roger Charles, a Sergeant in the U. S. Armed Forces and son-in-law of defendant, cursing them and threatening to strike them with a pop bottle and with a knife. Defendant's wife fainted. Defendant told Wright he wanted no trouble with him, told him to leave and not come back. Wright left and returned to his trailer.

Wright and his wife and Maxine Price had been caring for the eighteen months old child of Brenda Price, a daughter of defendant, while Brenda worked as a waitress. About 3:30 or 4:00 p.m., Brenda went to the Wright trailer to get her child. Wright told Brenda, speaking of defendant and of Charles: "Both of them were chicken. Neither of them would fight me." Wright, apparently resenting the fact that Brenda had taken the child, threw the articles of clothing belonging to the baby out into the yard. These were picked up by Maxine, put in a box and taken to Brenda. Shortly thereafter Wright left his trailer and crossed Skycrest Drive. Charles, who was in the Price trailer, testified: "Mr. Wright proceeded to come in the yard and Mr. Price got the pistol and says: 'I will scare him away.' I said: 'Don't shoot him.' He said, 'I won't.' "

Defendant testified: "I got the gun and said, 'I can't have him back over here today,' and pushed the front door open. My daughter asked me not to let him come in. He started across a little valley and I said, 'Mr. Wright, I told you not to come back.' He said, 'Damn your soul, I'm coming after you now.' I said, 'No, go back.' He said, 'I'm going to get you.' He had his right hand in his right rear pocket and I shot at the ground. He kept coming saying, 'You s. o. b., you are not going to shoot nobody. You ain't got the nerve as I have.' I shot again and the baby ran out and grabbed both my legs. As I raised my gun to shoot again at his feet my daughter grabbed the baby. As she snatched, the gun was fired and I looked and he was backing up. He stumbled back 3 or 4 steps, then stopped,

shook his head and said, 'Damn you,' and fell. I turned around to walk inside to call an ambulance."

Jeannette (Mrs. Charles), daughter of defendant, testified: "My father was in the living room when I saw my grandfather come out of his driveway. I was afraid of him because he hit me Thanksgiving day. I hadn't done anything and was pregnant. My father got a gun and went to the door and said, 'Jeannette, I'm not going to shoot. I'm just going to scare him away.' I heard my father tell my grandfather, 'Walter, don't come any closer. I told you not to come back over here,' and my grandfather said, 'I'm going to get you anyway.' My little girl ran between my daddy's legs crying. My father used the pistol that's been introduced in evidence and fired it 3 times — I saw the first two hit the ground, because the dirt threw up. The third one hit him fired while I was standing behind daddy attempting to get my little girl. She was right between his legs holding on to him."

Defendant testified: "You could say I was in the doorway when it happened. I was not aiming the gun and he could see the gun and heard the shots. When my daughter grabbed the girl it could have pulled me in the air."

Defendant testified to prior threats and assaults made upon him by Wright when Wright was drinking and also to Wright's general reputation for violence when drinking. Defendant testified: "I had known Mr. Wright about 23 years. When he was drinking, he was bad, a different person altogether, he would cut or slap you. When he wasn't drinking he was all right. He has served time for cutting a man and has cut me. He shot at me before. I was afraid of him and was protecting my family on that day."

No weapon was found on Wright's body except a closed pocketknife recovered from his "left rear pocket underneath a handkerchief."

Defendant testified: "I don't know the interval between the shots but there was a pause for conversation — not bang, bang, bang." Testimony of other witnesses tended to show three shots were fired in quick succession.

The jury returned a verdict of guilty of manslaughter. Judgment, imposing a prison sentence of not less than nine nor more than ten years was pronounced. Defendant excepted and appealed.

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

E. Glenn Scott for defendant appellant.

BOBBITT, J. Defendant's wife, while testifying in behalf of her husband, was asked on direct examination the following question:

"Do you know your father's reputation for the use of violence, particularly when he was under the influence of alcoholic beverages?" The State objected, the court sustained the objection and defendant excepted to the court's ruling. Defendant's assignment of error based on this exception is without merit. Since the record does not show what the witness would have testified if permitted to answer, it cannot be determined whether the ruling was prejudicial. *State v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342. It is noted that the court admitted evidence that Wright had a general reputation for violence while drinking and evidence of Wright's specific acts of violence toward defendant while drinking.

Defendant excepted to and assigns as error excerpts from the charge relating to what must be established to raise the presumptions that the killing was unlawful and with malice. It is well established that these presumptions arise "when the defendant *intentionally assaults* another with a deadly weapon and thereby proximately causes the death of the person assaulted." *State v. Gordon,* 241 N.C. 356, 358, 85 S.E. 2d 322, 323, and cases cited; *State v. Adams,* 241 N.C. 559, 85 S.E. 2d 918; *State v. Wagoner,* 249 N.C. 637, 107 S.E. 2d 83; *State v. Revis,* 253 N.C. 50, 116 S.E. 2d 171; *State v. Phillips,* 264 N.C. 508, 515, 142 S.E. 2d 337, 340. When considered in the light most favorable to the State, there was plenary evidence tending to show defendant intentionally shot Wright and thereby proximately caused Wright's death. Error, if any, in the court's instructions on this feature of the case was in favor of and not prejudicial to defendant.

Defendant excepted to and assigns as error portions of the charge relating to defendant's rights when acting in his own defense and in defense of his home and family. Careful consideration of the court's instructions on this feature of the case does not disclose prejudicial error. These instructions are in substantial accord with numerous decisions of this Court.

Defendant's more serious exceptions and assignments of error relate to portions of the charge as given bearing upon whether the actual shooting of Wright was of an accidental nature and upon whether the court failed to charge fully "on the issue of accidental death and the possibility of a verdict of involuntary manslaughter."

The court instructed the jury in substance as follows: If the jury found the actual shooting of Wright was not intended by defendant but was accidental, this fact was for consideration in determining whether defendant used excessive force under the circumstances in defense of himself and of his home and family.

Defendant contends the jury should have been instructed to return a verdict of not guilty if they found defendant did not intend

that the bullet discharged from the pistol he fired would actually strike Wright; and that it was error to limit the significance of such fact to consideration in determining whether defendant used excessive force in defense of himself and of his home and family. This contention is untenable.

Defendant contends, and rightly so, that in an appropriate factual situation, a defendant, under his plea of not guilty, may rely on more than one defense, *e.g.*, (1) that he acted in self-defense, and (2) that the shooting was accidental. Appropriate circumstances for the assertion of these defenses were present in *State v. Wagoner, supra,* where the evidence as to accidental shooting tended to show that the pistol was not intentionally fired but discharged accidentally.

Here, there is no evidential basis for a contention that the firing of the pistol was unintentional. The accident here, according to defendant's contention, is that defendant did not intend that any bullet from the intentionally fired pistol would actually strike Wright. The evidence most favorable to defendant tends to show it was his intention that the third bullet, as well as the prior two bullets, would strike in the area where Wright was standing and sufficiently close to him to put him in fear.

It is well established "that no man by the show of violence has the right to put another in fear and thereby force him to leave a place where he has the right to be." *State v. Martin,* 85 N.C. 509; *State v. Douglas,* 268 N.C. 267, 150 S.E. 2d 412. Here, on his own testimony, defendant assaulted Wright with a deadly weapon, thereby proximately causing Wright's death, and therefore was guilty of manslaughter, at least, *unless* he fired the pistol under such circumstances that the firing of the pistol was or reasonably appeared to be necessary in his own defense or in defense of his home or family. This was a matter for determination by the jury in the light of all circumstances disclosed by the evidence.

Defendant's guilt or innocence depended upon whether he acted within the limits of his legal right to defend himself, his home and his family. This conclusion is in accord with the court's instructions. Moreover, the court did not err by failing to instruct the jury with reference to involuntary manslaughter. There was no evidential basis for such instruction.

The record reveals another family tragedy. Apparently, Wright, when he was sober, enjoyed a cordial relationship with other members of the family, including defendant. However, when he was under the influence of intoxicants, it would seem that he became abusive, rowdy and combative. The jury seems to have evaluated the evidence properly, namely, by deciding that defendant under all

the circumstances, notwithstanding his patience may have been exhausted, used more force than was or reasonably appeared to be necessary to defend and protect himself, his home and his family. The verdict of guilty of manslaughter and the judgment pronounced thereon will not be disturbed.

No error.

CITY OF GASTONIA, ORIGINAL PLAINTIFF AND PAUL MAUNEY, MORRIS D. McMANAMA AND WIFE, MILDRED F. McMANAMA, AND NEIL YOUNG AND WIFE, SUE P. YOUNG, INTERVENING PLAINTIFFS, v. GEORGE PARRISH; AND HUGH W. JOHNSTON AND WIFE, AUDREY S. JOHNSTON, DEFENDANTS.

(Filed 11 October, 1967.)

1. **Evidence § 26—**

Where it is shown that a municipal zoning ordinance map has been lost and could not, after due and diligent search, be found, it is competent to permit the introduction in evidence of a map made by a tracing process (Kronaflex), established by oral testimony as an accurate copy of the lost original.

2. **Municipal Corporations § 34—**

Where a municipality introduces evidence that its council unanimously adopted a zoning ordinance and that it was later printed in book form and certified by the city clerk, there is a presumption in favor of the validity of the ordinance and the burden is upon the complaining property owner to show its invalidity or inapplicability. G.S. 160-272.

3. **Evidence § 22—**

An engineer who has made an actual survey of the area may use a map of the property to illustrate his testimony.

4. **Municipal Corporations § 25—**

A civil engineer may testify from a survey made by him that the property in question lay within one mile of the city limits of the municipality in question.

5. **Same—**

A property owner with personal knowledge of the property lines of nearby property and of the boundary lines of the city limits may testify that such other property was within a mile of the city limits.

6. **Municipal Corporations § 34—**

A municipality may restrain the use of property in violation of its valid zoning ordinances. G.S. 160-179.

7. **Same; Criminal Law § 1—**
In a prosecution for violation of a municipal zoning ordinance, evidence that other violators of the ordinance had not been prosecuted is properly excluded, since it is no defense that others have not been penalized or the law not enforced as to them.

8. **Municipal Corporations § 34—**
A municipality's evidence tending to show the valid adoption of a municipal zoning ordinance, that the lands of defendant lay within a zone restricted to residential use in which fences of a height of more than four feet on the frontage were prohibited, and that defendant was using his premises for a junk yard surrounded by a fence in excess of the maximum height permitted, *held* sufficient to overrule nonsuit in the municipality's action to enforce the ordinance.

APPEAL by plaintiff, City of Gastonia, from *McLean, J.*, 9 January 1967, Civil Session, GASTON Superior Court.

The City of Gastonia instituted this action, and the additional plaintiffs were, upon their motion, permitted to intervene. They have done so and have adopted the pleadings filed by the City.

The allegations of the complaint are summarized below:

On 5 January 1965, the plaintiff, through its City Council, duly adopted a new zoning ordinance which designated the uses to which the various sections of the City could be put. It included the corporate limits of the City and the perimeter of one mile beyond the limits. Those sections zoned R-15 were restricted to residential use and prohibited the establishment and maintenance of business enterprises therein. The use of fences more than four (4) feet in height was forbidden.

The defendants, Hugh W. Johnston and wife, are the owners of a tract of land lying within the one-mile perimeter, and it has been rented to the defendant Parrish and is being used by him as a junk yard. He has constructed a fence some seven (7) to eight (8) feet in height which surrounds the property. The defendants were notified that this use of the property was in violation of the zoning ordinance and were ordered to desist.

Upon their refusal to do so, this action was instituted to compel observance of the ordinance, the City seeking a mandatory injunction to forbid the further use of the property in violation of the zoning law.

The defendants denied practically all of the City's material allegations, and issues were joined.

At the trial, the City offered evidence tending to support the allegations, but at the conclusion thereof the Court sustained the defendants' motion for judgment as of nonsuit, and the plaintiff appealed.

J. Mack Holland, Jr., and Charles D. Gray, III, Attorneys for City of Gastonia, plaintiff appellant.

Childers and Fowler by H. L. Fowler, Jr., Attorneys for defendant appellees.

PLESS, J. In order to prevail, plaintiff must first show that the zoning ordinance of 5 January 1965 was legally adopted by the Gastonia City Council and that it is valid. Taken in the light most favorable to it, it has offered evidence which tends to show:

That the ordinance (Plaintiff's Exhibit A) was unanimously adopted by the Council 5 January 1965, which was later printed in book form and was certified by the City Clerk;

The ordinance made a map showing the zoned territory a part of it;

The above map has been lost and cannot, after due and diligent search, be found;

A map made by a tracing process which is called Kronaflex (Exhibit A-2) was introduced as substantive evidence upon oral testimony that it was an accurate copy of the lost original map;

This map showed the zoned territory, and the type of zoning, of the City of Gastonia and a perimeter extending one mile outward from the city limits.

The map was properly admitted under the best evidence rule. "Evidence that a record or document had been lost and could not be found after due diligence or had been destroyed, is sufficient foundation for the admission of secondary evidence thereof, either by introducing a properly identified copy thereof, or parol evidence of its contents." 2 Strong's N. C. Index, Evidence, § 26.

G.S. 160-272 provides that all printed ordinances duly certified by the town clerk shall be admitted in evidence in all courts; and "(w)hen it is shown that a zoning ordinance has been adopted by the governing board of a municipality, there is a presumption in favor of the validity of the ordinance and the burden is upon the complaining property owner to show its invalidity or inapplicability. *Raleigh v. Morand,* 247 N.C. 363, 100 S.E. 2d 870." *Helms v. Charlotte,* 255 N.C. 647, 122 S.E. 2d 817.

Upon the evidence summarized above and upon the authorities cited, we hold that the ordinance was properly admitted and is presumed to be valid.

The next requirement of the plaintiff is that it show that the property owned by the defendants, Hugh W. Johnston, and wife, and now rented by them to their co-defendant George Parrish, lies within the zoned area.

The ordinance provides (Section 25-50):

"Territory within perimeter.

"This ordinance shall be applicable not only within the corporate limits of the City but also within the territory beyond the corporate limits, as now or hereafter fixed, for a distance of one (1) mile in all directions."

The ordinance also included the following provisions:

"Within the R-15 . . . zones . . . the following regulations shall apply:

"(a) Permitted uses:

"(1) Single-family dwellings."

It also permits other uses not applicable here.

Another provision of the ordinance is: "No building or land shall be used or occupied . . . except in conformity with the regulations herein for the zone in which it is located."

Another provision was: "No fence more than four (4) feet in height shall be permitted in a front yard," and one more than six feet high is forbidden.

The City offered the evidence of Samuel L. Wilkins, City Engineer of Gastonia, who testified that he graduated from North Carolina State University with a B.S. degree in Civil Engineering; that he began part-time surveying in 1958 and has continued to survey periodically since that time; that on 6 January 1967 he measured from the city limits to the Johnston property and found that it was 3,789.92 feet from the city limit points on the Shannon-Bradley Road to the northeast property line of the defendant. He testified that the defendants' property was within the one-mile perimeter and that the map marked Exhibit A-1 fairly and accurately represents the same area and the same lines and markings as Plaintiff's Exhibit A-2. The latter had already been properly admitted as substantive evidence. *McKay v. Bullard,* 219 N.C. 589, 14 S.E. 2d 657. This evidence rendered the map A-1 competent for illustrative purposes, at least. At this point the record is not entirely clear as to the ruling of the Court, but it appears that the map was admitted for illustrative purposes.

The testimony of Morris D. McManama was that he owns the Hospitality Motel which lies beyond the city limits but is within the zoned perimeter; that his motel is approximately six hundred feet west of the Shannon-Bradley intersection and has about two hundred four feet of frontage on the south side of the Kings Mountain Highway; that he is familiar with the zoning ordinance and that his motel is in an R-15 Single Family Residential Zone. "The zoning classification for property one thousand feet west of the Hospitality Motel . . . is R-15 Single Family Residential Zone.

. . . The western line of my property is the eastern line of the adjoining property belonging to the Defendants . . . The physical improvements and general layout of the Defendant's property can be described as follows: It is a three-cornered tract on the south side of the Kings Mountain Highway. It has a frontage of approximately 550 feet along the road, runs about 300 feet on the east side and follows the creek from there to the road, . . ." The above evidence was admitted without objection and shows that the defendants' property occupies five hundred fifty (550) feet of the road frontage west of the witness' while the zoning regulations extend one thousand (1000) feet in that direction.

The evidence of Mr. Wilkins was competent since he was testifying as to the result of a survey made by him, and the testimony of Mr. McManama was competent since he had personal knowledge of the location of the defendants' property and the limits of the zoned area.

In *Gahagan v. Gosnell,* 270 N.C. 117, 153 S.E. 2d 879, the surveyor was permitted to testify that the plaintiff's lands lie west of a line shown on the map and that the lands of the defendant lie to the east of the line. In *Berry v. Cedar Works,* 184 N.C. 187, 113 S.E. 772, similar evidence was held to be "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," and such testimony does not invade the province of the jury.

Mr. McManama also testified that the defendants' property "has a fence made of vertical boards . . . being from eight to ten feet in height . . . — in a ragged height; they are not even. Then it continues as a wire fence to the property line approximately eight feet high. . . . [A]bout a month after the fence was built, there were three wrecked automobiles put on the property. As of Thursday of last week, there were fifteen wrecked automobiles on the property. . . . I have seen him [Parrish] working on the cars out there — moving in and out . . . parking them and working on them — taking parts out. The cars located on the Defendant's property in question were wrecked automobiles."

The General Assembly of 1949 (Chapter 700) authorized the City of Gastonia to pass zoning ordinances covering the area within one mile of the city limits, and the first zoning ordinance was adopted by the City under its authority. This act was amended in 1963 (Chapter 486), but it did not change the provisions regarding

the one-mile zoning jurisdiction outside the corporate limits, and the 1965 ordinance is authorized by both acts.

G.S. 160-179 provides that where any land is used in violation of any zoning ordinance, the municipal authorities may institute an action to restrain the violation.

The defendants attempted to show by the cross examination of the plaintiff's witnesses that in some two or three instances zoning regulations had not been enforced or that they were being violated and that the City had taken no action to stop the violators. The plaintiff's objections to the questions of this type should have been sustained. It is no defense to a criminal charge nor to one of this type that others have not been penalized or the law enforced as to them. To permit evidence of other violations would result in the trial of their merits rather than the proper determination of a case then being tried.

In *State Bar v. Frazier,* 269 N.C. 625, 153 S.E. 2d 367, the respondent complained "that he had been singled out for prosecution; that others have been guilty of unethical conduct who have not been punished . . . and, in effect, because all have not been prosecuted and punished, he should not be. . . . The fallacy of this position is apparent from a statement of his contentions." By analogy it may be said here that it is no defense to the defendants' alleged violation of the zoning ordinance that action has not been taken as to other violators.

The plaintiff's evidence, as outlined herein, tends to show that a valid zoning ordinance included the defendants' property which is being used in violation of it. This makes a case for the jury and will, if accepted, support the remedy sought by the City.

There was ample evidence to repel the motion for nonsuit. Granting it was error. There must be a

New trial.

MRS. MURRELL (IDA) BROWN v. WALTER NESBITT AND ROBERT LEE BROWN.

(Filed 11 October, 1967.)

1. Automobiles § 120—

In order to hold the owner liable for injury resulting from the driver's negligence, it is required that plaintiff not only prove agency but also that the damage complained of was the result of the negligent operation by the agent.

2. Trial § 21—

Contradictions and discrepancies in the evidence are for the jury to resolve and do not warrant nonsuit.

3. Automobiles § 68—

Evidence permitting the inference that some three days prior to the accident in suit the driver had knowledge that the brakes of the truck were defective, that on the day of the accident he drove the truck across an intersection into plaintiff's building, and that immediately after the accident the brake pedal could be depressed to the floorboard, *held* sufficient to be submitted to the jury on the issue of the driver's negligence.

4. Automobiles § 105—

Proof of the registration of a vehicle makes out a *prima facie* case of agency in the registered owner sufficient to support, but not to compel, a verdict against him on the doctrine of *respondeat superior.*

5. Automobiles § 106— Driver must be operating vehicle in course of his employment in order for owner to be liable.

Where there is evidence that the vehicle was registered in the name of defendant owner but also that the owner had surrendered possession to a prospective purchaser who had, in turn, given possession to the driver whose negligence caused the damage, an instruction on the question of *respondeat superior* to the effect that the driver was operating the vehicle as an agent of the owner if he was operating it with the knowledge, consent and approval of the owner is erroneous as being incomplete without a further instruction that it was also required that the driver was operating the truck as an agent of the owner and within the scope of such agency at the time of and in respect to the very transaction under consideration.

6. Appeal and Error § 62—

Even though error relates to a single issue, the Supreme Court, in the exercise of its discretion, may grant a general new trial when it is apparent from the entire record that the ends of justice so require.

APPEAL by defendant Nesbitt from *Mintz, J.*, June 1967 Session of ONSLOW.

Plaintiff alleged that, on June 18, 1966, at approximately 9:10 p.m., defendant Brown, operating a Ford truck owned by and registered in the name of defendant Nesbitt, "ran through the intersection from State Road 1211 across State Road #1001 into the store building" of plaintiff. She alleged her building and "the contents therein" were damaged by the negligence of defendant Brown (referred to hereafter as Brown) in that (1) he operated the truck "in a careless and reckless manner" and (2) "failed to have adequate brakes in good working order sufficient to control said vehicle." She alleged Brown was operating the truck "as the agent of and with the permission, knowledge, and consent of . . . Nesbitt." She alleged that Nesbitt was negligent in that he permitted

the truck to be operated by Brown when he knew, or by the exercise of reasonable care should have known, that the brakes were defective and in such condition "as to be liable to fail at any time and cause serious damage to the property of others," and that such defective condition of the brakes, together with the negligent operation of the truck by Brown, caused damage to plaintiff's property.

Defendants, in separate answers, denied the essential allegations of the complaint.

Evidence was offered by plaintiff and by Nesbitt.

Evidence offered by plaintiff tends to show: Plaintiff's frame building, fourteen by twenty-four feet, had been vacant since April 1966. Prior thereto, it had been rented at $25.00 per month. When the Highway Patrolman arrived, "some pulpwood truck was sitting under the porch of a building where he ran into it." The Patrolman testified: "(I)t had hit the corner of the building and struck the post and it had collapsed on top of the cab of the truck." There was testimony that the building "was nearly totally demolished," and that it could not be repaired and was torn down. There was also evidence as to the monetary loss on account of the damage to the building and to a drink box and showcase for candy.

Plaintiff offered no evidence as to the course and movement of the truck before it struck plaintiff's said building. The following evidence was admitted against Brown but *excluded* as to Nesbitt, *viz.:* The Patrolman testified that Brown told him, in a conversation at the scene of the mishap, that he was the driver of the truck and that "his brakes failed and he couldn't stop," and that earlier in the day when he picked up the truck "he had had to pump the brakes at least once or twice." The Patrolman charged Brown with operating the truck with improper equipment (brakes) and Brown pleaded guilty to this charge.

The court *admitted,* over objection by defendant Nesbitt, the following testimony of the Patrolman: After the accident he tried the brakes on the truck and discovered that "(t)he brake pedal was mashed all the way to the floor." On cross-examination by counsel for Nesbitt, the Patrolman testified that he had no knowledge of having seen the truck prior to this accident; that he had "no personal knowledge of the condition of the brakes at the time of the accident"; and that all he knew was what he found "some time at the accident."

The evidence offered by Nesbitt tends to show: On June 18, 1966, Nesbitt was the registered owner of the 1964 blue Ford truck involved in the accident. Prior to June 18, 1966, the truck had been in Charlie Redding's garage for repairs. Redding repaired the brakes

and muffler system and Nesbitt paid him for this work. At the direction of Nesbitt, Redding turned the truck over to Eddie Lee Wooten, a prospective purchaser, who "wanted to try it out." Before doing so, Redding took the truck out, "road tested it," and "the brakes were working properly." The truck was taken out of Redding's garage by Wooten "over a week before the accident." Wooten had actual or constructive possession thereof from the time he obtained the truck from Redding until the accident on June 18, 1966. Nesbitt did not drive the truck or have possession thereof at any time after Wooten obtained possession from Redding. Brown was not an employee or agent of Nesbitt. Brown was not driving the truck pursuant to any authority or permission to do so from Nesbitt. Whatever authority or permission Brown had to drive the truck was pursuant to an arrangement between him and Wooten.

Nesbitt knew Brown and saw him driving the truck during the week preceding June 18, 1966. With reference to a conversation between Brown and Nesbitt, the record shows that, during the cross-examination of Nesbitt, the following occurred:

"Q. Did he (Brown) report to you that he had been charged three days before the 18th with faulty brakes? OBJECTION BY MR. OLSCHNER (counsel for Nesbitt) AND MR. STRICKLAND (counsel for defendant Brown).

"COURT: Members of the jury, the objection of the defendant Brown is sustained, the objection of the defendant Nesbitt is overruled. Do not consider this evidence as against Brown. (To the witness:) Answer the question.

"Q. Did the defendant Brown tell you or did you find out that three days before the 18th he had been charged with faulty brakes of this same vehicle?

"A. Yes, he tell *(sic)* me.

"Q. He did tell you that?

"A. Yes sir.

"MR. OLSCHNER: I don't believe he has answered the question, your Honor.

"COURT: The question was, 'Did he tell you three or four days before he had been arrested for driving your truck with faulty brakes?'

"A. He did not."

The court submitted and the jury answered the following issues: "1. Was the property of the plaintiff damaged as a result of the negligence of the defendant, Robert Lee Brown, as alleged in the complaint? ANSWER: Yes. 2. Was the defendant, Robert Lee Brown, an agent of defendant, Walter Nesbitt, at the time of the alleged

damage? ANSWER: Yes. 3. What amount, if any, is plaintiff entitled to recover as a result of the damage sustained? ANSWER: 1200.00."

Judgment for plaintiff, in accordance with the verdict, was entered against both defendants. Nesbitt excepted and appealed. Brown did not appeal.

Robert E. Lock for plaintiff appellee.
Joseph C. Olschner for defendant appellant Nesbitt.

BOBBITT, J. Nesbitt excepted to and assigns as error the court's denial of his motion for judgment of nonsuit at the conclusion of all the evidence. This assignment presents, *inter alia,* whether the evidence *admitted* against Nesbitt was sufficient to support a finding that plaintiff's damage was proximately caused by the negligence of Brown, allegedly the agent of Nesbitt.

To establish Nesbitt's liability under the doctrine *respondeat superior,* plaintiff was required to prove, by evidence competent against Nesbitt, that Brown was negligent and that his negligence proximately caused plaintiff's damage. *Branch v. Dempsey,* 265 N.C. 733, 145 S.E. 2d 395; *Edwards v. Hamill,* 266 N.C. 304, 145 S.E. 2d 884.

The Patrolman's testimony that, when he tried the brakes after the truck had struck the building, "(t)he brake pedal was mashed all the way to the floor," is the only portion of plaintiff's evidence admitted against Nesbitt relating to the brakes on the truck. This admitted evidence, whether competent or incompetent, was for consideration in passing on Nesbitt's motion for nonsuit. *Kientz v. Carlton,* 245 N.C. 236, 246, 96 S.E. 2d 14, 21, and cases cited.

Nesbitt's testimony, quoted in our preliminary statement, as to what Brown had told him relating to Brown's arrest for driving with faulty brakes, is contradictory and unclear. However, contradictions and discrepancies in the evidence are to be resolved by the jury. 4 Strong, N. C. Index, Trial § 21.

When the evidence is considered in the light most favorable to plaintiff, the inference may be drawn that the conversation, in which Brown told Nesbitt that he (Brown) had been charged with driving the truck with faulty brakes, occurred three days before June 18, 1966. Too, it may be inferred from the condition of the brakes after the truck struck plaintiff's building, and from the fact the truck left the highway and struck plaintiff's building, notwithstanding there is no evidence the driver (Brown) was under any disability, that the damage to plaintiff's building was proximately caused by the faulty condition of the brakes on the truck.

Although a borderline case, the conclusion reached is that the evidence admitted against Nesbitt, when considered in the light most favorable to plaintiff, was sufficient to support a finding that plaintiff's damage was proximately caused by the negligence of Brown in operating the truck when he knew or should have known that the brakes thereon were faulty.

With reference to the second (agency) issue, the court, in earlier portions of the charge, stated that the burden was on plaintiff to satisfy the jury that Brown was the agent of Nesbitt at the time of the accident. However, the court's final instruction relating to the second issue was as follows: "So, when you come to the second issue, if the plaintiff has satisfied you by the greater weight of the evidence that at the time of the accident Brown was operating the vehicle in question with the knowledge, consent, and approval of the owner Nesbitt, then it would be your duty to answer it, 'Yes.'" Defendant excepted to and assigns as error this (quoted) portion of the charge.

By virtue of G.S. 20-71.1, Nesbitt's testimony that he was the registered owner of the truck made a *prima facie* case of agency sufficient to support, but not compel, a verdict against Nesbitt under the doctrine *respondeat superior* for damages proximately caused by the negligence of the operator thereof. *Lynn v. Clark,* 252 N.C. 289, 292, 113 S.E. 2d 427, 430, and cases cited.

To establish liability under the doctrine *respondeat superior,* 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; *Whiteside v. McCarson,* 250 N.C. 673, 110 S.E. 2d 295; *Duckworth v. Metcalf,* 268 N.C. 340, 150 S.E. 2d 485. As to the necessity of 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. The court in substance charged the jury that Brown was operating the truck as agent of Nesbitt if he was operating it with the knowledge, consent and approval of Nesbitt. This instruction omitted entirely the essential element as to whether Brown was operating the truck as agent of Nesbitt and within the scope of such agency at the time and in respect of the very transaction under consideration.

The error must be considered prejudicial because under Nesbitt's testimony the truck had been delivered into the possession of Wooten, a prospective purchaser thereof; and, to the knowledge of Nesbitt, Brown had been driving the truck of Nesbitt under some arrangement between Brown and Wooten. The determinative question in-

volved in the second (agency) issue was whether at the time and on the occasion of plaintiff's damage Brown was operating the truck as agent of Wooten or as agent of Nesbitt.

We do not consider whether upon the evidence in the present record the court also erred by failing to give an instruction, related directly to the evidence, that it was the jury's duty to answer the agency issue, "No," if they found the facts to be as the evidence on behalf of Nesbitt tended to show. See *Whiteside v. McCarson, supra,* and *Torres v. Smith,* 269 N.C. 546, 153 S.E. 2d 129.

For error in the court's instruction relating to the second issue, and mindful of the dubious purport of certain of the evidence admitted against Nesbitt with reference to the first issue, this Court awards a new trial upon *all* issues arising on the pleadings as between plaintiff and Nesbitt.

New trial.

STATE OF NORTH CAROLINA v. JOE CECIL INGRAM, OTTO SEAWOOD, JR., AND CHARLES ERVIN.

(Filed 11 October, 1967.)

1. **Criminal Law § 124; Larceny § 9; Burglary § 7—**

   In a prosecution under an indictment charging felonious breaking and entering, a verdict of guilty of larceny of goods of a value of more than $200.00 without reference to the indictment is not sufficient to support judgment, and the Supreme Court *ex mero motu* will vacate the judgment and order a new trial.

2. **Larceny § 4; Burglary § 3—**

   An indictment describing stolen property as "merchandise, chattels, money, valuable securities and other personal property" is fatally defective where the proof shows the property to have been eleven rings, since the indictment must describe the property stolen with sufficient particularity to protect defendant from a second prosecution.

3. **Indictment § 13—**

   The office of a bill of particulars is to furnish defendant further information not required to be set out in the indictment, G.S. 15-143, and a bill of particulars cannot cure a fatal defect in an indictment.

4. **Indictment § 15; Criminal Law § 127—**

   The motion to quash is directed only to patent defects in the pleadings, while a motion in arrest of judgment may be directed to patent defects in the pleadings, verdict, or other parts of the record proper.

5. **Indictment § 16—**

   The quashal of an indictment for failing properly to charge an offense will not bar further prosecution.

APPEAL by defendants from *Froneberger, J.*, July 10, 1967 Criminal Session of GASTON.

Defendants Joe Cecil Ingram and Charles Ervin were each charged in separate bills of indictment with the crimes of felonious breaking and entering on one count and felonious larceny of goods of the value of more than $200.00 on another count.

Defendant Otto Seawood, Jr., was charged in a bill of indictment with felonious breaking and entering. The cases were consolidated for trial. Before pleading to the charges in the bills of indictment, each defendant made a motion to quash the bills of indictments. The motions were denied. All defendants then entered pleas of not guilty.

Evidence pertinent to the decision of this case tends to show that on the morning of 3 May 1967, at about 8:45 o'clock, defendants Ingram, Seawood and Ervin entered a jewelry store known as Thomas Jewelers, located in Cherryville, North Carolina. Upon entry, Seawood spoke to Ingram and pointed to the show case containing rings, located at the front of the store. Defendants Seawood and Ervin then moved to another part of the store. Ingram told Mr. Thomas, owner of the store, that he was interested in looking at something for a six-year old girl, whereupon Mr. Thomas turned on the rotating ring case for his inspection. Mr. Thomas then went to the back of the store to answer the telephone. In the meantime, Seawood purchased a set of glasses from a clerk in the store by the name of Mary A. Jarrett, who later testified she saw Ingram with a tray of rings in his hand. Mr. Thomas started to the front of the store, and defendant Ervin stepped in front of him and handed him a Mother's Day card with a dollar bill to pay for it. Mr. Thomas told his wife to give Ervin change. Mr. Thomas testified:

> "Joe Cecil Ingram turned to go out the front door and I went over to look at the show case. I looked in the show case and there was a whole tray of rings missing, and Joe Cecil Ingram had gone out the front door. He had left hurriedly. There was no one else at this ring counter at that time except Joe Cecil Ingram, and I had him in my vision except for the two times that Ervin stepped in front of me. There were eleven rings missing, and they had a total valuation of approximately $878.00. No one paid me for these rings and I did not give anyone permission to remove them."

Ervin and Seawood remained in the store until the police arrived shortly thereafter. Roy Wilson, a truck driver, testified that he picked up Ingram sometime after 9:00 o'clock A.M. on 3 May, 1967 at Clement's Store near Cherryville, and let him out on High-

way 74. Other evidence placed the point where Wilson picked up Ingram to be about a mile outside Cherryville.

Defendant Ingram offered Geraldine McCaskill as a witness, and she testified, in substance, that on 3 May 1967 Ingram was traveling with her from Washington, D. C. to Charlotte. They arrived in Cherryville about one or two o'clock in the afternoon. They were on the way to Charlotte from Washington at around 9:00 o'clock. Defendants offered no other evidence. Defendant Ingram was later arrested in Charlotte.

The jury returned a verdict, as to each defendant, of guilty of larceny of goods of a value of more than $200.00. From judgment entered on the verdict, defendants appealed.

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

Mullen, Holland & Harrell and Thomas H. Morgan for defendants.

BRANCH, J. The record in this case does not show what disposition, if any, was made of the charges of felonious breaking and entering. Defendants' case on appeal states that each defendant was charged in a bill of indictment with the crime of larceny of goods of the value of more than $200.00. The record fails to show an indictment charging larceny of goods of the value of more than $200.00 against defendant Otto Seawood, Jr. The verdict of the jury as to Otto Seawood, Jr., was guilty of larceny of goods of value of more than $200.00.

In the case of *State v. Whitaker*, 89 N.C. 472, the Court, speaking to the insufficiency of the verdict as a basis for judgment, said:

> ". . . It is not sufficiently responsive to the issue; and whenever a verdict is imperfect, informal, insensible, *or one that is not responsive to the indictment*, the jury may be directed to reconsider it with proper instructions as to the form in which it should be rendered. 1 Arch. Cr. Prac. & Pl., 176, note 4; *State v. Arrington*, 7 N.C. 571. (Emphasis added).
>
> "But if such a verdict is received by the court and recorded, it would be error to pronounce judgment upon it. The most regular course would be to set aside the verdict and order a *venire de novo*."

The Court considered the same point in *State v. Brown*, 248 N.C. 311, 103 S.E. 2d 341, where the defendant was charged under an indictment with unlawful possession of intoxicating liquors con-

trary to the form of the statute, and the jury returned a verdict of guilty of possession. Here, the Court stated:

> "It appears upon the face of the record proper that the verdict is insufficient to support a judgment. *S. v. Lassiter,* 208 N.C. 251, 179 S.E. 891. See also *S. v. Shew,* 194 N.C. 690, 140 S.E. 621; *S. v. Barbee,* 197 N.C. 248, 148 S.E. 249. . . .
>
> ". . . the verdict 'Guilty of possession' is without specific reference to the charge, and is insufficient to support a judgment; and defendant is entitled to a *venire de novo.*"

In the instant case the judgment returned was not responsive to the indictment and would not support *any* judgment. The verdict neither refers to the indictment nor uses language to show a conviction of the crime charged in the indictment. The court should not have received the verdict, but since the verdict was received, the verdict and judgment must be vacated. The Solicitor, if he so elects, may send a bill of indictment as to Otto Seawood, Jr., charging larceny of goods of the value of more than $200.00.

Before pleading to the bill of indictment, defendants moved to quash the bills for failure to charge the crimes of larceny of goods of a value of more than $200.00. The bills attacked described the property alleged to have been stolen, taken and carried away as "the merchandise, chattels, money, valuable securities and other personal property, located therein, of the value of $878.25 of the goods, chattels and money of the said Henry J. Thomas."

In the case of *State v. Caylor,* 178 N.C. 807, 101 S.E. 627, the defendant was indicted for larceny of lumber of the value of $200.00, the property of A. T. Dorsey. In holding that the property was sufficiently described in the indictment, the Court stated:

> "The description of an indictment must be in the common and ordinary acceptation of property, and with certainty sufficient to enable the jury to say that the article proved to be stolen is the same, and to enable the court to see that it is the subject of larceny, and also to protect the defendant in any subsequent prosecution for the same offense."
>
> "The rule is that 'where raw material has been exchanged to some extent by labor, it may nevertheless still be called by the name of the material, provided it has not been wrought into a new substance with a specific name to designate it. When, however, the product has a specific or distinguishing name, that name must be used to describe it.' "

Again considering an indictment for stealing "fifty pounds of flour, of the value of sixpence," this Court in the case of *State v.*

Harris, 64 N.C. 127, held that the description of the property was adequate, and stated: "The object of describing property stolen, by its quality and quantity, is that it may appear to the court to be of value. The object of describing it by its usual name, ownership, etc., is to enable the defendant to make his defense, and to protect himself against a second conviction."

The case of *State v. Campbell,* 76 N.C. 261, presented the question of whether the proof was at variance from the indictment for larceny. In holding that the proof and indictment were not at variance, the Court states:

> "The description in an indictment must be in the common and ordinary acceptation of property and with certainty sufficient to enable the jury to say that the article proved to be stolen is the same, and to enable the court to see that it is the subject of larceny and also to protect the defendant by pleading *autre fois convict* or *autre fois acquit* in the event of future prosecution for the offense, so that there may be no doubt of its identity; and the evidence must substantially correspond with the description in the indictment. . . . The description must still be in a plain and intelligible manner and must correspond to the different forms of existence in which the same article is found. In its raw or unmanufactured state it may be described by its ordinary name, but if it be worked up into some other forms, etc., when stolen, it must be described by the name by which it is generally known."

The defendant contended that the indictment was defective in the case of *State v. Patrick,* 79 N.C. 655, because the property alleged to have been stolen in the bill of indictment was insufficiently described. The bill of indictment described the property as "one pound of *meat* of the value of five cents." The Court, holding the indictment defective, stated: ". . . in an indictment for larceny, the property which is alleged to have been stolen should be described with reasonable certainty; and a charge of stealing *meat* which applies only to the flesh of all animals used for food, but in a general sense, to all kinds of provisions, is too vague and uncertain. . . . Such articles have more specific names in commerce and in the country, which ought to be employed in criminal proceedings."

In the case of *State v. Strickland,* 243 N.C. 100, 89 S.E. 2d 781, the indictment charged larceny and receiving stolen goods knowing them to have been stolen, which described the property in each count as "a quantity of meat," of a specified value belonging to a designated company. In holding this to be an insufficient description of

the property to meet constitutional requirements, the Court, speaking through Parker, J. (now C.J.) said:

> "Art. I, Sec. 11, of the North Carolina Constitution, guarantees to every person charged with crime the right to be informed of the accusation against him. This constitutional guarantee is a substantial redeclaration of the common law rule requiring the charge against the defendant to be set out in the warrant or indictment with such exactness that the defendant can have a fair and reasonable opportunity to prepare his defense, can avail himself of his conviction or acquittal as a bar to subsequent prosecution for the same offense, and can enable the court, on conviction, to pronounce sentence according to law. *S. v. Jenkins,* 238 N.C. 396, 77 S.E. 2d 796; *S. v. Green,* 151 N.C. 729, 66 S.E. 564; *S. v. Lunsford,* 150 N.C. 862, 64 S.E. 765; 42 C.J.S., Indictments and Informations, Sec. 90. This right of the accused is a substantital right that may not be ignored, and not a mere technical or formal right. *People v. Green,* 368 Ill. 242, 13 N.E. (2d) 278, 115 A.L.R. 348."

Neither does G.S. 15-143, which enables a defendant to call for a bill of particulars cure a defect in the bill of indictment. This section applies only when further information not required to be set out in the indictment is desired. *State v. Cox,* 244 N.C. 57, 92 S.E. 2d 413.

It is of interest to note that most of the cases referred to above concern motions to arrest judgment. A motion to arrest judgment and motion to quash serve the same purpose. A motion to arrest has a somewhat broader scope, since it may be directed to patent defects in the pleadings, verdict, or other part of the record. The motion to quash is directed only to patent defects in the pleadings. *State v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663.

The proof offered by the State showed that the personal property alleged to have been stolen and carried away consisted of eleven rings with a total value of approximately $878.00. The description of this property by the general and broadly comprehensive words, "merchandise, chattels, money, valuable securities and other personal property" is not sufficient. The property was not described in the name generally applied to it in the trade, and in common language. Nor was the description sufficient to enable the jury to say that the article proved to be stolen is the same, or such that the defendant could avail himself of his conviction or acquittal as a bar to subsequent prosecutions for the same offense.

The trial court erred in not quashing the bills of indictment which sought to charge felonious larceny. Although these indict-

ments are fatally defective so as to vacate the verdict and judgment below, they will not serve to bar further prosecution if the Solicitor elects to proceed upon a sufficient bill of indictment. *State v. Barnes,* 253 N.C. 711, 117 S.E. 2d 849; *State v. Strickland, supra; State v. Miller,* 231 N.C. 419, 57 S.E. 2d 392.

Reversed.

STATE v. FRANKLIN D. WOODY.

(Filed 11 October, 1967.)

1. **Criminal Law § 23—**

A defendant, through counsel, may plead guilty to less degrees of the same crimes charged in the indictments against him, and the State may accept such pleas. G.S. 15-170.

2. **Criminal Law § 138—**

In sentencing a defendant upon his plea of guilty, it is not required that any evidence heard before the court before entering judgment be transcribed, since an appeal from the judgment will bring up for review only whether the facts charged, which defendant has himself admitted, constitute an offense punishable under the laws and the Constitution, and whether the sentence is within the punishment allowed for the offense.

3. **Criminal Law § 23—**

Defendant's counsel entered pleas of guilty upon his trial some three months after he had been bound over, and on the date, as an indigent, he had been appointed counsel by the court, with nothing in the record to show or suggest that defendant's attorney did not have ample time to prepare any defense defendant may have had, and it appeared that neither defendant nor his attorney requested the court to allow him more time to prepare his defense, the pleas of guilty being to mere misdemeanors upon indictments charging felonies. *Held:* The question of defendant's right to continuance not having been raised in the trial court, may not be raised on appeal in the Supreme Court.

4. **Attorney and Client § 3; Criminal Law § 23—**

Generally speaking, the legal profession is composed of honorable men who are fair and candid in their dealings with the court, and it will be presumed, nothing else appearing, that an attorney in entering pleas of guilty to misdemeanors on charges of felonies was duly authorized to do so by his client, and a defendant will not be allowed to contend for the first time on appeal that his attorney was without authority to enter the pleas of guilty.

5. **Criminal Law § 134—**

On defendant's pleas of guilty to non-felonious breaking and entering and non-felonious larceny, judgment that the defendant be imprisoned for

a term not less than two years, with recommendation that he be assigned under the work-release program, is not ambiguous, it being apparent that the court consolidated the two pleas for a single judgment, and that the judgment on the consolidated pleas was definite and certain.

APPEAL by defendant from *Brock, S.J.*, 8 May 1967 Special Criminal Session of CLEVELAND.

Criminal prosecution on an indictment with two counts: The first count charges the defendant on the 26th day of December, 1966, with feloniously breaking and entering a certain storehouse and building occupied by The Stamey Company, Inc., a corporation, with intent to take, steal, and carry away the chattels, money, valuable securities, and other personal property therein, a felony and a violation of G.S. 14-54; the second count in the indictment charges the defendant on the same date and in the same place, after having feloniously broken and entered a storehouse and building occupied by The Stamey Company, Inc., a corporation, with the larceny of property of said corporation in the said building, a felony, *S. v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91.

The defendant was an indigent and upon his request the court appointed J. A. West, a member of the Cleveland County Bar, to represent him in said trial.

When the case was called for trial, the defendant by his court-appointed attorney entered a plea of guilty of non-felonious breaking and entering and guilty of non-felonious larceny, both offenses being misdemeanors, G.S. 14-54 and G.S. 14-72, which plea the solicitor for the State accepted.

From a judgment upon the two counts that the defendant be imprisoned for a term of not less than two years, with a recommendation of the court that the defendant be granted the privilege of serving the sentence under the work-release program as provided by law, he appeals.

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

J. A. West for defendant appellant.

PARKER, C.J. Defendant through his counsel pleaded guilty to a less degree of the same crimes charged in the indictment against him, which plea was accepted by the State. This is authorized by G.S. 15-170 and cases cited thereunder.

Defendant insisted that his case be appealed to the Supreme Court. Upon his request the same counsel was appointed by the

court to represent him on the appeal, and the record in the case and his brief were mimeographed in the same fashion as if he were the richest man in the State, at the expense of the taxpayers.

The record states that evidence was offered by both the State and the defendant, but it was not taken down by the court reporter. The defendant on appeal assigns that as error. This assignment of error is overruled.

Defendant did not ask that the evidence be taken down. In *S. v. Perry,* 265 N.C. 517, 144 S.E. 2d 591, the Court said:

> "This is said in 21 Am. Jur. 2d, Criminal Law, § 495, p. 484: 'By a plea of guilty a defendant waives the right to trial and the incidents thereof, and the constitutional guaranties with respect to the conduct of criminal prosecutions.' To the same effect, 22 C.J.S., Criminal Law, § 424(6). In *S. v. Wilson, supra* [251 N.C. 174, 110 S.E. 2d 813] it is said: 'Defendant's plea of guilty was equivalent to a conviction of the offense charged, and no other proof of guilt was required.' *S. v. Smith,* 265 N.C. 173, 143 S.E. 2d 293, quotes *S. v. Warren,* 113 N.C. 683, 684, 18 S.E. 498, 498, as follows: 'The defendant having pleaded guilty, his appeal could not call in question the facts charged, nor the regularity and correctness in form of the warrant. * * * The appeal could only bring up for review the question whether the facts charged, and of which the defendant admitted himself to have been guilty, constitute an offense punishable under the laws and constitution.' To the same effect, 5 Wharton's Criminal Law and Procedure (Anderson Ed. 1957), § 2247, p. 498."

See also *S. v. Caldwell,* 269 N.C. 521, 153 S.E. 2d 34.

In addition, if hereafter it should become necessary for the evidence to be reproduced, it can be made up from the testimony of the witnesses who testified in the trial. See *S. v. Roux,* 263 N.C. 149, 139 S.E. 3d 189; *Griffin v. Illinois,* 351 U.S. 12, 100 L. Ed. 891, 55 A.L.R. 2d 1055 (1956).

Defendant's first assignment of error is: "The act of the State in accepting the defendant's guilty plea offered by his Court-appointed attorney without allowing sufficient time to prepare a defense, and without ascertaining whether or not the defendant personally wished to enter such a plea."

The record shows the following facts: On 26 December 1966 K. Wilbur Costner, a justice of the peace in Cleveland County, issued a warrant for the arrest of the defendant charging him with the same offenses set forth in the indictment in the case, except that the second count in the warrant charged defendant with the larceny of

the goods and chattels of The Stamey Company of the value of less than $100 and did not charge that the larceny was committed after a felonious breaking and entering into the building. The defendant was bound over by the recorder's court of Cleveland County to the Superior Court of Cleveland County on said warrant. At the 8 May 1967 Special Criminal Session of Cleveland, an indictment was returned a true bill by the grand jury of Cleveland County. On 8 May 1967 defendant filed with the Superior Court an affidavit that he was an indigent, and on the same day the Honorable Walter E. Brock, judge presiding, appointed J. A. West of the Cleveland County Bar to represent him. On the same day, to wit, 8 May 1967, the defendant entered a plea as set forth above. There is nothing in the record to show or to suggest that defendant's attorney did not have ample time to prepare any defense defendant may have had. The question was not raised at the trial. Neither defendant nor his attorney requested the court to allow him more time to prepare his defense. If either had done so, we are confident that the learned and experienced trial judge would have given them such permission. What is said in *S. v. Hodge,* 267 N.C. 238, 147 S.E. 2d 881, is relevant here:

> "The four hours during which Messrs. Eudy and Burke (the defendants' attorneys) had access to their court-appointed clients most probably would not have been sufficient time in which to prepare a contested case for trial. *Prima facie,* however, it was sufficient time for defendants to decide whether they should enter a plea or contest the charges. They themselves had had two and a half months to consider the matter. The record is devoid of any suggestion that defendants needed more time either to prepare a defense or to present evidence in mitigation of punishment. They did not ask for a continuance, nor do they now contend that one would have profited them. Counsel for a defendant 'caught in the act' or against whom the State has an 'air-tight case' has no duty to advise him against entering a plea of guilty merely to delay the day of judgment. Frequently such advice would be a great disservice to the defendant, for trial judges are often inclined to reward the truth, which they consider the best evidence of repentance. Furthermore, time spent in jail awaiting trial will not be credited on the sentence imposed and need not be considered by the judge in fixing his punishment."

There is no merit in the assignment of error that the act of the State in accepting the defendant's guilty plea offered by his court-

appointed attorney did not allow him sufficient time to prepare a defense.

There is nothing in the record to indicate or suggest that defendant was young and inexperienced, or that he did not understand and consent to the entry of the plea of guilty of lesser offenses. Defendant was tried on an indictment containing two counts. If he had been found guilty as charged, the court could have imposed a maximum sentence of 10 years on each count, amounting to 20 years. The State accepted his plea of guilty to the above-stated misdemeanors which would have allowed the court to impose a maximum sentence of two years on each count, amounting to only four years.

This Court would find itself under an avalanche of frivolous appeals from criminal convictions if it were to allow a defendant to attack for the first time in an appellate court his own plea of guilty entered by and through the advice and assistance of competent counsel, when this attack is made simply because the trial court saw no need to examine him for the purpose of ascertaining whether he actually intended to plead guilty originally and whether he still freely assents thereto. Though it is a good practice and it would be considered proper in all respects, it is not a prerequisite to the sustaining of a conviction based upon a guilty plea that the trial judge so examine the defendant because it is to be presumed that no honorable lawyer would enter such a plea in behalf of his client unless the client authorized him to do so. Generally speaking, the legal profession is composed of honorable men who are fair and candid in their dealings with the court. Defendant's first assignment of error is overruled.

Nevertheless, due to the ever-increasing burden placed upon this Court to rule upon the countless petitions for a review of the constitutionality of criminal convictions, it would be well, though not mandatory, for every trial judge in this State to interrogate, as most of our trial judges do, every defendant who enters a plea of guilty in order to be sure that he has freely, voluntarily and intelligently consented to and authorized the entry of such plea. However, we wish to make it clear that any failure on the part of the trial judge to follow this recommended procedure in cases of this nature would not be fatal to the conviction. The members of the Bar have a particular interest in encouraging the continuance of this practice because many of these petitions for post conviction review or for a writ of *habeas corpus* include, as a last resort when all other possible grounds for relief have been exhausted, an attack upon the court-appointed counsel in the form of an assertion that the guilty plea was entered without the consent and authorization of the defendant. Petitions setting forth claims of this nature are in most

cases filed by hardened criminals with lengthy records and are no more than an attempt by such individuals to get the attention of the appellate courts and exploit the absolute right of appeal which is furnished them at the expense of the State. The upshot of such petitions is that the court-appointed counsel is practically placed on trial himself and is required to appear in a State or Federal court to answer charges. The result is that many competent lawyers are reluctant to appear in behalf of criminal defendants and will only do so under the compulsion of an appointment by the court because of the embarrassment likely to be produced by such post conviction review proceedings. Frequently, when a competent attorney has employed with diligence every honorable means at his disposal in the representation and defense of his client both in the court below and on appeal, the only gratitude which he receives is that the defendant as a last resort attacks his professional competency and integrity. Most often, such an attack has no basis in fact or in law and is tending to cast the administration of the criminal law into disrepute.

Defendant assigns as error that the sentence is ambiguous. This assignment of error is overruled. It is manifest that the court consolidated the two pleas of guilty for one judgment, and the judgment is imprisonment for a term of not less than two years, which means that at the expiration of the one sentence, giving the defendant the benefit of any good time he may have earned, the defendant will be released. In addition to that, the court extended mercy to the defendant in recommending that he be granted the privilege of serving the sentence under the work-release program.

This is another example of frivolous appeals, without merit, taken by indigent defendants simply because they have the absolute right of appeal and it does not cost them anything. Such abuse of the right of appeal by indigent defendants is costing the taxpayers of this State more to pay lawyers to represent them and to pay for mimeographing their cases on appeal and the briefs of their counsel than it costs the State to prosecute them. No wonder there is in our midst a nationwide growth of contempt for law and order which is plaguing our present-day society.

Defendant's plea of guilty amply supports the judgment of the court. No error of law appears on the face of the record proper. In the trial below we find

No error.

JESSIE JAMES LOWE v. CLAUDE FUTRELL, TRADING AS FUTRELL FARM EQUIPMENT COMPANY, AND PERRY WILSON DRAPER.

(Filed 11 October, 1967.)

1. Automobiles § 16—

Although G.S. 20-149(b) does not apply to a motorist overtaking and passing another vehicle within a business or residential district, such motorist remains under the common law duty to exercise due care, which may require him to sound his horn in overtaking and passing a bicycle or other vehicle when the rider or driver thereof has not looked back and has given no awareness of the overtaking vehicle.

2. Automobiles § 54—

Evidence failing to show that the *locus* was within a business or residential district and tending to show that defendant attempted to overtake and pass a bicycle traveling in the same direction without giving warning by horn or other device, and that the vehicles collided as the automobile was in the process of passing the bicycle, *held* sufficient to take the issue of negligence to the jury, assuming for the purpose of nonsuit that the *locus* was not within a business or residential district.

3. Negligence § 26—

Nonsuit is properly granted on the ground of plaintiff's contributory negligence where plaintiff's own evidence reasonably permits no other inference.

4. Automobiles § 39—

A bicycle is a vehicle and its rider is a driver within the meaning of the Motor Vehicle Law. G.S. 20-38(38).

5. Automobiles § 85—

Plaintiff's evidence tending to show that he, a 69 year old man, was riding his bicycle, in the afternoon, on the righthand side of the paved portion of a highway, and that as an automobile was overtaking and passing him he suddenly turned to his left and started toward the center of the highway in an attempt to cross it, without looking to his rear to see if the movement could be made in safety, *held* to disclose contributory negligence on his part as a matter of law.

APPEAL by plaintiff from *Fountain, J.*, at the January 1967 Session of NORTHAMPTON.

The plaintiff sues for damages for personal injuries alleged to have been sustained by him as the result of a collision, in the Town of Rich Square, between the bicycle upon which he was riding and an automobile owned by the defendant Futrell and driven by the defendant Draper. He alleges that Draper was negligent in that he drove the automobile at an excessive speed, failed to keep it under proper control and failed to sound the horn or give other warning as

he approached, overtook and ran into the rear of the bicycle. The defendants deny any negligence on their part and allege, alternatively, that the plaintiff was guilty of contributory negligence in that he suddenly turned his bicycle to his left and into the path of the automobile without looking and without giving any warning of his intent to turn.

It is stipulated that the collision occurred within the Town of Rich Square, and it is admitted in the answer that Draper was driving the automobile in the course of his employment by Futrell, its owner, that the plaintiff was riding his bicycle eastwardly on his right side of Highway 305, that the automobile was also proceeding eastwardly on the same highway, that the two vehicles collided and the plaintiff sustained some injury as a result.

At the conclusion of the plaintiff's evidence, the defendants moved for judgment as of nonsuit. The motion was allowed and from such judgment the plaintiff appeals, his only assignment of error being the granting of such motion.

The material portions of the evidence introduced by the plaintiff, other than that relating to the extent of his injuries, are:

Testimony of the Chief of Police: At the point of collision, the paved portion of the highway is 20 feet wide and has shoulders about six feet wide. It is straight and level. The posted speed limit is 35 miles per hour. The shoulders are grass covered and level. At the time of the collision, the weather was clear and the highway dry. The plaintiff's home is on the north [his left] side of the highway. A driveway leads to it from the point of the collision. There are several homes in the vicinity on both sides of the highway, and in both directions from the point of the collision. The plaintiff told the officer that he did not see any car coming and he turned out into the road to go to his home and the car hit him.

Testimony of the plaintiff: "I am 69 years old and retired. On July 24, 1964, at about three o'clock in the afternoon, I was traveling on the right-hand side of the paved portion of the highway. * * * As I traveled east toward Ahoskie, I met a car coming from the opposite direction just as I approached my driveway. Just as I started to turn toward the center of the highway to enter my driveway on the left side of the highway, I was struck from the rear by defendant's automobile. * * * When Perry Draper came up behind me, he ran into me and threw my wheel (bicycle) down and knocked me down on the highway. I was about two feet from the right edge of the highway when I got hit. I did not tell Mr. Hinton Joyner [the Chief of Poilce] * * * that I turned my bicycle from the shoulder of the highway directly across the highway. I was on the right edge of the pavement and I did not look back before I

started to turn to my left, but Perry Draper hit me before I had got two feet to my left. * * * I was not thinking, and I did not look back to see if I could get across the highway with safety, but Perry Draper ran over me on my right side of the road when I was still on my right side of the highway. * * * Mr. Draper did not blow his horn before he hit me, do I would have heard it, and I would not have turned."

Testimony of plaintiff's daughter: "On July 24, 1964, at about three o'clock in the afternoon * * * I saw my father riding his bicycle on the right-hand side of the highway coming from the Rich Square direction toward his driveway. My father stopped for the car meeting him to pass and, as my father started to turn toward the driveway, Mr. Draper's car struck him. My father was about four or five feet from the right-hand dirt shoulder when he was struck. I did not see defendant Draper until he was right on my father, but I did hear tires sliding and squealing. Mr. Draper did not blow his horn before he hit my father. I ran to the highway and my father was lying motionless in the middle of the highway, bleeding at the mouth and about the face."

Jones, Jones and Jones for plaintiff appellant.
V. D. Strickland for defendant appellees.

LAKE, J. Taking the plaintiff's evidence to be true, resolving all conflicts therein in his favor, and considering it in the light most favorable to him, together with all inferences in his favor which may reasonably be drawn therefrom, it is sufficient to show that the defendant Draper, driving the automobile of his employer in the course of his employment, overtook the plaintiff's bicycle and attempted to pass it without blowing the horn or otherwise giving warning of his approach. However, it also leads inescapably to the conclusion that the adult bicyclist, familiar with the area and with the highway, after riding for an undisclosed distance eastwardly on the right-hand edge of the pavement, at three o'clock in the afternoon, turned his bicycle to his left and started toward the center of the road, with intent to cross it, without ever looking to his rear to see if the movement could be made in safety, the automobile driven by Draper being then practically upon him and in plain view.

Interpreting the plaintiff's evidence in the light most favorable to him, we assume that the point of collision was not a residence district, as that term is defined in the Motor Vehicle Law, and that, consequently, G.S. 20-149(b) applies. As amended in 1959, this statute provides:

> "The driver of an overtaking motor vehicle not within a business or residence district, as herein defined, shall give audible warning with his horn or other warning device before passing or attempting to pass a vehicle proceeding in the same direction, but his failure to do so shall not constitute negligence or contributory negligence *per se* in any civil action; although the same may be considered with the other facts in the case in determining whether the driver of the overtaking vehicle was guilty of negligence or contributory negligence."

In *Cowan v. Transfer Co.* and *Carr v. Transfer Co.,* 262 N.C. 550, 138 S.E. 2d 228, this Court, speaking through Moore, J., said:

> "The 1959 amendment of G.S. 20-149(b) does not mean that an overtaking and passing motorist is relieved of all duty to give audible warning; it simply means that a failure to give such warning may or may not constitute a want of due care, depending upon the circumstances of the particular case."

If, on the other hand, it be assumed that the point of collision was a residence district, as defined in the Motor Vehicle Law, the foregoing statute would impose upon the defendant Draper no duty to blow his horn, but it would not relieve him of a duty imposed upon him by the common law. The common law imposes upon him the duty to use reasonable care to avoid injury to other persons upon the highway and, for that purpose, to blow his horn if, under like circumstances and conditions, a reasonably prudent driver would have done so. The provision of this statute with reference to a vehicle within a business or residence district was not intended to forbid the overtaking motorist to sound his horn, or to absolve him of the duty to do so, where the circumstances are such that a reasonable man in the position of the overtaking motorist could foresee risk of injury to the person or property of the occupant of the forward vehicle if he undertakes to pass the forward vehicle without such warning. In the absence of a statutory requirement, "a motorist is required, when reasonably necessary, to blow his horn to give warning to travelers ahead." *Guthrie v. Gocking,* 217 N.C. 476, 8 S.E. 2d 607. See also, 8 Am. Jur. 2d, Automobiles, §§ 779, 780.

Evidence that a motorist overtook and, without blowing his horn, attempted to pass a bicyclist, who had not looked back and who had given no other indication of awareness of the overtaking vehicle, is evidence of negligence sufficient to carry that issue to the jury, whether the attempt to pass occurred in a residence district or in open country. See *Webb v. Felton,* 266 N.C. 707, 147 S.E. 2d 219. See also, 60 C.J.S., Motor Vehicles, § 288. Under the circumstances

disclosed by the plaintiff's evidence, interpreted in the light most favorable to him, there is in the present record sufficient evidence of negligence by the defendant Draper, imputed to his employer, Futrell, which was a proximate cause of the injury to the plaintiff, to withstand the motion for judgment of nonsuit so far as the issue of the defendants' negligence is concerned.

However, a nonsuit may properly be granted on the ground of the plaintiff's contributory negligence where his own evidence reasonably permits no other inference. *Short v. Chapman,* 261 N.C. 674, 136 S.E. 2d 40; *Cowan v. Transfer Co.* and *Carr v. Transfer Co., supra; Sheldon v. Childers,* 240 N.C. 449, 82 S.E. 2d 396; *Lyerly v. Griffin,* 237 N.C. 686, 75 S.E. 2d 730.

G.S. 20-154(a) provides, "The driver of any vehicle upon a highway before * * * turning from a direct line shall first see that such movement can be made in safety." In *Cowan v. Transfer Co.* and *Carr v. Transfer Co., supra,* this Court said:

> "A violation of this provision is negligence *per se. Mitchell v. White,* 256 N.C. 437, 124 S.E. 2d 137; *Grimm v. Watson,* 233 N.C. 65, 62 S.E. 2d 538. We held in *Tallent v. Talbert,* 249 N.C. 149, 105 S.E. 2d 426, that failure to look during the last 90 feet before turning constituted contributory negligence as a matter of law. See also *Badders v. Lassiter,* 240 N.C. 413, 82 S.E. 2d 357; *Gasperson v. Rice,* 240 N.C. 660, 83 S.E. 2d 665."

By Chapter 768 of the Session Laws of 1965, subsection (b) of G.S. 20-154, which deals specifically with the signals to be given before turning or stopping, was amended by changing the period at the end thereof to a semi-colon and adding, "and provided further that the violation of this *section* shall not constitute negligence *per se.*" (Emphasis added). We need not now determine whether this proviso was intended to apply to subsection (a), for the collision here involved occurred 24 July 1964, prior to the amendment.

A bicycle is a vehicle and its rider is a driver within the meaning of the Motor Vehicle Law. G.S. 20-38(38). *Van Dyke v. Atlantic Greyhound Corp.,* 218 N.C. 283, 10 S.E. 2d 727.

The paintiff's evidence leads only to the inference that, without looking behind him to see that the move could be made in safety, the plaintiff, an adult, turned his bicycle to the left and into the path of the overtaking vehicle, thereby contributing to the collision and to his own injury. For this reason, the motion for judgment of nonsuit was properly allowed.

Affirmed.

STATE v. CHARLES MASSEY, JR.

(Filed 11 October, 1967.)

1. **Homicide § 6—**

The common-law definition of involuntary manslaughter includes unintentional homicide resulting from the performance of an unlawful act, from the performance of a lawful act in a culpably negligent manner, and from the culpably negligent failure to perform a legal duty.

2. **Automobiles § 110—**

Culpable, or criminal, negligence is something more than actionable negligence in the law of torts; it is such recklessness, proximately resulting in injury or death as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.

3. **Same—**

The intentional, wilful or wanton violation of a safety statute which proximately results in injury or death is culpable negligence; but an unintentional violation of a safety statute, unaccompanied by recklessness or probable consequences of a dangerous nature, is not such negligence as imports criminal responsibility.

4. **Automobiles § 113— Evidence that defendant was driving on the left side of street when he struck child held insufficient, standing alone, to go to jury on involuntary manslaughter.**

The State's evidence tended to show that the defendant, driving on a residential street at approximately 7 p.m. on a foggy, autumn evening, at a speed of about 30 m.p.h., approached a group of children playing on the sidewalk on the right side of the street, that a boy ran out into the street, and that the defendant was operating his car on the left side of the street at the time he struck the boy. *Held:* The evidence was insufficient to withstand nonsuit on charge of involuntary manslaughter, since, in the absence of other evidence surrounding the accident, it cannot be said that defendant's driving on the left side of the street, in violation of G.S. 20-146, constituted culpable negligence or was a proximate cause of the child's death.

5. **Automobiles § 110—**

The mere fact that a pedestrian is killed when struck by an automobile in a public street, nothing else appearing, does not raise an inference of culpable negligence.

6. **Same—**

Failure to keep a proper lookout does not constitute negligence unless the failure is accompanied by dangerous speed or perilous operation.

7. **Automobiles § 131—**

Evidence in this case *held* sufficient to support a charge of failing to stop an automobile after an accident resulting in death of a person. G.S. 20-166.

APPEAL by defendant from *Clarkson, J.*, 30 January 1967 Regular Criminal "A" Session of MECKLENBURG.

Defendant was tried upon a bill of indictment, which charged him with the felonious killing of Michael Frazier. He was convicted of involuntary manslaughter and sentenced to ten years in the State's prison. On appeal, defendant's only assignment of error is that the court erred in denying his motion for nonsuit made at the close of all the evidence.

Attorney General T. W. Bruton by Assistant Attorney General William W. Melvin and Staff Attorney T. Buie Costen for the State.
T. O. Stennett for defendant appellant.

SHARP, J. Both the State and defendant offered evidence. The State's evidence, considered in the light most favorable to it, shows the following facts: Gibbs Street in Charlotte is a 2-lane, 18-foot-wide roadway without curbing. On 26 October 1966, a few minutes before 7:00 p.m., defendant backed his 1959 red-and-white Ford out of a driveway between Persons and Oaklawn on Gibbs Street. He "took off . . . running about thirty miles per hour up the street" toward Oaklawn. In addition to the driver, there were five people in the automobile. It was drizzling, and the weather was foggy. The glass in the back was also "foggy." A group of children, which included Michael Frazier, were playing on the right side of the street on the sidewalk. As defendant's car approached the children, Michael, looking backward, ran out into the street in front of the automobile. James Stover, one of the occupants of the front seat, said to defendant, "Look out, you are going to hit the child." Stover then threw his arm over his face. Defendant applied his brakes, but the car hit the child with a "bump." Stover told defendant he had hit the child. Defendant replied that he knew it but, disregarding the pleas of two of his passengers that he stop, he kept going. The reason he gave was that he had no insurance on his car. Defendant then began to drive crazily, beat on his steering wheel, and to say "maybe he had killed somebody." His speed and manner of driving so alarmed his passengers that they made a concerted effort to get him to stop. After he had driven about four miles, they did prevail upon him to stop and let Stover do the driving. Stover returned three of the passengers to their home, where an inspection of the automobile revealed a dent on the right side of the hood or fender and a crack in the windshield on the right side. Stover then drove defendant to South Carolina. There, after taking the license plate off the car and dropping it into a well, defendant left the automobile in a pasture about 2 miles from Lancaster. Later that night, one of defendant's relatives drove them back to Charlotte.

When the police arrived at the scene of the accident on Gibbs Street at 7:00 p.m., they found Michael 150-200 feet from the intersection of Persons Street. "It was not on the hard surface." The boy was bleeding from his nose and mouth. His teeth were knocked out, and he had injuries on the back of his head. He died about midnight in the hospital.

James Stover, who was riding in the front seat of defendant's automobile at the time it hit the child, testified that defendant was on his right side of the road and that the boy came into the street from the right. John Ford, a pedestrian, who testified that he saw the accident, said that the car was on the left side of the street at the time it struck the boy. Ford said that he was walking on the left side of Gibbs Street, going toward Oaklawn, and that he was almost hit as defendant passed. He said: "I saw the child standing on the side of the street. I didn't see him enter the street. I saw this automobile strike that child. After the automobile struck the child it slowed down, but it didn't come to a complete stop, and then it pulled off again."

Defendant's only evidence was his testimony, which tended to show:

Defendant had no driver's license and no insurance on his car. For that reason, he never drove it when he could obtain a driver. James Stover, and not defendant, was driving the automobile which struck the child. Stover was driving about 25-30 MPH on the right-hand side of the road when the boy, one of a group of 5-6 children, ran into the road in front of defendant's automobile at a time when it "couldn't possibly be stopped." After he hit the child, Stover stopped the car but pulled off immediately. Later that evening they took the automobile to South Carolina.

"The common-law definition of involuntary manslaughter includes unintentional homicide resulting from the performance of an unlawful act, from the performance of a lawful act done in a culpably negligent manner, and from the negligent failure to perform a legal duty." *State v. Stansell,* 203 N.C. 69, 71, 164 S.E. 580, 581. In *State v. Cope,* 204 N.C. 28, 167 S.E. 456, Stacy, C.J., laid down the criteria for determining criminal responsibility in automobile-accident cases. Criminal negligence is something more than actionable negligence in the law of torts; it is such recklessness, "proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *Id.* at 30, 167 S.E. at 458. Under this definition "[a]n intentional, wilful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately

results in injury or death, is culpable negligence. . . . But an unintentional violation of a prohibitory statute or ordinance, unaccompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, is not such negligence as imports criminal responsibility." *Id.* at 31, 167 S.E. at 458; *accord, State v. Tingen,* 247 N.C. 384, 100 S.E. 2d 874.

Measured by the gauge of *State v. Cope, supra,* does the evidence in the case support the jury's verdict of manslaughter? As defendant drove along Gibbs Street, it was his duty to drive on his right half of the street, G.S. 20-146, to drive at a speed which was reasonable and prudent under the existing conditions, and to operate his vehicle at a speed within the maximum permitted by law in a residential area. G.S. 20-141. It was also his duty to keep a careful lookout in the direction of his travel. When he saw — or should have seen — the children beside the street, he had a duty to warn them of his approach, to reduce his speed, and to bring his car under such control that he could stop if one of the children darted into the street. *State v. Gash,* 177 N.C. 595, 99 S.E. 337. Did defendant fail to perform these duties? If so, in what manner did he fail, and was such failure the proximate cause of Michael Frazier's death? To answer these questions, we must first answer others.

At the time he struck the decedent, how far was defendant from the driveway from which he started? How far was the child's body thrown from the hard-surface by the impact? When should defendant, in the exercise of a proper lookout, have seen the children on the sidewalk? Was the street lighted? How old were the children? How old was the deceased? Was it an area in which children should have been expected to be playing on the street at 7:00 on a rainy, foggy night in the latter part of October? Was there anything to obstruct the driver's view of the children as he approached them? Was the center of the street marked by a white line or some other indicium? Where was the impact in relation to the center of the street? The record provides no answers to these questions.

The mere fact that a pedestrian (child or adult) is killed when run over by an automobile in a public street does not make out a *prima facie* case of civil negligence. *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246; *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661. *A fortiori,* it does not give rise to an inference of culpable negligence. *State v. Reddish,* 269 N.C. 246, 152 S.E. 2d 89. Were we to assume — which we may not — that defendant was not keeping a proper lookout, such failure alone would not constitute criminal negligence. "[D]angerous speed or perilous operation" would have

to be added. *Dunlap v. Lee,* 257 N.C. 447, 450, 126 S.E. 2d 62, 65; *State v. Becker,* 241 N.C. 321, 85 S.E. 2d 327.

The evidence discloses that the accident occurred in a residential area. No witness, however, estimated defendant's speed to be in excess of 30 MPH, which is 5 miles below the maximum permitted for a residential district. G.S. 20-141(2). The testimony of the State's witness Ford tends to show that defendant was operating his vehicle on the left side of the 18-foot street at the time he hit the child. If he was, defendant violated G.S. 20-146. For the violation to constitute culpable negligence, however, it must have been a proximate cause of the death of Michael Frazier. *State v. Tingen, supra.* Furthermore, "[i]nadvertently allowing a motor vehicle to encroach upon the wrong side of the road does not in all instances constitute culpable or criminal negligence or a reckless disregard for the safety of others, upon which a conviction for involuntary manslaughter may be based, in the event another is killed as a result thereof." 7 Am. Jur. 2d Automobiles and Highway Traffic § 282 (1963), citing *State v. Stansell, supra; accord, State v. Dupree,* 264 N.C. 463, 142 S.E. 2d 5; *State v. Roop,* 255 N.C. 607, 122 S.E. 2d 363. Assuming the truth of Ford's testimony that defendant was somewhere on the left side of the street when he struck decedent, we may speculate that, had defendant been to his right of the center, the boy would have run into the *side* of the automobile or that he might have traversed defendant's lane and crossed the center, line without being hit, or that defendant might have seen him a split second earlier. A distance of only 9 feet was involved. Considering the deficiencies in the development of the State's case, we cannot say that defendant's driving to the left of the center of the street was either culpable negligence or a proximate cause of the tragic death of Michael Frazier. "Verdicts may not be predicated upon speculation." *Tysinger v. Dairy Products, supra* at 25, 36 S.E. 2d at 251. The court erred when it denied defendant's motion for nonsuit. *State v. Hancock,* 248 N.C. 432, 103 S.E. 2d 491.

Upon the State's evidence, as disclosed by the case on appeal, defendant is guilty of the felony of failing to stop after being involved in a collision resulting in death to a person, G.S. 20-166 and G.S. 20-182. Upon this record he was convicted of the wrong crime. It, however, reveals no reason why the solicitor, if so advised, may not yet put him on trial for a violation of G.S. 20-166.

Reversed.

LELA ROSE McLEAN WHITESIDES v. HENRY MONROE WHITESIDES, SR.

(Filed 11 October, 1967.)

1. Divorce and Alimony § 16—

In an action for alimony without divorce, a judgment, entered by consent of the parties, which orders defendant to make alimony payments to his wife, is valid and is enforceable against the husband by attachment for contempt, notwithstanding the absence of allegations or findings that the separation was caused by the misconduct of the husband.

2. Judgments § 9—

A judgment entered by consent of all the parties is valid and enforceable, although its provisions are outside the issues raised by the pleadings, if the court has jurisdiction of the parties and the matters adjudicated.

APPEAL by plaintiff from an order entered June 7, 1967, by *McLean, J.*, Judge Presiding over the courts of the Twenty-Seventh Judicial District, in chambers, in an action pending in GASTON Superior Court.

Plaintiff instituted this action June 24, 1966, under G.S. 50-16, for (permanent) alimony without divorce, and for reasonable subsistence and counsel fees *pendente lite.*

In brief summary, plaintiff alleged: She and defendant were married on December 23, 1955. Three children were born of their marriage. She and defendant lived together until March 12, 1966, "at which time the defendant separated himself from the plaintiff, and since that time the defendant has failed to provide to the plaintiff and the minor children the necessary subsistence according to the defendant's means and condition in life." "(D)ue to the ages of the children, it is to the best interest of the minor children that their custody be awarded to the plaintiff." She is not gainfully employed and has no assets other than those enumerated in the complaint. Properties owned by plaintiff and defendant and the income of the defendant are set forth in detail.

Answering, defendant denied that, since their separation on March 12, 1966, he had failed to provide plaintiff and the children of the marriage necessary subsistence according to his means and station in life. Except as stated, defendant admitted all of plaintiff's allegations.

The complaint and answer were filed on June 24, 1966, on which date an order was entered by Houk, J., Judge Presiding over the June 20, 1966 Civil Schedule A Session of Gaston Superior Court, which recited the parties, through their counsel, had "stipulated and agreed that it was to the best interest of the plaintiff and the de-

fendant for a permanent order of alimony to be entered," and had filed a written waiver of jury trial. The order provides that the court, "(a)fter considering the pleadings and evidence," makes findings of fact and conclusions of law as set forth therein. Thereafter, the order provides: "By and with the consent of the plaintiff and the defendant, and with the approval of their attorneys of record, IT IS ORDERED, ADJUDGED AND DECREED as follows: 1. Beginning on the 1st day of July, 1966, and on the 1st day of each and every month thereafter, pending further orders of the Court, the defendant shall pay direct to the plaintiff the sum of $1,065.33 per month for the support and maintenance of the plaintiff and the minor children born of the marriage." Further provisions of the order required defendant to make additional mortgage, insurance and tax payments. The order awarded custody of the children to plaintiff and set forth visitation privileges allowed defendant. Plaintiff was awarded the use of the home at 2650 Armstrong Circle, Gastonia, North Carolina, for her benefit and that of the children born of the marriage. The court ordered that defendant pay a fee of $1,000.00 to plaintiff's counsel. Paragraph 11 of said order is in these words: "This Order is more than a simple Consent Order and upon proper cause shown, the Court shall subject the parties to such penalties as may be required by the Court in case of contempt." The order concludes: "This cause is retained pending further orders of the Court." Plaintiff and defendant, both in person and by their then counsel, signed their consent to the court's said order.

On November 14, 1966, defendant, represented by different counsel, filed a motion that the order dated June 24, 1966, be declared null and void on the ground that the complaint does not state a cause of action upon which to predicate a valid judgment; and, if this motion were denied, that said order of June 24, 1966, be modified by reducing the payments for alimony and support because of material changes in circumstances since June 24, 1966. Defendant's said motion came on for hearing before Bryson, J., on November 30, 1966. An order entered by Judge Bryson on that date recites that "the defendant through counsel withdrew the demurrer and proceeded upon his motion to modify the judgment dated June 24, 1966." Thereafter, the court, "after considering the evidence and statement of counsel," made findings of fact and conclusions of law, and based thereon, "ORDERED, ADJUDGED AND DECREED: 1. That paragraph one of said order (of June 24, 1966) be modified as follows: 'That the monthly payments of $1,065.00 be reduced to the sum of $600.00 per month, said payment of $600.00 per month to begin on December 1, 1966.' Except for the monthly payment for

support and maintenance of the plaintiff and minor children, the remaining provisions of paragraph one of said order shall remain in full force and effect." Judge Bryson's order also (1) modified the provision of said order of June 24, 1966, relating to defendant's visitation rights, (2) allowed plaintiff's attorney an additional fee of $500.00, (3) provided that the order of June 24, 1966, except as modified, remain in full force and effect pending further orders of the court, and (4) retained the cause for further orders.

On December 10, 1966, *defendant* filed a motion that plaintiff be cited for contempt for wilful failure to comply with Judge Bryson's order of November 30, 1966, with reference to defendant's visitation privileges. The record does not show what action, if any, was taken with reference to this motion.

On May 12, 1967, defendant filed a motion that said order of June 24, 1966, be declared null and void on the ground the complaint did not state a cause of action on which to predicate a valid judgment; and, if this motion were denied, that said order of June 24, 1966, be modified further because of material changes in circumstances. Simultaneously, defendant filed a paper entitled "Demurrer." This purported demurrer asserts the order of June 24, 1966, should be declared null and void because the complaint contains no allegations and the order contains no factual findings to the effect the separation was caused by misconduct of defendant and without fault on the part of plaintiff.

After a hearing on defendant's purported demurrer, Judge McLean entered a judgment in which it was "ORDERED, ADJUDGED AND DECREED that the defendant's demurrer be, and the same is hereby sustained, and the plaintiff is given thirty days from the date of this judgment in which to file an amended Complaint and the defendant shall have thirty days after the filing of an amended Compaint in which to file answer, demurrer, or otherwise plead."

Plaintiff excepted to Judge McLean's judgment and appealed therefrom.

Sanders, Walker & London and Larry Thomas Black for plaintiff appellant.

Hollowell, Stott & Hollowell and Ernest R. Warren for defendant appellee.

BOBBITT, J. The judgment of June 7, 1967, from which plaintiff appeals, does not refer to the order of June 24, 1966, entered by Judge Houk or to the modification thereof by order of November 30, 1966, entered by Judge Bryson. By sustaining the purported

post-judgment demurrer to the complaint and providing for the filing of new pleadings, Judge McLean seemingly treated as void the prior orders of Judge Houk and Judge Bryson.

Plaintiff did not allege, nor did the court find, either in terms or in substance, that the separation was caused by defendant's misconduct and not by any fault or misconduct on her part. However, whether plaintiff's allegations or the court's findings would be deemed defective if they had been challenged in apt time and in proper manner is not presented. The question for decision is whether the "permanent order of alimony" entered by the court on June 24, 1966, and consented to by the parties and their attorneys, is void on account of asserted deficiencies, if any, in plaintiff's allegations and in the court's findings.

The order of June 24, 1966, is a judgment of the Superior Court of Gaston County, which had jurisdiction of the parties and of the subject matter. It does not merely recite and approve the terms of an agreement entered into between the parties, but *orders* defendant to make the payments and to comply with the conditions set forth therein. *Stancil v. Stancil,* 255 N.C. 507, 121 S.E. 2d 882, and cases cited; *Bunn v. Bunn,* 262 N.C. 67, 136 S.E. 2d 240; 2 Lee, North Carolina Family Law, § 152; 40 N.C.L.R. 530.

In *Edmundson v. Edmundson,* 222 N.C. 181, 22 S.E. 2d 576, plaintiff (husband), simultaneously with the issuance of summons, applied for an extension of time to file complaint, stating the purpose of his action was "(t)o obtain a divorce from the defendant, *a mensa et thoro.*" No pleadings were filed. A judgment was entered, based on consent, in which plaintiff was ordered to make specified payments "(i)n lieu of alimony, or other marital rights or obligations, . . ." Pertinent to the cause of their separation, the court's factual findings were that plaintiff and defendant "lived together as man and wife until 9 June, 1939, . . . that plaintiff and defendant, being unable to live together agreeably as husband and wife, have lived separate and apart since 9 June, 1939, and that differences and disagreements existing between them render it reasonably necessary to their health and happiness that they continue to live separate and apart, . . ." This Court, in opinion by Winborne, J. (later C.J.), stated: " 'Can alimony against the husband be awarded when there is no allegation, evidence or finding that he was the party at fault?' In an adversary proceeding the answer would be, 'No,' but where, as here, the parties acted in agreement and the judgment was entered by consent, the answer is, 'Yes.' " The court quoted with approval this statement from the opinion in *Keen v. Parker,* 217 N.C. 378, 8 S.E. 2d 209: "It is generally held that provisions in

judgments and decrees entered by consent of all the parties may be sustained and enforced, though they are outside the issues raised by the pleadings, if the court has general jurisdiction of the matters adjudicated."

In *Edmundson,* the judgment contained the following provision: "The money payments provided herein shall be more than a simple judgment for debt. They shall be as effectively binding upon plaintiff as if rendered under and by virtue of the authority of section 1667, Consolidated Statutes of North Carolina, and the failure of plaintiff to make the payments, as required by this judgment, shall, upon proper cause shown to the court, subject him to such penalties as may be required by the court, in case of contempt of its orders." It was held valid and enforceable against plaintiff by attachment for contempt. The statute then codified as C.S. 1667, as amended in respects not material to this appeal, is now codified as G.S. 50-16.

In *Edmundson,* three Justices dissented. Devin, J. (later C.J.), and Schenck, J., dissented solely on the ground the *Special* Superior Court Judge who entered the judgment had no authority or jurisdiction to do so after expiration of the term of court at which the matter was heard. Seawell, J., dissented on this ground and also on additional grounds, namely, (1) that the court had no authority to convert the action from an action for divorce from bed and board into an action for alimony without divorce under C.S. 1667, and (2) that the consent judgment was "in reality a judgment for debt" and was not enforceable against plaintiff by attachment for contempt.

Edmundson has been cited with approval in later cases including *Smith v. Smith,* 247 N.C. 223, 100 S.E. 2d 370; *Stancil v. Stancil, supra; Bunn v. Bunn, supra.*

On legal principles stated and applied in *Edmundson,* it is clear the order of June 24, 1966, entered by Houk, J., as modified by the order of November 30, 1966, entered by Bryson, J., is valid *and* is enforceable against defendant by attachment for contempt.

For the reasons stated, the judgment of June 7, 1967, purporting to sustain defendant's post-judgment "Demurrer," is reversed and vacated.

Reversed.

FRED THOMAS ROUSE, JR., MINOR, BY HIS NEXT FRIEND, FRED THOMAS ROUSE, SR., AND FRED THOMAS ROUSE, SR., v. FRED HAMILTON SNEAD, JR.

(Filed 11 October, 1967.)

1. Automobiles § 56—

Evidence favorable to plaintiff tending to show that defendant's speed was excessive, that palintiff's vehicle was disabled but that its lights were burning and visible to approaching traffic, and that plaintiff and his companions were in the process of pushing their disabled vehicle on the straight and unobstructed highway, with its left wheels on the hardsurface only to the extent of some two feet, and that defendant collided with the rear of the disabled vehicle as plaintiff was attempting to get back into the driver's seat, resulting in plaintiff's injury, *held* sufficient to be submitted to the jury on the issue of defendant's negligence.

2. Automobiles § 88—

If plaintiff's own evidence discloses contributory negligence as a sole reasonable conclusion to be drawn from his evidence, nonsuit is proper; if the evidence is such that reasonable minds may differ, the question of contributory negligence must be submitted to the jury.

3. Automobiles § 81— Evidence held not to show contributory negligence as matter of law in pushing disabled vehicle on highway.

The evidence tended to show that plaintiff's vehicle became disabled on the highway at nighttime, but that its lights remained burning, and that he and his companions began pushing the car on the highway, plaintiff being on the left for the purpose of steering, that only the left wheels of the vehicle were on the hardsurface to the extent of about two feet, and that defendant collided with the rear of plaintiff's vehicle and injured plaintiff as he was attempting to get back in the driver's seat in response to a warning of an oncoming vehicle. The evidence further disclosed that the disabled vehicle was in a slight depression, that the highway was straight and unobstructed, and that when plaintiff and his companions began pushing the vehicle there was no other traffic in sight. *Held:* The evidence does not show contributory negligence on the part of plaintiff as a matter of law.

APPEAL by defendant from *Parker, J.*, March 27, 1967 Civil Session, NEW HANOVER Superior Court.

The plaintiffs, Fred Thomas Rouse, Jr., a minor, and Fred Thomas Rouse, Sr., instituted civil actions against the defendant for personal injuries and property damage alleged to have been proximately caused by the negligence of defendant, Fred Hamilton Snead, Jr. The case was before this Court at a former term and is reported in 269 N.C. 623.

The plaintiffs alleged and offered evidence tending to show that on October 2, 1964 a rear-end collision occurred between a 1954 Oldsmobile owned by Rouse, Sr. and driven by Rouse, Jr., and a 1963 Chevrolet owned and driven by the defendant. The collision

occurred near midnight on U. S. Highway 117 in New Hanover County. While Rouse, Jr. was operating the vehicle on the highway, the engine suddenly cut off. He and his two companions were unable to start the motor. They had stopped in a slight depression, but the road was straight for several hundred yards in each direction. Rouse, Jr. and his companions attempted to push the disabled vehicle to a service station further down the highway. The two left wheels were as much as 2 or 3 feet on the highway and the other wheels were on the shoulder. The minor plaintiff was on the left side pushing, and at the same time attempting to manipulate the steering wheel. One of his companions was pushing from the rear and the other from the right-hand side. The defendant drove up from behind and struck the minor plaintiff and the automobile, injuring the minor plaintiff, and damaging the Oldsmobile. The minor plaintiff testified:

> ". . . I made sure all the lights were on, front and back. They were burning very brightly, because the trouble wasn't in my battery. Michael got on the right hand side of the automobile on the shoulder. Sammy Raymor got in the middle of the automobile, and I was at the driver's door. That is on the left side, and we pushed it up on the highway. We had the two left tires of the automobile no more than two feet on the highway. The other two tires on the right side were on the shoulder.
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> Before we started pushing, we noticed there was no cars coming either way, and started pushing it and got the tires about two feet on the highway, and Michael hollered there was a car coming. . . . I tried to get inside the automobile, and before I could the car hit me. When I was struck I was at the driver's door, trying to get in. . . ."

The evidence disclosed that U. S. Highway 117 is a hard surfaced, two-lane highway, 24 feet wide, with shoulders 8 to 10 feet wide. There was a dip which began about 100 feet from the point of impact and which continued for about 400 feet.

At the scene of the accident, the defendant told the investigating officer that he "swerved to avoid striking the vehicle and skidded, slid on the wet pavement". The plaintiffs offered evidence of personal injury and damage to the automobile. At the close of his evidence, the defendant renewed his motions for nonsuit first made at the close of plaintiffs' evidence. To the Court's denials, defendant excepted. The jury answered the issues of negligence, contributory negligence, and damages in favor of the plaintiffs. From judgments on the verdicts, the defendant appealed.

Marshall & Williams by Lonnie B. Williams for defendant appellant.

Aaron Goldberg, James L. Nelson for plaintiff appellees.

HIGGINS, J. The defendant has assigned errors based on numerous exceptions to the admission and exclusion of evidence. Examination of each exception fails to reveal error of substance. The evidence was conflicting as to the defendant's speed, as to whether the lights on the plaintiff's vehicle were visible to approaching traffic, and as to the position of the disabled vehicle at the time of collision. The evidence was sufficient to permit the jury to find the Oldsmobile was well lighted, notwithstanding the motor was dead. The evidence of defendant's speed, the skidmarks, and failure to avoid striking the plaintiff's vehicle was sufficient to go to the jury on the issue of defendant's negligence.

We have examined the many objections to the Court's charge and find them without merit. When considered as a whole, as it must be, the charge presented the case fairly and gave the jurors an accurate legal blueprint by which they were to be governed.

Notwithstanding plaintiff's contention to the contrary, the defendant's motion for nonsuit presented the question whether plaintiff's evidence disclosed his contributory negligence as a matter of law. On motion to nonsuit, where negligence and contributory negligence arise on the pleadings, as here, the Court considers first whether the evidence is sufficient for jury consideration on the issue of defendant's negligence. If found insufficient, the Court will grant the motion. However, if the evidence is sufficient for jury determination, then the Court will determine whether plaintiff's contributory negligence appears from his evidence as a matter of law. If there is some evidence of contributory negligence, but not enough to disclose contributory negligence as a matter of law, then the case should go to the jury on all issues upon which there is sufficient evidence to raise a jury question. Plaintiff's contributory negligence as a matter of law requires nonsuit, notwithstanding evidence on other issues. *Rosser v. Smith,* 260 N.C. 647, 133 S.E. 2d 499; *Holland v. Malpass,* 255 N.C. 395, 121 S.E. 2d 576; *Peeden v. Tait,* 254 N.C. 489, 119 S.E. 2d 450.

After careful review, we think the evidence of the contributory negligence places this case in the borderline category. There was evidence which would support a finding the plaintiff, driver, in pushing the vehicle back on the road, was negligent. The hour was late at night. No traffic was in sight. The road was straight for several hundred yards. Only the left wheels of the vehicle were on the

hard surface, to the extent of about 2 feet. The evidence, however, does not compel a finding the plaintiff was negligent. On the issue of contributory negligence, reasonable minds may differ. Such being so, that issue was for the jury. *Short v. Chapman,* 261 N.C. 674, 136 S.E. 2d 40; *Rodgers v. Thompson,* 256 N.C. 265, 123 S.E. 2d 785. Judge Parker was correct in overruling motions for nonsuit.

In the judgment of the Superior Court, we find

No error.

THEDIA WILSON LONDON v. DREWEY LONDON.

(Filed 11 October, 1967.)

1. Judgments § 3—

An exception to the judgment limits review to the questions whether the findings of fact are sufficient to support the judgment and whether error of law appears on the face of the record.

2. Same—

Plaintiff instituted separately two actions for alimony without divorce. Motion for alimony *pendente lite* was scheduled to be heard in the second action but was continued, and on the day of the hearing the second action was nonsuited and the court found facts and awarded alimony *pendente lite. Held:* It will be presumed that the order awarding alimony *pendente lite* was entered in the prior action which was still pending rather than the second action which had been nonsuited, and the order being supported by facts found in the duly constituted action for alimony without divorce, it will not be disturbed.

3. Appeal and Error § 46—

The presumption is in favor of the regularity of proceedings in the lower court, and when it does not appear from the record which of two bases constitutes the foundation for the judgment, the order will be referred to that basis which is sufficient to support it.

APPEAL by defendant from *Froneberger, J.,* 31 July 1967 Non-Jury Civil Session of GASTON.

Proceedings under G.S. 50-16. Defendant appeals from an order awarding plaintiff alimony *pendente lite.* The chronology of pertinent events is as follows:

Plaintiff and defendant were married on 4 October 1952. On 17 April 1967, plaintiff, by her attorney of record, John R. Friday, instituted this action (Case No. 4941) for alimony without divorce. She alleges, *inter alia,* that defendant frequently resides with another woman (Dot Sponceller) and boasts to her of this misconduct; that he has moved a trailer on their property — next door to their

residence — and put "the other woman" and her minor children in possession of it; that he drinks to excess and is violent and abusive towards plaintiff; and that defendant spends money on the other woman, but has cut off plaintiff's credit at the grocery. Plaintiff prays that she be awarded reasonable subsistence and counsel fees; that she be granted the exclusive possession of the residence of the parties; and that defendant be required to remove the trailer and its occupants from the premises.

On 18 July 1967, plaintiff instituted a second action against defendant for alimony without divorce. This case was given docket No. 5314. The second complaint, signed by Frank P. Cooke, attorney, contained allegations substantially the same as those in the complaint in Case No. 4941, to which no reference was made. On the day Mr. Cooke filed the complaint in Case No. 5314, he secured from Judge Froneberger an order requiring defendant to show cause why he should not be required to pay plaintiff alimony *pendente lite* before the presiding judge at 10:00 a.m. on 31 July 1967 — or as soon thereafter as the matter could be heard.

When the calendar for the July Non-Jury Session was made, plaintiff's motion for alimony *pendente lite* was scheduled for hearing at 4:00 p.m. on 31 July 1967. It appeared as Case No. 4941; counsel listed were Messrs. Friday and Roberts respectively. On 27 July, Mr. Friday wrote Judge Froneberger requesting that he continue the case "for a week or so" until he returned from a vacation. Counsel for defendant, Mr. Roberts, wrote Judge Froneberger that he had no objection to continuing the case. Judge Froneberger, however, took no action on Mr. Friday's request for a continuance.

On 31 July 1967, Judge Froneberger heard plaintiff's motion for alimony upon "evidence introduced by the plaintiff and the defendant." He did not, however, enter judgment on that day. On 3 August 1967, defendant filed answer to the complaint in case No. 5314. On the same day, Judge Froneberger nonsuited that case. The judgment of nonsuit was consented to by Mr. Cooke as attorney for plaintiff. Also on 3 August 1967, Judge Froneberger denied defendant's motion to dismiss Case No. 5314 made for the reason that Case No. 4941 was pending. (The nonsuit rendered this motion moot.) He then, in open court, made findings of fact and entered an order, which is summarized as follows:

Plaintiff had discharged her first attorney, Mr. John R. Friday, and at the hearing on 3 August she was represented by her present attorney, Mr. Frank P. Cooke. Defendant, who had received proper notice of the hearing, was present and represented by his counsel, Mr. Roberts.

Plaintiff and defendant are living in Cherryville in a residence

owned by them as tenants by the entireties. Defendant has purchased a trailer, which he moved onto the rear of the lot owned by the parties, and has moved Dot Sponceller (aged 36) and her three children into it. Defendant has been eating his meals with Dot Sponceller and associating with her in a manner to cause plaintiff anxiety and mental suffering. It would be to the best interest of both parties that they separate. Defendant is an able-bodied man, capable of supporting plaintiff and himself.

Pending the final determination of the issues, Judge Froneberger awarded plaintiff exclusive possession of the residence and its furnishings, and ordered defendant to remove Dot Sponceller and her children from the trailer. Defendant was granted the right to occupy the trailer thereafter. Defendant was directed to pay plaintiff $10.00 a week alimony and to pay all utility bills incidental to plaintiff's occupancy of the residence. No counsel fees were awarded plaintiff pending the final trial of the case.

From the foregoing order defendant appeals.

No counsel for plaintiff appellee.
Joseph B. Roberts, III, for defendant appellant.

SHARP, J. Defendant's sole exception is the one which the law entered for him when he gave notice of appeal. "An appeal is itself an exception to the judgment . . . but limits the review to the question of whether the findings of fact are sufficient to support the judgment or whether error of law appears on the face of the record." 1 Strong, N. C. Index, Appeal and Error § 21 (1957).

In his brief, defendant assumes that the order from which he appeals was entered in the second suit, Case No. 5314, and he challenges the authority of the court to award plaintiff alimony *pendente lite* in that case after it had been nonsuited. Appellant's conclusion is based on a false premise. The judgment of nonsuit specifies that it was entered in Case No. 5314. The cause which was calendared for trial was Case No. 4941, and, although the order awarding plaintiff alimony does not bear the docket number of the case in which it was entered, obviously it was made in Case No. 4941. Both the nonsuit in Case No. 5314 and the order from which defendant appeals were signed on 3 August 1967. The latter appears last in the transcript, and we do not assume that Judge Froneberger entered an order in a case which he had just nonsuited. There is a presumption in favor of the regularity and validity of judgments in the lower court, and the burden is upon appellant to show prejudicial error. 2 McIntosh, N. C. Practice and Procedure § 1800 (2d Ed., 1956). "Where the record is silent upon a particular point, the ac-

tion of the trial judge will be presumed correct." 1 Strong, N. C. Index, Appeal and Error § 39 (1957).

The pendency of a prior action between the same parties for the same cause in a State court of competent jurisdiction works an abatement of a subsequent action in the same court or in another court of the State having like jurisdiction. *Houghton v. Harris,* 243 N.C. 92, 89 S.E. 2d 860; *McDowell v. Blythe Brothers Co.,* 236 N.C. 396, 72 S.E. 2d 860. The institution of Case No. 5314 in nowise affected the right of Judge Froneberger to proceed to hear the prior action, Case No. 4941, which had been duly calendared for trial. So far as the record discloses, defendant made no motion to continue the hearing of plaintiff's motion for alimony *pendente lite* when Case No. 4941 was reached on the calendar. The complaints in both cases contained substantially the same allegations, and there is no reason to believe that it was the number of the case which induced the order. Defendant offered evidence, and his counsel argued his contentions. The court found the facts against him, and the facts support its judgment.

No error.

STATE v. CHESTER LEE GODWIN.

(*Filed 11 October, 1967.*)

Homicide § 20—

Evidence tending to show that defendant and his companions had been drinking and playing poker, and that one or two nonfelonious assaults had broken out between them during the course of the evening, that defendant and his companions left the building and another altercation broke out, and that defendant intentionally shot deceased with a pistol, inflicting mortal injury, without any evidence that deceased at that time was advancing upon defendant or threatening him in any way, *held* amply sufficient to overrule defendant's motion to nonsuit and to sustain his conviction of manslaughter.

APPEAL by defendant from *Cowper, J.,* 30 January 1967 Criminal Session of NASH.

Criminal prosecution upon an indictment charging the defendant on 12 December 1966 with the first degree murder of one Frederick Jones Bell. G.S. 15-144.

On 3 January 1967 defendant executed an affidavit of indigency before the assistant clerk of the Superior Court. On the same day, May, J., presiding, appointed Royal G. Shannonhouse, a member of

the Nash County Bar, to represent defendant. After the appointment of Mr. Shannonhouse to represent defendant, defendant obtained funds from friends and employed W. O. Rosser, a member of the Nash County Bar, to represent him. At the trial in the Superior Court, defendant was represented by both attorneys. At the inception of the trial, the solicitor announced in open court that the State would not seek a verdict of guilty of murder in the first degree but would seek a verdict of guilty of murder in the second degree or a verdict of guilty of manslaughter, as the facts might appear. The defendant pleaded not guilty. Verdict: Guilty of manslaughter.

From a judgment of imprisonment in the State's prison for a term of 20 years, defendant appeals to the Supreme Court.

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

Royal G. Shannonhouse for defendant appellant.

PER CURIAM. After the defendant appealed to the Supreme Court, W. O. Rosser announced to the court that he was no longer appearing for the defendant unless some other arrangements were made for his fee on appeal. Whereupon, Cowper, J., who had presided at the trial, found that defendant was still an indigent, and appointed Mr. Shannonhouse to represent him on appeal. He also entered an order that Nash County should pay the cost of preparing a transcript of the evidence at the trial and of the charge of the court for the purpose of appeal and that Nash County should pay for mimeographing the case on appeal and the brief of defendant's counsel in the same way that appeals are prepared for this Court on the part of rich people.

The State offered evidence; the defendant offered none. Defendant has only one assignment of error, and that is the denial of his motion for judgment of compulsory nonsuit made at the close of the State's evidence.

The testimony of Gerald Measley, a witness for the State, tends to show the following facts: Measley is 17 years old. On the afternoon of Sunday, 11 December 1966, and until about 1:00 or 1:30 in the morning of December 12, Chester Lee Godwin (defendant), Milton Hair, Gordon Creech, Pete Narron, Ted Bell (the deceased, who is also known as Frederick Jones Bell), Grover Bissette, and Sam Narron were playing poker and drinking alcoholic liquors in a filling station or grocery store near Middlesex, North Carolina, known as Beaver Dam Center and operated by Pete Narron. Measley

was keeping the fire in the heater. Defendant wanted to give Sam Narron a drink. Ted Bell did not want him to do so. Defendant told Ted, "Because you weigh about 400 pounds, you ain't going to run over top of nobody." Defendant used some profanity. Ted threw off his coat and backed defendant down to the other end of the counter. He did not grab or hit defendant. No licks were passed. They apologized and said it was all over with, and went back and played some more poker. They played four or five more hands and Ted Bell said he knew where there was some good brandy. Defendant gave Ted $25 to go and get the brandy and let Ted drive his car. Ted was gone about an hour. Defendant was playing poker during that time. Ted came back and said he had the brandy in a gallon jug. They all took a drink of the brandy. Then Measley carried the brandy back to the car. Defendant went out and got the brandy again, brought it back in, and put it on the counter. Defendant and Ted both drank until they were about drunk. Then Ted and defendant and Grover Bissette went outside. After they went out, Gordon, Pete, Dalton and Measley went outside. When Measley got outside, he saw Gordon Creech knock Grover Bissette down. This assault started over something that had happened about two years ago when Gordon had a broken arm in a sling and Grover knocked him down. After Gordon hit Grover, Grover said, "Hit me again and we will be even." At that time defendant and Ted Bell were standing outside. Measley testified as follows:

> "After that trouble was over between Gordon and Grover Ted Bell told Gordon, 'What you want to hurt him for? He ain't never hurt nobody.' Then Ted Bell hit Gordon Creech and Gordon hit him back. They just hit one time apiece. When Ted hit Gordon, Chester Lee Godwin was standing over there in front of his car. Chester had a weapon at that time. I cannot say what kind of weapon he had, but I could see about an inch of the barrel. After Ted and Gordon had hit each other once, Chester told Ted to back up against the door, pulled off his coat and said Ted might be bad but he would not be bad no more. Then Chester shot Ted. All I saw was one shot. Ted was 10 to 15 feet from Chester when he was shot. Chester said nothing at all to Ted before he shot him other than what I have just testified."

After defendant shot Ted, Ted fell to the ground on his stomach with his face down in the dirt. Defendant went over to him and kicked him in the head. At that time defendant had his gun in his right hand. Ted did not move or say anything after he hit the

ground. After defendant kicked Ted in the head while the latter was lying on the ground, defendant got in his car and left.

Gordon Creech, a witness for the State, testified in material part as follows: He was at the store when it was being closed for the night. Pete Narron, an Evans boy, and he went outside. He and Grover Bissette had an argument, and he hit Grover and knocked him down. Ted Bell took it up and told him not to hit Grover any more, and he told Ted he would not unless Grover wanted some more of it. He and Ted started arguing, and Ted hit him above the eye and on the chin, and he hit him back about twice. Then they stopped fighting, and that was all there was to that. He does not know where defendant was while Ted Bell and he were fighting. After they stopped fighting, defendant came up and shot Ted Bell. Ted did not do anything to defendant outside the store. Ted had no kind of weapon that he saw. Ted was not doing anything to defendant that he saw. Ted was about 8 to 10 feet from defendant when he shot him. Defendant used some profanity before he shot Ted and told him he was a "bad s. o. b." After defendant shot Ted, Ted was on the ground lying on his face. Defendant came up to him and pointed the pistol back of his head. He asked defendant not to shoot Ted any more, and he did not.

Pete Narron, a witness for the State, ran the Beaver Dam Grocery. He knew he had a pretty rough crowd there. He testified as follows:

> "There was no trouble that I know of between the time Chester and Ted had their little argument and the time I closed up. After I closed up, I heard Gordon Creech and Grover Bissette arguing on the outside. Gordon hit Grover Bissette and then Ted Bell hit Gordon and Chester Godwin was out there and had a gun in his hand. I put the change box in the car and when I was at the car I heard a gun fire. When I turned back around, Ted Bell was on the ground. I had forgotten to put the lock on the door and I went back to lock the door and Chester Godwin turned around with the gun toward me and I said, 'Damn, Chester, what's the matter?' and he said, 'I mistook you for somebody else.' Then I turned and went back toward the car and, as I was going back, he pointed the gun down towards the ground toward's Bell's head, and I said, 'Don't shoot no more,' and I got in the car and started to leave.
>
> "Ted Bell was on the ground at the time Chester started to shoot him again. He was lying with his face down towards the ground. I heard Chester say to Ted before he shot him, 'You are a bad s. o. b.' After he said that is when I heard the

shot. After I asked Chester not to shoot him again, he turned and got in his car and left."

G. O. Womble, sheriff of Nash County, has known defendant for about 15 years. He knew Ted Bell. In response to a telephone call from Deputy Sheriff Gilliam, he went to the Beaver Dam Grocery about 2:20 a.m. on December 12. Upon arrival he saw Ted Bell lying on his face on the ground dead in front of the Beaver Dam Grocery. He had one bullet wound in his left side four inches from his left breast and two inches below his left breast. After defendant had been placed in jail charged with the homicide, Sheriff Womble had a conversation with him. Sheriff Womble warned him fully of his constitutional rights, and defendant freely and voluntarily made a statement to him after having been warned fully of his constitutional rights. The court found as a fact after the sheriff had been examined on the *voir dire* that the sheriff had warned defendant fully of his constitutional rights, and that the statement was given freely and voluntarily. Defendant offered no testimony to the contrary and did not except to the court's ruling. The sheriff's testimony in respect to what defendant told him is as follows:

> "I asked him why he shot Ted Bell and he said he was about half-scared of Ted Bell, that Ted was a bully. He said, 'I am sorry it happened now and it never would have happened if I had not been drinking.' He did not at any time tell me that Ted was coming on him or had threatened him in any way. He told me that all the trouble he and Ted Bell had had was on the inside of the place."

All the evidence tended to show that the deceased died from a wound which defendant intentionally inflicted with a pistol. Defendant's motions for nonsuit were, therefore, properly denied. *S. v. Smith,* 268 N.C. 659, 151 S.E. 2d 596; *S. v. Redfern,* 246 N.C. 293, 98 S.E. 2d 322; *S. v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322; 2 Strong's N. C. Index, Homicide, § 20. The jury was merciful to defendant in that it convicted him merely of manslaughter when it could well have convicted him of murder in the second degree. His assignment of error is overruled.

There are no exceptions or assignments of error to the exclusion or admission of evidence or to the charge of the court. The court's charge was full, clear, and accurate. Defendant's counsel candidly states in his brief: "Defendant's counsel advances no argument because a diligent review of the trial and of the record reveals that the State's evidence was sufficient to support the conviction and that no prejudicial error appears on the Record. But defendant's

appointed counsel respectfully tenders defendant's case for review by the Court." Mr. Shannonhouse is an able and experienced lawyer, and, after a careful examination of the record, we concur with his statement.

In the trial below there was

No error.

STATE v. JERRY DELFRED JARRETT.

(Filed 11 October, 1967.)

1. Criminal Law § 169—

Even conceding that the introduction in evidence of the photograph of defendant's accomplice was erroneous, its admission *held* cured by testimony theretofore and thereafter admitted without objectiton describing the accomplice in detail.

2. Criminal Law § 42—

Where the evidence discloses that defendant and his accomplice took certain bank bags filled with money from a store, the introduction in evidence of the bank bags, sufficiently identified by the witnesses, is competent, since any object which has a relevant connection with the case is admissible in evidence. The fact that the bank bags were not found in the possession of defendant is favorable to him and does not affect the admissibility of the exhibits.

3. Same—

Testimony of a witness that bank bags introduced in evidence looked similar to the ones which the witness had seen at the time of the commission of the offense and which were used in connection therewith, *held* competent.

4. Criminal Law § 167—

The burden is upon appellant not only to show error but to show error amounting to a denial of some substantial right.

APPEAL by defendant from *Clarkson, J.*, 6 March 1967 Criminal Session of MECKLENBURG.

Defendant was tried for the kidnapping of Ann Dutton and Ann Nickols Cashion under two separate bills of indictment and was tried under a third bill of indictment for armed robbery.

The State's evidence in pertinent part tends to show that Thomas C. Dutton was employed as supervisor of Park-N-Shop located at Sugar Creek Road and North Tryon Street in Charlotte. On Friday night, 29 April 1966, he and Thomas Frank Cashion, the assistant manager, placed the days receipts of about $18,000 in the safe. They

checked to see that the bank bags were in the safe and that the safe was locked before closing. Dutton and Cashion left the store about 12:30 a.m. Dutton's wife, Ann Dutton, picked him up in their 1962 Volkswagen and they drove home. As they got out of their car, a man appeared with a gun and ordered them to enter their home (a house trailer). He told Dutton and his wife that they were going back to the store. Dutton stated that Cashion had the keys to the store. A second man, later identified as defendant, came into the trailer armed with a pistol. At the direction of these two men, Dutton and his wife accompanied them to Cashion's residence in Dutton's Volkswagen, with Dutton driving and Jarrett riding in the front seat with a gun in his hand.

Jarrett kept Dutton, his wife, and Ann Cashion in the Cashion's home while Thomas Cashion was forced to drive the other man to the Park-N-Shop store in Dutton's Volkswagen. When they arrived at the store, three newspapermen were there to pick up and distribute newspapers. The armed man forced these men to assist in taking the bank bags from the safe. The bank bags were placed in the back seat of Dutton's Volkswagen.

After leaving the Park-N-Shop store, they all went back to Cashion's residence. Thomas Cashion and the three newspapermen were tied and left there. Dutton, his wife, and Ann Cashion were taken at gun point by Jarrett and the alleged accomplice to Dutton's trailer in his Volkswagen. They all went inside with the exception of Jarrett, who went to a car. Dutton was instructed to tie both women's feet and was permitted to go out to his Volkswagen to get some rags to use for this purpose. He noticed that the bank bags which had been in his car when he left the Cashion residence were no longer there. Jarrett and his accomplice left Mr. and Mrs. Dutton and Mrs. Cashion in the trailer with their hands and feet tied. Jarrett was apprehended in Fort Wayne, Indiana.

Defendant was identified at the trial by witnesses Ann Dutton, Thomas C. Dutton, Thomas Frank Cashion and Ann Nickols Cashion as one of the persons taking part in the kidnapping and armed robbery.

Dutton and his wife gave a description of the alleged accomplice. While Dutton, the State's first witness, was on the witness stand, he identified a photograph shown him as being the man he had described. This photograph was admitted in evidence over defendant's objection.

The witness Thomas F. Cashion identified several bank bags as being the bags belonging to Park-N-Shop No. 2, and being the bags which contained the checks and money alleged to have been taken by defendant and his accomplice. These bags were offered in evi-

dence over defendant's objection. Later, the witness Ann Cashion, in reply to the Solicitor's question as to whether the bags which had been admitted into evidence resembled the bags she saw on the back seat of the Volkswagen, replied, over defendant's objection, "Well, they look similar."

Defendant testified and offered additional evidence tending to show that he was not in Charlotte at the time the crime was committed.

The jury returned verdicts of guilty as to the charge in each of the three bills of indictment. From judgment entered thereon, defendant appealed.

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

William L. Stagg for defendant.

PER CURIAM. Defendant contends it was prejudicial error to allow a photograph of an alleged accomplice to be admitted into evidence.

Upon admission of the photograph in evidence, the court instructed the jury that it was admitted for the purpose of corroboration, if it did, and was not admitted as evidence against the defendant and the jury should not so consider it. The State offered, without objection, plenary evidence that there *was* an accomplice present. Before the photograph was offered into evidence, the witness Thomas C. Dutton, without objection, gave a detailed description of the alleged accomplice. The defendant's attorney later elicited a partial description of him from other witnesses on cross-examination.

Conceding, *arguendo,* that the photograph was immaterial and irrelevant, its admission was cured when evidence of like import was admitted before and after the admission of the photograph. *Wood v. Insurance Co.,* 245 N.C. 383, 96 S.E. 2d 28; *Hall v. Atkinson,* 255 N.C. 579, 122 S.E. 2d 200.

Defendant also assigns as error the admission into evidence of certain bank bags as exhibits.

The exhibits were sufficiently identified by the witness and offered into evidence at the proper time, *State v. Eagle,* 233 N.C. 218, 63 S.E. 2d 170, and any object which has a relevant connection with the case is admissible in evidence. *State v. Macklin,* 210 N.C. 496, 187 S.E. 785. The testimony relative to the bank bags tends to show some evidence of possession by the defendant of the fruits of the crime. However, the record does not reveal that the bags were found in the possession of defendant when apprehended. This would

seem to be favorable rather than prejudicial to defendant. On the other hand, there was ample evidence, aside from that relating to the bank bags, to support the charges of armed robbery and kidnapping.

Neither was there prejudicial error in admitting the testimony of the witness, Mrs. Cashion, that the bank bags offered in evidence looked similar to the ones she had seen on the night of the alleged crime.

In the case of *State v. Macklin, supra,* the Court said:

> "The only other exception was to the admission of the shotgun as an exhibit in the case. It was competent to show the possession of a shotgun by defendant about the time of the homicide, and it was testified that the one found in his room was like the one with which he had been seen on the night the deceased was shot. This exception cannot be sustained."

A pertinent rule of law applicable to all of defendant's exceptions is stated in *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39, as follows:

> "It is a well settled rule in North Carolina that the burden is upon the appellant to show prejudicial error amounting to a denial of some substantial right and in the absence of such showing there is no reversible error. *Kennedy v. James,* 252 N.C. 434."

Defendant having failed to show prejudicial error in the trial below, we hold there is

No error.

STATE v. JOHN EARL COX, JR.

(Filed 11 October, 1967.)

1. Criminal Law § 43—

A witness may use a blackboard sketch to illustrate his testimony as to the *locus* of the crime, and the failure to sufficiently identify the sketch as an accurate portrayal of the scene is not prejudicial when the sketch was drawn in view of the jury without objection and when the court subsequently instructed the jury that the sketch was for illustrative purposes only.

2. Rape § 4—

Testimony that the prosecutrix exclaimed that the defendant "was trying to rape me", such remark being made to officers immediately upon

their arrival at the scene of the offense, *held* competent as part of the *res gestæ*, it appearing that the statement was spontaneous and practically contemporaneous with the offense.

APPEAL from *McLaughlin, J.*, December 5, 1966 Conflict Session "C" of MECKLENBURG.

Defendant was prosecuted under bill of indictment charging the capital felony of rape.

The State's evidence tends to show that two witnesses, Arthur Gordon Blue and Dorothy McManus, were sitting in an automobile in a driveway leading from E. Ninth Street in Charlotte on the night of 21 August, 1966. Around midnight, they observed defendant and prosecutrix, Ponsie Lee Chapman, standing on the sidewalk on the opposite side of E. Ninth Street, talking in a loud manner. Defendant began pulling prosecutrix by her arm and she fell. Defendant picked her up and carried her to a wooded area back from E. Ninth Street, despite her screams and protests. Blue then went into his house and called the police. A few minutes later, four police officers arrived at the scene.

Police Officer L. E. Lewis testified that he and the other police officers went into the wooded area. As they approached, defendant jumped up from the ground and ran. After a short chase, the police officers apprehended defendant and returned him to the wooded area where he and the prosecutrix were first observed. She was bleeding from the mouth and was in a hysterical condition.

On direct examination of police officer Lewis, the following colloquy occurred.

> "Q. All right, now I will ask you, sir, to please go ahead and indicate on the board everything that's shown by that sketch that you hold there in your hand.
>
> (Whereupon witness did as directed.)
>
> Q. Officer Lewis, does this sketch that you put on the blackboard, here, now represent the same sketch that you made on the scene that night that you now hold here in your hand?
>
> A. Yes, sir, it does, as near as I can tell.
>
> Q. Officer Lewis, when you arrived on the scene there, I will ask you to describe the general scene referring to this sketch, and point out what you did and what happened while you were there, using this sketch on the blackboard to illustrate your testimony.
>
> Objection — Overruled —— Exception.
>
> A. All right.

> COURT: Well, ladies and gentlemen, this sketch is permitted for the purpose of illustrating the witness' testimony, and for no other purpose, and you will not consider it as substantive evidence."

Ponsie Lee Chapman testified, in substance, that she was twelve years old; that on 21 August 1966 at about nine o'clock P.M. she saw the defendant for the second time on the corner of Ninth and Davidson Streets. Defendant wanted to see his son, who was at Lee Smith's house, and she accompanied him there. After she and defendant left Smith's house, they went down E. Ninth Street, and she stopped on the sidewalk. Defendant urged her to "come on," but she resisted. He then pulled her by her arm and she slipped and fell. Defendant picked her up and carried her into the wooded area and threw her on the ground. She resisted defendant and continued to scream. Defendant put a handkerchief in her mouth and hit her in the mouth and side. He then had intercourse with her. She stated that when the police officers came to the wooded area, defendant jumped up and ran. During her examination she was asked what she told the police officers, and she replied: "I told them he was trying to rape me. I told them he was raping me, exactly."

The prosecuting witness was taken to the hospital and examined by Dr. David Sandridge, who testified that his examination revealed live male sperm in her vagina.

The State offered other cumulative and corroborating testimony.

Defendant testified that Ponsie Lee Chapman had provoked a scuffle with him and that she began screaming "rape"; that he had thrown her to the ground and was reaching down to pick up his hat when the police arrived. He denied having intercourse with her. He also offered other witnesses whose testimony tended to corroborate portions of his testimony.

The jury found defendant guilty of assault with intent to commit rape. Defendant appealed.

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

T. O. Stennett for defendant.

PER CURIAM. Defendant assigns error in that the court overruled his objection to the State's witness using a blackboard sketch to illustrate his testimony.

> "A witness may use a map or diagram, a photograph or a model of a place or a person or an object, to illustrate his testimony and make it more intelligible to the court and jury. It

> must of course be identified as portraying the scene with sufficient accuracy." Stansbury: North Carolina Evidence, Witnesses, Sec. 34, p. 64.

Admittedly, the State had not sufficiently identified the sketch when the officer was asked to use it to illustrate his testimony. However, the sketch had been drawn upon the blackboard in view of the jury, without objection, and when objection was interposed the court properly instructed the jury that it was to be used for illustrative purposes and was not to be considered as substantive evidence. All of the State's evidence was to the effect that the alleged crime took place in a wooded area near E. Ninth Street in the City of Charlotte. There were six eyewitnesses who placed the defendant there, and defendant admitted in his own testimony that he was in the area with the prosecuting witness at the time the crime was alleged to have taken place. It is apparent that any confusion or prejudice that might have been caused by the sketch was removed by cross-examination of the witness.

> ". . . The admission of incompetent evidence will not be held prejudicial when its import is abundantly established by other competent testimony." *Bullin v. Moore,* 256 N.C. 82, 122 S.E. 2d 765.

We find no prejudicial error as to this assignment of error.

It was not error to allow the prosecuting witness to testify as to what she told the officers when they arrived on the scene immediately after defendant was taken into custody.

In the case of *Coley v. Phillips,* 224 N.C. 618, 31 S.E. 2d 757, this Court stated:

> "For a declaration to be competent as part of the *res gestæ,* at least three qualifying conditions must concur: (a) The declaration must be of such spontaneous character as to be a sufficient safeguard of its trustworthiness; that is, preclude the likelihood of reflection and fabrication; . . . instinctive rather than narrative; . . . (b) it must be contemporaneous with the transaction, or so closely connected with the main fact as to be practically inseparable therefrom; . . . and (c) must have some relevancy to the fact sought to be proved."

And in 29 Am. Jur. 2d, Evidence, § 719, p. 788, we find the following:

> "Statements of the victim of a sex crime made within a few minutes after commission of the offense will ordinarily be re-

garded as part of the *res gestæ,* assuming, of course, the absence of circumstances indicating a lack of spontaneity."

Here, there was evidence that the 12-year old prosecutrix was "hysterical and crying" when she made the challenged statement immediately after the commission of the offense and at the scene of the offense. Her statement was a spontaneous declaration of a relevant fact which was practically a part of the occurrence.

We have considered the other assignments of error and prejudicial error has not been made to appear.

No error.

STATE v. WILLIE O. BANKS
AND
STATE v. TOMMIE PAULING.

(Filed 11 October, 1967.)

1. Indictment and Warrants § 17; Robbery § 4—

Where the indictment for robbery alleges the use of a "pistol," and the proof is that the robbery was committed with a "gun", there is no fatal variance, the word "gun" being a generic term for a variety of firearms and embracing within its meaning, in everyday speech the term "pistol".

2. Robbery § 5; Criminal Law § 111—

The failure of the court, in instructing the jury upon the lesser offenses of robbery, to repeat an instruction previously given relating to the defense of alibi, is not error, since the jury could reasonably conclude that if defendant should be acquitted of armed robbery on the ground that he was not present at the time of the offense, he should likewise be acquitted of common law robbery.

APPEAL by defendants from *Martin, S.J.,* at the 3 April 1967 Regular Criminal Session of MECKLENBURG.

By separate indictments, each proper in form, the defendants were charged with the robbery of Roy Benjamin Cook "with the use and threatened use of firearms * * * to wit: a pistol." Without objection, the cases were consolidated for trial. The jury found each defendant "guilty as charged," and each was sentenced to confinement in the State Prison for a term of 12 years.

The alleged victim of the robbery, Roy Benjamin Cook, testified: He is a taxi driver. At approximately 10:30 p.m. on 24 January 1967, the two defendants approached his taxicab and asked him to carry them to a specified address. En route he had several opportunities to see both of them clearly and did so. Upon arrival at the

designated address, he turned on the dome light of the taxicab and, by its light, saw both of his passengers clearly. They were the two defendants. They refused to get out of the cab and ordered Cook to drive on, which he did. The passenger in the back seat, identified by Cook as Pauling, had a scar over his eye and was wearing a string through a hole in his ear. Pauling sat in the back seat of the cab and Banks sat beside the driver on the front seat. As Cook proceeded on from the originally designated destination, pursuant to the direction of the defendants, "Pauling throwed the gun" to the back of Cook's head and held it there, instructing Cook to stop and turn off the lights of the taxicab. Pauling threatened to blow Cook's brains out if he did not comply. Cook stopped the vehicle and Banks took Cook's billfold and money from his jacket pocket. The two defendants then left the taxicab, instructing Cook to drive on. Immediately thereafter, Cook, using the two-way radio on his taxicab, reported the robbery to the taxicab dispatcher who, in turn, radioed the police. Cook remained within a block of the scene of the robbery until police officers arrived approximately six minutes later. Some seven or eight minutes after the robbery, Cook, in the vehicle of the police officers who came to the scene, drove to the parking lot of a supermarket, about one block from the scene of the robbery, where other police officers, acting upon the description of the robbers so given by radio, had apprehended Pauling as a suspect. Cook immediately identified Pauling as one of the two robbers and Pauling was taken to jail.

Cook also testified: On 1 February, he identified Banks as the other robber in a lineup of five colored men, of approximately the same age and size, at the police station. At the request of the police, Cook had previously viewed another lineup, which did not include Banks, and had then told the police that neither of the men who had robbed him was present in that lineup.

With reference to the weapon used by the robbers, Cook testified: "The gun they held me up with had white handles on it. The gun had been pretty well worn. You know how it is when you carry it in your pocket without a holster, but the gun had white handles on it. The boy in the back — Pauling — was holding the gun on the back of my head. He had the handle in his hand, but when he went to get out of the car I could see enough of the gun to see that the handles was [*sic*] white." He positively identified both defendants in the courtroom as the men who robbed him.

One of the arresting officers testified that Pauling, at the time of his arrest on the night of the robbery, had a piece of string through his left ear and the same scar on his face which the officer and Cook pointed out in the courtroom.

Each defendant testified in his own behalf, denying any participation in or knowledge of the alleged robbery. Each testified that at the time it was committed, according to the evidence of the State, the defendants were not together but each was in the presence of other persons at a location somewhat remote from the scene of the alleged robbery. Each defendant offered the testimony of a number of other witnesses who corroborated his alibi.

The defendants appealed jointly and assign as error the denial of their respective motions for judgment of nonsuit, contending that there was a material variance between the indictment and the proof in that the indictment alleged robbery with the use of a "pistol," whereas the evidence of the State is that the alleged robbers used a "gun." The defendants also assign as error certain portions of the charge to the jury and the failure of the court, when instructing the jury upon the lesser charge of common law robbery, to repeat the instruction concerning the contention of alibi which had been given by the court in connection with the charge of armed robbery.

Attorney General Bruton and Staff Attorney Vanore for the State.
Lila Bellar and Fenton T. Erwin, Jr., for defendant appellants.

PER CURIAM. Since a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment, or of a lesser offense included therein, where there is a material variance between the allegations of the indictment and the proof, the defendants' motion for judgment of nonsuit should be sustained. *State v. Keziah*, 258 N.C. 52, 127 S.E. 2d 784.

It is obvious that in the present case, unless there was such a variance, the motion for nonsuit was properly denied. It is equally obvious that there was no such variance. The word "gun" is a generic term including a variety of firearms ranging in size and shape from the largest cannon to the smallest pistol. It is a matter of common knowledge that in everyday speech, on television programs and elsewhere, a pistol is frequently called a "gun." That this is not a misuse of the term "gun," see: *State v. Barnes*, 253 N.C. 711, 117 S.E. 2d 849; *State v. Christ*, 189 Iowa 474, 177 N.W. 54; Black's Law Dictionary; Webster's New International Dictionary, 2d Ed.

In common speech, the term "gunslinger" and the phrase "throwing a gun" call to the ordinary mind the use of a pistol. The victim of the alleged robbery in the present case testified that Pauling "throwed a gun" to the back of Cook's head. He then testified that this "gun" had white handles, that it was "pretty well worn" as "when you carry it in your pocket without the holster," and Paul-

ing "had the handle in his hand, but when he went to get out of the car I could see enough of the gun to see that the handles was [*sic*] white." These could be no doubt in the mind of any reasonable person that the weapon so referred to by Cook was a pistol. For this reason, there was no error in the denial of the defendants' motions for judgment of nonsuit, or in the court's statement in the charge to the jury that the State had produced evidence tending to show the use of a "pistol" or in the instruction that "a pistol is a firearm within the meaning of" the statute dealing with robbery by the use of firearms.

The trial judge reviewed, fairly and adequately, the evidence presented by the defendants in support of their respective claims of alibi. He charged the jury correctly and adequately as to the nature of the claim of alibi and as to the burden of proof when that claim is presented by a defendant charged with crime. While this instruction was given in that portion of the charge concerned with the offense of armed robbery and the court then proceeded to instruct the jury as to the lesser offense of common law robbery without repeating the instruction concerning alibi, this was not error. Obviously, if the jury concluded that the defendants should be acquitted of the charge of armed robbery on the ground that they were not present when the offense was committed, it would acquit them of common law robbery in connection with the same transaction. The jury could not have misunderstood the significance of the court's instruction on this point.

The remaining exceptions to the charge of the court are equally without merit.

No error.

WILLIAM DAVID RHINEHART, EMPLOYEE, v. ROBERTS SUPER MARKET, INC., EMPLOYER, AND FIDELITY & CASUALTY CO. OF NEW YORK, CARRIER.

(Filed 11 October, 1967.)

Master and Servant §§ 63, 93—

Evidence tending to show that an employee, while engaged in moving cases of soup in the ordinary manner and free from confining or otherwise exceptional conditions and surroundings, suffered a back injury which was accentuated by a congenital condition, *held* insufficient to support a finding that the injury resulted from an accident within the purview of the Workmen's Compensation Act, and the finding to the contrary by the Industrial Commission must be reversed.

APPEAL by defendants from *Jackson, J.*, at the 2 January 1967 Non-Jury Session of GASTON.

This is a claim under the Workmen's Compensation Act. The sole question is whether the plaintiff sustained an injury by accident arising out of and in the course of his employment. The Hearing Commissioner found that he did and issued an award directing the defendants to pay compensation for disability, medical expenses and counsel fees. This was affirmed by the Full Commission and by the superior court on appeal to it by the defendants. The following is a summary of the evidence bearing upon that question:

The plaintiff was employed in the supermarket as a stock boy. His duties included building displays and carrying out groceries. On the occasion of his alleged injury, he and another employee were building a display of cans of soup and were in a hurry. To do this they moved about 50 cases containing cans of soup from the stockroom to the front of the store. Each case weighed approximately 48 pounds and its dimensions were 18 inches by 12 inches by 10 inches. To so move the cases they used a four-wheel cart, which they called a float.

In the stockroom the plaintiff picked up the cases one at a time, and handed or tossed each to his co-employee, who placed it upon the float. The loading of the float being virtually completed, the plaintiff stooped to pick up the last or next to the last case from the floor, lifted it, turned and handed or threw it to his companion, who was standing almost behind him. When he did so, he felt a sharp pain in his back. He reported the injury to his superior and then he and his companion went ahead and completed the construction of the display.

Usually, the plaintiff loaded the float by himself, bending over to pick up the cases and placing them on the float. The only thing unusual about the handling of the case at the time of the alleged injury was that in this instance, after lifting the case from the floor, he turned around to hand or toss it to his companion. His duties frequently required him to pick up boxes heavier than the cases handled on this occasion.

The attending physician diagnosed the claimant's condition as spondylolisthesis, a forward displacement of a lumbar vertebra. This is a congenital condition, but the testimony of the physician was that it could have been "affected" and "precipitated" by the above described actions in the store. An interior spine fusion was performed for this condition.

Fairley, Hamrick, Hamilton & Monteith for defendant appellants.
Whitener & Mitchem for claimant appellee.

PER CURIAM. Except in the case of certain occupational diseases, compensation may not be awarded under the Workmen's Compensation Act unless there is proof of a disability due to an injury, which injury was the result of an accident arising out of and in the course of the employment. G.S. 97-2(6). A finding by the Industrial Commission that the claimant sustained such an injury is conclusive upon an appeal to the courts if, but only if, the Commission had before it competent evidence sufficient to support such a finding. *Lawrence v. Mill,* 265 N.C. 329, 144 S.E. 2d 3.

The terms "injury" and "accident," as used in the Act, are not synonomous. "Absent accident (fortuitous event), death or injury of an employee while performing his regular duties in the 'usual and customary manner' is not compensable." *O'Mary v. Clearing Corp.,* 261 N.C. 508, 135 S.E. 2d 193. An accident, as the term is used in the Act, is "(1) an unlooked for and untoward event which is not expected or designed by the injured employee; (2) a result produced by a fortuitous cause." *Harding v. Thomas & Howard Co.,* 256 N.C. 427, 124 S.E. 2d 109. While there need be no appreciable separation in time between the accident and the resulting injury, *Keller v. Wiring Co.,* 259 N.C. 222, 130 S.E. 2d 342, there must be some unforeseen or unusual event other than the bodily injury itself.

In *Keller v. Wiring Co., supra,* the claimant was standing in a narrow ditch when, in the course of his employment, it became necessary for him to lift and, with a twisting motion, throw out of the ditch a heavy rock. The twist, under these circumstances, was deemed an accident from which the injury resulted.

Here, the evidence points inescapably to the conclusion that the claimant was doing what he expected to do and was employed to do, was doing it in the ordinary manner, and was free from confining or otherwise exceptional conditions and surroundings. There was nothing unforeseen or unexpected except the injury itself. Thus, the evidence is not sufficient to support the finding that there was an injury by an accident. The court erred in affirming the award of the Commission.

Reversed.

STATE OF NORTH CAROLINA v. ANDREW YOUNG, DEFENDANT
AND
STATE OF NORTH CAROLINA v. ROBERT YOUNG, DEFENDANT.

(Filed 11 October, 1967.)

1. **Criminal Law § 104—**
   On motion to nonsuit, the evidence must be considered in the light most favorable to the State, giving it the benefit of every reasonable intendment thereon and inference therefrom, and contradictions and discrepancies are for the jury to resolve and do not warrant nonsuit.

2. **Same—**
   On motion to nonsuit, defendant's evidence will not be considered when it is in conflict with that of the State.

3. **Criminal Law § 106—**
   Circumstantial evidence is sufficient to be submitted to the jury if it supports as a logical and reasonable inference a finding of every essential element of the offense and the identity of defendants as the perpetrators, it being for the jury to determine whether it excludes every reasonable hypothesis of innocence.

4. **Burglary and Unlawful Breakings § 5—**
   Circumstantial evidence in this case *held* sufficient to be submitted to the jury on the charge against defendants of felonious breaking and entering a store with intent to steal property therefrom, and with larceny of described property therefrom as a result of such unlawful breaking and entering.

APPEAL by defendants from *Martin, S.J.*, at the 17 April 1967 Conflict Schedule "C" Special Session of MECKLENBURG.

By an indictment, proper in form, the defendants were charged with the felonious breaking and entering of Jones Smoke Shop, in the City of Charlotte, with the intent to steal property of the proprietor and with the larceny therefrom of a number of cases of beer as a result of such unlawful breaking and entering. Each defendant entered a plea of not guilty to each charge. The jury found each defendant guilty of both offenses. The charges were consolidated for judgment as to each defendant. Andrew Young was sentenced to four years in the county jail to be assigned to work under the supervision of the State Prison Department. Robert Young received a similar sentence of three years, the difference being due to the past criminal record of Andrew. Both defendants appealed, their only assignments of error being to the denial of their motions for judgment of nonsuit.

The State offered evidence tending to show:

The proprietor of Jones Smoke Shop is Will Jones. On 24 December 1966, at about midnight, he closed the smoke shop, cut out

the lights, locked the door with a heavy padlock and left for the night. He then had in the smoke shop a number of cases of beer which he had purchased from various distributors that evening. This beer he left in the cases in which it was delivered. At 7:30 o'clock the next morning, he returned to the smoke shop. The lock was not on the door. The door was open. The cases of beer were gone. The value of the missing beer was approximately $72.00. Jones had never given either of the defendants permission to go into the smoke shop at night after he had locked up.

The operator of a pool room, separated from the smoke shop only by an alley, was spending the night in the pool room. Between 3 a.m. and 4 a.m. he heard a noise. He looked around and saw Robert Young standing outside the window of the pool room and then saw Andrew Young go past it toward the smoke shop. He then went out of the pool room onto the sidewalk and observed the two defendants, each well known to him, enter the smoke shop through its door, 30 feet from the pool room. The smoke shop was not then open for business. He then went back inside the pool room and did not see the defendants come out of the smoke shop.

The defendants offered no evidence except the testimony of Andrew Young, who denied any knowledge of or participation in any breaking and entering of the smoke shop or any larceny of anything therefrom, and also denied that the two defendants were together at any time during the night in question.

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

W. Herbert Brown, Jr., for defendant appellants.

PER CURIAM. "On motion to nonsuit, the evidence must be considered in the light most favorable to the state, and the state is entitled to every reasonable intendment thereon and every reasonable inference therefrom. Contradictions and discrepancies, even in the state's evidence, are for the jury to resolve, and do not warrant nonsuit. Only the evidence favorable to the state will be considered, and and defendant's evidence relating to matters of defense, or defendant's evidence in conflict with that of the state, will not be considered." Strong, N. C. Index, 2d Ed., Criminal Law, § 104.

The State's evidence identifying the defendants as the perpetrators of the offenses was circumstantial, but in determining the sufficiency of the evidence to withstand a motion for judgment as of nonsuit, it is immaterial whether the evidence is circumstantial or direct or both. *State v. Tillman*, 269 N.C. 276, 152 S.E. 2d 159.

It is sufficient that there be substantial evidence of each material element of the offense and that the defendant was the guilty party. *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431.

When considered in accordance with these rules, the evidence in this record is sufficient to support a finding that the locked door of Jones Smoke Shop was forced open, the smoke shop was entered for the purpose of committing larceny therein and that a quantity of beer of substantial value was stolen and removed therefrom by the persons so breaking and entering. It is also sufficient to support a finding that each of the defendants entered the smoke shop unlawfully at the time when the breaking and entering and the larceny were committed. Thus, the evidence was sufficient to justify the denial of the motions for judgment as of nonsuit and the submission of the cases to the jury, which found each defendant guilty of each of the offenses charged in the indictment.

No error.

STATE v. JOHN CLOUD, JR.

(Filed 11 October, 1967.)

1. **Burglary and Unlawful Breakings § 8—**

   A person who breaks and enters a building with intent to commit the crime of larceny is guilty of a felony, regardless of whether he is frustrated before he accomplishes the larceny.

2. **Burglary and Unlawful Breakings § 5—**

   Evidence in this case *held* sufficient to overrule nonsuit in the prosecution for unlawfully breaking and entering a building with intent to steal merchandise therefrom.

APPEAL by defendant from *Martin, Special Judge,* April 17, 1967 Conflict Criminal "C" Session of MECKLENBURG.

Defendant was tried on an indictment charging that he, on January 15, 1967, unlawfully, wilfully and feloniously did break and enter the building of Hemmingway Transport, Incorporated, wherein valuable merchandise was kept, with intent to steal such merchandise.

The only evidence was that offered by the State. It consists of testimony of Thomas C. Ramsey, Terminal Manager of Hemmingway Transport, Incorporated, and of P. H. Jackson, a Charlotte Police Officer, tending to show the facts narrated below.

Hemmingway is engaged in the business of transporting and

handling general freight commodities in interstate commerce. Its place of business in Charlotte, North Carolina, located at 1100 South Clarkson Street, includes a building, consisting of an office and adjoining warehouse (terminal), and loading dock and parking space for its trucks, tractors and trailers.

On Sunday, January 15, 1967, Hemmingway's was not open for business. On that date, Mr. Ramsey, between 12:00 noon and 1:00 p.m. while standing outside the building, heard a noise inside the warehouse. Through a window in one of the warehouse doors, Ramsey saw defendant, at which time defendant was approximately fifteen feet from him. Ramsey testified: "(H)e (defendant) was sorting through freight like he was picking through the freight — he was picking or sorting through the freight that was unloaded that Saturday and put in the warehouse. His hands did come in contact with some of the boxes inside the warehouse. When he touched the boxes he was moving them around, scattering them around like he was searching for something."

While telephoning the police from a nearby place of business, Mr. Ramsey saw defendant walk and then run away from the warehouse. Ramsey alone, and later with a police officer, followed defendant. Defendant was overtaken and placed under arrest by (officer) Jackson.

When Ramsey returned to Hemmingway's place of business, he found that two or three of the boards on the outside of the warehouse had been pulled off, leaving a "large enough space for someone to crawl through." Too, he discovered a roller was missing from the inside of one of the "overhead doors that roll up on a track." When defendant was arrested, he had in his hand "a broken roller from an overhead roller door."

An inventory taken the next (Monday) morning disclosed that merchandise that had been stored in the warehouse was missing.

Defendant had never been an employee of Hemmingway. Ramsey did not know defendant. Defendant had no authority or permission to be inside that building on Sunday, January 15, 1967, when the place of business was closed.

The jury returned a verdict of guilty as charged; and judgment, imposing a prison sentence of four years, was pronounced. Defendant excepted and appealed.

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

W. B. Nivens for defendant appellant.

PER CURIAM. Pertinent legal principles include the following: "Under G.S. 14-54, if a person breaks *or* enters one of the buildings described therein with intent to commit the crime of larceny, he does so with intent to commit a felony, without reference to whether he is completely frustrated before he accomplishes his felonious intent . . . (H)is criminal conduct is not determinable on the basis of the success of his felonious venture." (Our italics.) *State v. Smith,* 266 N.C. 747, 147 S.E. 2d 165; *State v. Nichols,* 268 N.C. 152, 150 S.E. 2d 21.

Defendant's motion for judgment as in case of nonsuit was properly overruled. The State's evidence was amply sufficient to support the verdict. Moreover, defendant's other assignments do not disclose prejudicial error or present questions of sufficient substance to warrant detailed discussion. Hence, the verdict and judgment will not be disturbed.

No error.

STATE v. ROBERT LOVELACE.

(Filed 11 October, 1967.)

Constitutional Law § 36—

Punishment within the statutory maximum cannot be considered cruel or unusual in the constitutional sense. Constitution of North Carolina, Art. I, § 14.

APPEAL by defendant from *Brock, S.J.,* 8 May 1967 Special Criminal Session of CLEVELAND.

Two bills of indictment, Nos. 67-87 and 67-87A, were returned by the grand jury against the defendant. Both bills of indictment contained separate counts of felonious breaking and entering and felonious larceny of goods of the value of over $200.00.

Detective E. W. Howell of the Shelby Police Department testified that he investigated a break-in on January 12, 1967 at the Allen Refrigeration Company where five television sets valued at $879.75 were reported missing. One set was found near the back door. Howell further testified to investigating a breakin that occurred on the night of January 15, 1967 at Taylor Johnson, Inc., where an electric calculator valued at $880.00 and an electric typewriter valued at $445.00 were reported missing. Howell and Lt. Lee talked to defendant about the breakins. Defendant voluntarily told them how he entered the two buildings and removed the goods therefrom. He stated that he sold the television sets for $35.00 each and the cal-

culator and typewriter for $50.00 each. The calculator, typewriter and three television sets were recovered.

Defendant, through court-appointed counsel, tendered pleas of guilty as charged on all counts. The court conducted oral and written inquiry and found that the pleas were freely, understandingly and voluntarily made before the pleas were accepted by the court.

Defendant was sentenced to not less that eight nor more than ten years under each indictment.

Defendant appealed.

Attorney General Bruton, Assistant Attorney General Melvin, and Staff Attorney Costen for the State.

Henry B. Edwards for defendant.

PER CURIAM. Defendant's sole assignment of error was that the sentences imposed by the court were excessive. He argues in his brief that they constituted cruel and unusual punishment, in violation of Article I, § 14, of the North Carolina Constitution.

> "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." *State v. LePard,* 270 N.C. 157, 153 S.E. 2d 875.

The court could have sentenced defendant to imprisonment for forty years. The sentences are well within the statutory limit and no error appears on the face of the record.

No error.

STATE OF NORTH CAROLINA v. CLEVELAND BATTLE.

(Filed 11 October, 1967.)

1. Criminal Law § 166—

Exceptions not brought forward in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Criminal Law § 101—

A juror who was not a member of the jury impaneled to try defendant through error entered the jury room with eleven members of the jury impaneled to try the case on the morning following a recess. The trial judge found that the juror in question was in the room only for a short time and that the twelfth juror impaneled to try defendant replaced him within a matter of moments, prior to any deliberations of the jury. *Held:* The court properly denied defendant's motion to set aside the verdict on the ground of any such nonprejudicial incident.

APPEAL by defendant from *Morris, E.J.*, 22 May 1967 Special Criminal Session of NASH.

Defendant was convicted by the Recorder's Court of Nash County upon a warrant charging him with the larceny of two tarpaulins valued at $40.00, the property of J. L. Skinner. From the prison sentence imposed, he appealed to the Superior Court, where he was tried *de novo*. The State's evidence tended to show:

Before noon on 4 August 1966 (the date charged in the warrant), defendant and one Debro twice went in an automobile to the barn of J. L. Skinner, where he and his tenants were housing tobacco. That afternoon, Skinner discovered that two tarpaulins, which had been on a bench at the barn, were missing. The next day, he found the tarpaulins at William Avent's farm store. The previous afternoon, defendant and Debro had sold the tarpaulins to Mr. Avent. They said they had found them in the road, where they had been blown from a truck. Avent paid the two $12.00 in cash and gave then $6.00-$8.00 in trade.

On or about 18 August 1966, while defendant was in jail on charges of larceny, forgery, and false pretense, the sheriff questioned him about the tarpaulins. After he had been fully warned of all of his constitutional rights, defendant told the sheriff that on 4 August he had been drinking; that he discovered the tarpaulins in his car and carried them to Mr. Avent's store; that he sold them to Avent for $5.00; and that he and Debro split the money, which they spent "riding around drinking."

Pending the verdict of the jury, the court took a recess at 5:30 p.m. on 23 May 1967. When court reconvened the following morning, a juror, who was not a member of the jury impaneled to try this case, took a seat in the jury box. By mistake he went into into the jury room with eleven members of defendant's jury. A few moments later the twelfth juror appeared and the "mistaken juror" was removed immediately. The judge, after carefully examining him and the eleven jurors with whom he went into the room, ascertained that he was with them only long enough to get a drink of water,

and that the eleven had not discussed the case with him or in his presence.

The verdict was "guilty as charged." The judge denied defendant's motion to set the verdict aside and imposed a prison sentence of two years. Defendant appealed.

Attorney General T. W. Bruton, Deputy Attorney General Harrison Lewis, and Staff Attorney D. M. Jacobs for the State.

Royal G. Shannonhouse for defendant appellant.

PER CURIAM. Appellant assigns as error the failure of the court to grant his motion to set aside the verdict. The exception upon which this assignment of error is based is the only one which defendant sets out in his brief. All others, therefore, are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court of North Carolina; *State v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781.

Defendant argues that the presence of a "stranger" in the jury room creates such an "opportunity for corruption" that it invalidates a verdict. This thesis is not substantiated. "A motion for a new trial for incidents or misconduct of or affecting the jury is addressed to the discretion of the trial court." 4 Strong, N. C. Index, Trial § 50 (1961). When the trial judge finds facts showing that neither the deliberations nor the verdict of the jury were in any manner influenced by the misconceived entrance of an outsider, and that there was no communication between such person and any juror, his refusal to set aside the verdict is not reviewable. *State v. Hill,* 225 N.C. 74, 33 S.E. 2d 470.

In the trial below, we find

No error.

STATE OF NORTH CAROLINA v. ALLEN BRITT WYATT.

(Filed 11 October, 1967.)

1. Criminal Law § 166—

Assignments of error not brought forward in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Burglary and Unlawful Breakings § 5—

Sufficiency of defendant's guilt of breaking and entering a store and with larceny of property therefrom as a result of the unlawful entry *held* sufficient to be submitted to the jury.

APPEAL by defendant from *Bailey, J.*, 29 May 1967, Special Criminal Session, MECKLENBURG Superior Court.

The defendant was charged in a bill of indictment with feloniously breaking and entering into a storehouse on 18 December 1966 occupied by Lowder's Grocery Store, owned and operated by Mr. E. H. Lowder, Jr., and with the larceny of a number of properly described articles valued at $447.79.

The defendant entered a plea of not guilty.

In summary, the State's evidence tended to show that on Sunday, 18 December 1966, Mr. Lowder went to his store to check his refrigerator unit and then went home. Within an hour he was notified that his store had been entered, and he returned to it. He found that the front door was still locked, but the back door and bathroom window "were busted out." He found some $500.00 worth of items missing, including a transistor radio, check writing machine, adding machine, sixty-six cartons of assorted cigarettes, two boxes of B. C. headache powders, eight packages of razor blades and fifteen flashlights. Shortly afterwards, most, if not all, of these articles were found behind a wall about fifty feet from the store.

Several officers of the Charlotte Police Department testified that they went to the store about 7:30 p.m. and found that the back door had been broken into; that they found the articles, later identified as belonging to Mr. Lowder, behind the wall, and that they saw Allen Britt Wyatt, the defendant, seated in a car approximately four or five feet from the wall where the merchandise was stacked. That the defendant was arrested, and upon emptying the contents of his pockets, two coins were found: a Canadian penny and a Canadian dime. These coins were identified by Richard Allen Helms, who was then employed by Mr. Lowder. He said that the penny was kept in the middle compartment of the cash register in the store, that he had seen it the day before and that it had an impression on both sides with a hole in it at the top. Fingerprints were taken from some of the cigarette cartons, compared with those of the defendant, and found to be his.

The defendant offered no evidence.

The jury returned a verdict of guilty on both counts, and from judgment of imprisonment, the defendant appealed.

William J. Richards, Jr., Attorney for defendant appellant.

T. W. Bruton, Attorney General, and George A. Goodwyn, Assistant Attorney General, for the State.

PER CURIAM. In the case on appeal, the defendant excepts to the failure of the Court to allow his motion for judgment of non-

suit and to a portion of the charge. However, he has not brought forth any assignments of error in his brief, and they are deemed to be abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783; *State v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781.

Nevertheless, we have examined the record and find the exceptions without merit. Evidence that the store had been broken open, that the defendant was found in the immediate vicinity within a few minutes afterwards, that he was sitting in a car only four or five feet from the articles taken from the store, had in his possession a coin taken from the store, and that his fingerprints were found upon some of the stolen property was ample to go to the jury and sustain a verdict of guilty.

That portion of the charge to which the defendant took an exception dealt with the doctrine of recent possession of stolen property and is in accord with many rulings of the Court.

No error.

STATE OF NORTH CAROLINA v. PAUL BENNETT.

(Filed 11 October, 1967.)

APPEAL by defendant from *Bailey, J.,* May 15, 1967 Schedule "B" Session, MECKLENBURG Superior Court.

The defendant, Paul Bennett, was indicted, tried and convicted of common law robbery in that he unlawfully, wilfully and feloniously made an assault on one J. C. Truesdale, and by putting him in fear, did feloniously take from his person the sum of $25. The offense occurred late at night. The victim complained immediately to the police, who arrested the defendant after the victim identified him. The investigating officer corroborated Truesdale with respect to the victim's immediate complaint, and gave substantive evidence with respect to the victim's bloody face.

The defendant testified as a witness in his own defense. He admitted he and Truesdale had been out drinking together. He admitted that he assaulted the prosecuting witness, but claimed he did so because of improper remarks made to defendant's girlfriend. The girlfriend corroborated the defendant's story. From a verdict of guilty, and judgment thereon, the defendant appealed.

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

Charles B. Merryman, Jr., for defendant appellant.

PER CURIAM. The State's evidence made out a case of common law robbery. The victim and the defendant had been drinking together. The evidence disclosed the witness had paid all the bills and the defendant knew the witness had money. The jury evidently believed the story of the victim because of his immediate complaint and his bloody face. The evidence was in sharp conflict and was resolved against the defendant by the jury. We find

No error.

STATE OF NORTH CAROLINA v. NATHANIEL GARRISON.

(Filed 11 October, 1967.)

APPEAL by defendant from *Bailey, J.*, 5 June 1967, Special Criminal Session, MECKLENBURG Superior Court.

The defendant was charged with robbing a 73-year-old man, George McGill, of $270.00. He pleaded not guilty.

McGill testified that Garrison came to his house early in the morning on March 13, 1967. After some drinking, McGill wanted to get some food for his lunch, went to lock the back door, and was then hit in the face and stomach; and his wallet, containing $270.00, was taken by the defendant. The defendant then left McGill's home in his Buick.

The defendant denied all connection with the charge, said he didn't know McGill, and that he was in Gaffney, South Carolina at the time in question. He offered other evidence tending to show an alibi.

Upon a verdict of guilty and a sentence of imprisonment, the defendant appealed.

John R. Ingle, Attorney for defendant appellant.

T. W. Bruton, Attorney General, and Ralph Moody, Deputy Attorney General, for the State.

PER CURIAM. This is a case in which the jury, upon competent and impressive evidence, found the defendant guilty. It rejected the defendant's alibi, and accepted the evidence of the State that the defendant beat an old man and robbed him.

The defendant assigns several alleged errors, but upon careful examination, we find them without substantial merit.

No error.

STATE v. WILLIE EDWARD STATEN.

(Filed 18 October, 1967.)

1. **Criminal Law § 181—**

In a hearing under the Post Conviction Hearing Act, a finding by the court that an indigent defendant had been denied right of appeal to the Supreme Court fully supports an order appointing counsel to perfect an appeal and directing the county to furnish a transcript of the trial. G.S. 15-4.1, G.S. 15-180, G.S. 15-221.

2. **Homicide § 20—**

The State's evidence tended to show that the defendant and two other persons were seen attacking the deceased on the street in the nighttime, that defendant's hands were making "swinging motions" over deceased's body, that a coat worn by defendant at the time of the attack and a knife were taken from defendant following his arrest, that tests performed on the coat revealed splotches of human blood, and that the deceased died from a stab wound in the chest. *Held:* The evidence was sufficient to go to the jury on the issue of defendant's guilt of murder in the second degree.

3. **Homicide § 14—**

Where the solicitor asked a witness if he had seen the defendant strike the deceased with his hands or fists, and the witness replied, "I seen motions, swinging motions", a motion to strike on the ground that the answer was not responsive to the question was properly denied, since the witness testified positively as to what he saw taking place between the defendant and the deceased.

4. **Criminal Law § 169—**

Where the court sustains an objection to a question asked on cross-examination, and the record fails to show what the witness would have testified, the exclusion of the testimony cannot be held prejudicial.

5. **Criminal Law § 87—**

The trial court has discretionary authority to allow the solicitor to ask a witness a leading question, and, in the absence of a showing of abuse of discretion, its rulings will not be reviewed on appeal.

6. **Criminal Law § 161—**

A mere reference in the assignment of error to the record page where the asserted error may be found is not sufficient, since an assignment of error must clearly present the error relied upon without compelling the Court to go beyond the assignment itself to learn what the question is.

7. **Criminal Law § 146—**

The Supreme Court may consider an assignment of error, although it is defective in compelling the Court to search the record to discover the purported error.

8. **Criminal Law § 158—**

Where the charge of the court is not included in the record, it will be presumed that the court properly instructed the jury as to the law arising upon the evidence.

APPEAL by defendant *in forma pauperis* from *Clarkson, J.*, 8 April 1963 Regular Criminal Session of MECKLENBURG.

Criminal prosecution upon an indictment charging defendant on 13 January 1963 with murder in the second degree of Ed Blake.

Defendant, an indigent, was represented by his court-appointed counsel, Elbert Foster, and entered a plea of not guilty. Verdict: Guilty of manslaughter.

From a judgment of imprisonment for not less than 15 years, defendant appeals to the Supreme Court.

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

Grier, Parker, Poe & Thompson by A. Marshall Basinger for defendant appellant.

PARKER, C.J. On 24 April 1967 defendant instituted a proceeding in the Superior Court of Mecklenburg County to review the constitutionality of his trial, pursuant to G.S. 15-217. This petition came on to be heard before Bailey, J., presiding at the 12 June 1967 Regular Schedule "C" Criminal Session of the Superior Court of Mecklenburg County. Defendant was represented by A. Marshall Basinger, a member of the Mecklenburg County Bar, who was appointed by the court to represent defendant who was an indigent. At the hearing defendant testified at length. We have a transcript of his testimony before us. After listening to the testimony, Judge Bailey entered a judgment in substance as follows: That the petitioner was tried at the 8 April 1963 Regular Criminal Session of the Superior Court of Mecklenburg County; that he was represented at said trial by Elbert Foster, who had been appointed by the court to represent him and who also represented him at the preliminary hearing; that petitioner entered a plea of not guilty, and was found guilty of manslaughter by a jury and sentenced to a term of 15 years in prison, which he is now serving; that the petitioner attempted to give notice of appeal and appeal his case to the Supreme Court and was not able to do so, and that in this there was a substantial denial of his right to appeal secured to him by the Constitution of the State of North Carolina. Based upon said findings, Judge Bailey adjudged that the petitioner shall be allowed to appeal to the Supreme Court of the State of North Carolina; that the County of Mecklenburg shall provide him with a transcript of his trial at the 8 April 1963 Regular Criminal Session; that he shall be allowed to perfect said appeal *in forma pauperis,* and A. Marshall Basinger was appointed to represent said petitioner and to perfect his appeal. The tran-

script of the evidence at the hearing before Judge Bailey amply supports Judge Bailey's recital of facts.

The defendant testified in substance: He told Mr. Foster to appeal the case. Foster told him he had been made fool enough out of the case and that he did not want anything else to do with it, and he refused to appeal the case. Defendant's mother and stepfather went to Mr. Foster and asked him to appeal the case, and he would not. He filed no notice of appeal. When defendant was committed to prison, he wrote to the clerk of the Superior Court of Mecklenburg County several times trying to get a transcript and trying to find out how his case could be appealed to the Supreme Court. The answers he received from the clerk's office did not pertain to what he was writing about, and he could not get the information that he wanted until this year when he finally learned how to write a writ. This is the defendant's version. So far as the record discloses Mr. Foster did not testify, nor is there anything to show that he was given an opportunity to testify.

G.S. 15-180 provides: "In all cases of conviction in the Superior Court for any criminal offense, the defendant shall have the right to appeal. . . ." G.S. 15-221 provides in substance, except when quoted, that the judge upon hearing a petition for a review of the constitutionality of his trial, if he finds with the petitioner, "shall enter an appropriate order with respect to the judgment or sentence in the former proceedings under which the petitioner was convicted, and such supplementary orders as to rearraignment, retrial, custody, bail or discharge as may be necessary and proper."

When Judge Bailey found at the hearing that defendant had been denied a substantial constitutional right, to wit, his right to appeal his case to the Supreme Court, he was correct in ordering his counsel to perfect an appeal from his trial at the 8 April 1963 Regular Criminal Session of Mecklenburg, and in ordering the county to furnish to him a transcript of his trial before Judge Clarkson. G.S. 15-4.1; G.S. 15-180; G.S. 15-221; *S. v. Roux,* 263 N.C. 149, 139 S.E. 2d 189; *Douglas v. California,* 372 U.S. 353; 9 L. Ed. 2d 811, reh. den. 373 U.S. 905, 10 L. Ed. 2d 200; *Griffin v. Illinois,* 351 U.S. 12, 100 L. Ed. 891, 55 A.L.R. 2d 1055, reh. den. 351 U.S. 958, 100 L. Ed. 1480; *Draper v. Washington,* 372 U.S. 487, 9 L. Ed. 2d 899; 43 N.C.L. Rev. 596.

This is a summary of the testimony in the trial at the 8 April 1963 Session before Judge Clarkson and a jury, except when quoted: About midnight on 13 January 1963 a witness, Larry Boyer, age 20, who knew defendant Willie E. Staten, left his girl friend's house and proceeded up Myers Street in the city of Charlotte until he came to the intersection of that street and Watkins Lane from which point

and at a distance of less than half a block he observed three figures attacking a man. There was a street light about two feet from where this scuffle was taking place and he was able to recognize defendant Willie E. Staten as one of the assailants. He then proceeded to within about five feet of the scene. He saw defendant Staten and Ed Blake, the victim, scuffling and tussling in the street. He heard Ed Blake say, "Please don't hit me anymore. I don't have any money." He did not see Willie Staten strike Ed Blake with his hands or fists, but he saw swinging motions. After seeing Willie Staten and Ed Blake on Myers Street, he turned around and ran back down the street to his girl friend's house. When asked upon cross-examination why he did this, he stated, "When I left my girl friend's house I was going home. I didn't go home because I wasn't going to walk past nobody looking for a fight." He saw defendant again that night at the intersection of Myers Street and Second about five minutes after Blake was taken to the hospital. He had a conversation with defendant. He testified as follows: "(H)e asked me said, 'What is happening, Baby?' and I said, 'Ain't nothing happening.' I said, 'You all just damn near killed that old man.' He said, 'Who is, Baby, you don't know nothing and I don't know nothing.' At that time he and Jesse Earl Brown and June Lindsey were all together. What he really said after I told him that he had damn near killed the old man, he said, 'Cool it, Baby, you don't know nothing and I don't know nothing.'" Willie Staten had on a sweater with different patterns of color in it and he had on a long white coat. The last time Boyer saw Ed Blake he was lying out there at the intersection of Myers and Second in a pool of blood, moaning and begging somebody to call somebody for some help. Boyer did not know how Ed Blake got from where he was being attacked to the intersection of Myers and Second Street where he was lying in a pool of blood.

Dr. W. M. Summerville, who is a medical doctor, saw the body of the deceased victim, Ed Blake, on 13 January 1963 at a funeral home. He performed an autopsy and a blood alcohol test. From the autopsy and alcohol test, he can say definitely that Ed Blake was under the influence of alcohol at the time of his death and, in his opinion, Ed Blake died as a result of a stab wound in the chest, with resulting hemorrhage.

W. E. Dew, a member of the Charlotte Police Department in the Detective Bureau, saw the defendant shortly after he was arrested. He questioned him at the police department about a coat and defendant said that he had been wearing it on 13 January 1963. He questioned him concerning some flecks of some substance on the

coat which appeared to be blood. He asked defendant to explain substances on his shoes, and defendant stated that there was nothing on the shoes because he had had them cleaned and polished the preceding day. He questioned defendant about a knife. Defendant stated that he got the knife some two weeks earlier from a friend, and that the knife just happened to be in his possession when he was arrested. The blade was approximately three and one-half inches long. He questioned him concerning the substance on the blade of the knife. Defendant said he knew nothing about any substance on the knife, but if there was a substance on it, it had gotten there before he got the knife. Dew told defendant that he wanted to have the coat and the knife examined at the State Bureau of Investigation to determine what the substance was that was on them. Defendant made no objection. Thereafter, Dew took the knife and the coat to the laboratory of the State Bureau of Investigation in Raleigh.

William S. Best is employed by the North Carolina Bureau of Investigation as a chemist. He has received an A.B. degree in chemistry and has done graduate work at the University of North Carolina. He conducted an examination of some spots found on the left sleeve of the long white coat which the evidence tended to show the defendant was wearing on the occasion in question. Mr. Best cut these spots out and ran a series of laboratory tests thereon for the purpose of ascertaining whether these spots were produced by blood and, if so, whether it was human blood. He testified that in his opinion the tests revealed that the substance was human blood. He made tests for blood on the knife also, but the quantity of blood thereon was insufficient to enable him to be completely sure that it was human blood.

Charles Miles testified in substance: After midnight on 13 January 1963 back of Big Wheel's house, he heard defendant bragging about how good his knife was, and defendant took it out and showed it to him. When Miles met defendant in the Big Wheel liquor joint, defendant told him that he (Miles) should have been ashamed of himself for killing that old man.

Defendant testified in substance, except when quoted, as follows: About 1:30 on the night in question he and one James Dickson went down Caldwell Street to Second Street. When he got to Second and Myers, he saw blood in the street. Some man was coming down the street from First Street. He did not see Larry Boyer at that time. He had not been in the vicinity of Second and Myers Street before that time that night. About that time Jesse Earl Brown and June Lindsey were coming up from McDowell Street. He asked Jesse Earl Brown where his sister was. About that time he saw Larry Boyer on

his porch near the grocery store where Ed Blake was supposed to have been killed. When he asked Brown where his sister was, he stated that she was down at the Elks, and he said, "I'll be around there after a while." Larry Boyer came from a porch about three or four houses from the grocery store, crossed the street, and walked over to a parked car. He heard them talking. Larry Boyer told Jesse Earl Brown "that him and Charlie Brown had stabbed a man — Charles Miles had stabbed the man." Jesse Earl asked him what had happened that night. He said, "Come across the street and I will tell you." Defendant left there and went down to McDowell Street, and went to an alley that leads to Big Wheel's house. When he got to Big Wheel's house, he was standing in the kitchen when Larry Boyer and Charles Miles both came in the back door, and they went in the middle room and were drinking something. A few minutes later they came out of the middle room and went in the rest room. Charles Miles asked Larry what did he want to stab that man for. Defendant said, "Larry, why did you all want to do something like that?" Then defendant left Big Wheel's liquor joint and went down the alley, and both Miles and Boyer came out just behind him. As they were approaching McDowell Street, they saw a police car and they "broke out and started running." Defendant did not run. Later all of them got back together and went up First Street to Houston's club. They started singing and as they were doing so the police came down by Grier's Funeral Home. The others "broke out and ran again," but he did not. He did not pull out a knife when he was down at Big Wheel's. He did not have a knife. He did not show a knife to anyone nor tell them that it was "mighty sharp" nor words to that effect. He had no knife on his person. When a colored officer told him on Second Street on Monday that the captain of detectives wanted to talk to him, he asked him if he had a knife on him. He said, "Yes," and reached in his pocket and gave the colored officer the knife. He went to the police station about 6 p.m. on Monday just after he had given the knife to the officer. The police officer, Mr. Dew, had questioned defendant about five or six times about spots on the sleeve of his coat and told him that they wanted to check the raincoat out. Defendant told him that that was all right, and gave him the raincoat. Mr. Dew came back after that and said that there were some specks on it, and defendant told him that they came from his mother and stepfather. Defendant also told him that he had no objection to his shoes being analyzed, and that he got the knife from a boy that stays down on Cherry Street. Defendant said he did not have the knife with him on the night of January 13. He had "never cut anybody with that knife." He did not stab Ed

Blake. He had never seen the man before in his life. He knows nothing about Blake, and the only time he saw Blake was when they showed him the pictures at the detective's office.

Defendant offered the testimony of his mother, who testified in substance: On Christmas Eve she and her husband fell out and her husband hit her and blood was dropping all over her. She fell into defendant's arms while she was bleeding, at which time her son had on his raincoat and his black shoes.

The evidence was amply sufficient to carry the case to the jury. 2 Strong's N. C. Index 2d, Homicide, §§ 5, 6, 13, and 20. Defendant's assignment of error that the court erred in denying his motion for judgment of compulsory nonsuit at the close of all the State's evidence is overruled.

The prosecuting officer for the State asked Larry Boyer, "Did you ever see Willie Staten ever strike Ed Blake with his hands or fists?" He answered, "I seen motions, swinging motions." The defendant made a motion to strike that answer as not being responsive to the question. The court overruled the motion. The defendant assigns as error the failure of the court to strike the answer. This assignment of error is overruled, because the answer was a direct answer as to what the witness saw with respect to the defendant and the deceased Blake. See *In re Will of Tatum,* 233 N.C. 723, 726, 65 S.E. 2d 351, 353.

The prosecuting officer for the State asked this question of Larry Boyer on direct examination: "The motions that you say that the defendant Staten made to Ed Blake, will you describe those motions, how they were made." The defendant objected. The court overruled the objection, and the witness answered as follows: "They were scuffling, like any two people scuffling, struggling." Defendant contends that "the court abused its discretion in allowing the State to question its own witness in a manner that amounted to a leading misstatement of the witness' testimony, such question also being repetitious and highly prejudicial to the defendant appellant." This assignment of error is without merit and is overruled.

On cross-examination counsel for defendant asked Larry Boyer this question: "What caused you to get some — after determining to go home, to go out and go down to Big Wheel's and get something to drink there and go over to Houston's place past your home and get liquored up there, what caused you to do those things?" The solicitor objected. His objection was sustained, and defendant assigns this as error. The answer to the question is not in the record. Defendant contends that this was error because the rule that an exception to the exclusion of testimony will not be considered where

the record does not show what the answer of the witness would have been had he been permitted to testify does not apply when the question is asked an adversary witness on cross-examination. The defendant cites in his brief in support of his assignment of error *S. v. Huskins*, 209 N.C. 727, 184 S.E. 480. The rule relied upon by defendant as stated in the *Huskins* case was disapproved by the Supreme Court in *S. v. Poolos*, 241 N.C. 382, 85 S.E. 2d 342, and is no longer the law in North Carolina. This assignment of error is overruled upon authority of the *Poolos* case.

Defendant assigns as error, based upon nine exceptions, that the court abused its discretion in repeatedly allowing the State to ask leading questions of its witnesses. This assignment of error does not comply with the Rules of this Court in that we cannot discover from the assignment of error itself what questions are challenged unless we go on a voyage of discovery throughout the record. *S. v. Coleman*, 270 N.C. 357, 154 S.E. 2d 485. This is stated in Stansbury's N. C. Evidence, 2d Ed., § 31 at 59: "The allowance of leading questions is a matter entirely within the discretion of the trial judge, and his rulings will not be reviewed on appeal, at least in the absence of a showing of abuse of discretion." We have gone on a voyage of discovery through the record and it is manifest that no abuse of discretion of the trial judge is shown. This assignment of error is overruled.

Defendant assigns as error that upon direct examination by his counsel of his mother, who was a witness in his behalf, she was asked this question, "Did he at any time say other than he had had anything to do with this?" The State objected, and the objection was sustained. Then she was asked, "What did he tell you?" The objection of the solicitor for the State was sustained. Then she was asked this question by his counsel, "For corroboration, what did he tell you with reference to this?" The State's objection was sustained, and defendant excepted and assigns this as error. He contends that this hampered him in his examination of one of his witnesses. The record is bare of what the witness would have answered if she had been permitted to answer. Consequently, prejudicial error is not shown. This assignment of error is overruled upon the authority of *S. v. Poolos*, *supra*.

Defendant has other assignments of error which on their face do not disclose the evidence challenged but compel us to go on a voyage of discovery through the record to discover the challenged testimony. This is a non-compliance with the Rules of this Court. We have repeatedly held that while the form of the assignments of error must depend largely upon the circumstances of each case, they

should clearly present the error relied upon without the necessity of going beyond the assignment itself to learn what the question is. Thus, they must specifically show within themselves the question sought to be presented, and a mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. 1 Strong's N. C. Index 2d, Appeal and Error, § 24 at 148-49.

The charge is not included in the case on appeal. It is, therefore, presumed to be free from error and that the jury was properly instructed as to the law arising upon the evidence as required by G.S. 1-180. *S. v. Harrison,* 239 N.C. 659, 80 S.E. 2d 481; 1 Strong's N. C. Index 2d, Appeal and Error, § 42 at 185.

We have carefully examined all the exceptions and assignments of error in the record before us and gone on a voyage of discovery several times, and, in our opinion, no error has been made to appear that would warrant a new trial. The evidence was conflicting, but that was for the twelve to decide and not this Court.

The verdict and judgment of the court below will be upheld.

No error.

BERTIE GRIMES v. HOME CREDIT COMPANY OF KINSTON, NORTH CAROLINA.

(Filed 18 October, 1967.)

1. Appeal and Error § 49—

Appellant must make the record disclose what the excluded evidence would have been in order for the appellate court to determine whether its exclusion was prejudicial.

2. Evidence § 31—

Immediately after plaintiff had slipped and fallen on the floor of defendant's store, defendant's employee stated that she had almost slipped down herself and that the janitor had waxed the floor the night before. *Held:* The testimony of what the girl said was properly excluded as a narrative of past events.

3. Negligence § 37f—

Evidence that plaintiff fell to her injury on the waxed floor of defendant's place of business, without evidence that the wax had been applied other than in the usual and customary manner or that an excessive quantity of wax had been used or that any unusual patches of wax were left on the floor, is insufficient to resist nonsuit.

APPEAL by plaintiff from *Cohoon, J.*, 25 May 1967 Civil Session of LENOIR.

Action for personal injuries.

In her complaint, plaintiff alleges: On 10 November 1962, plaintiff entered defendant's place of business as "an invitee and customer." In walking across the floor to the counter she slipped and fell on the tile floor to which an excessive amount of wax had been applied. Notwithstanding defendant's knowledge of this condition, it permitted the wax to remain on the floor and failed to warn plaintiff of the hazard. Plaintiff's kneecap was broken in the fall. As a result of this painful and permanent injury, she lost wages and incurred medical expenses for which she is entitled to recover damages.

Answering, defendant denied all plaintiff's allegations of negligence, alleged that it had used "a non-skid wax" on its floor, and averred that plaintiff had been guilty of contributory negligence in that she (1) "failed to keep a proper lookout while walking upon a perfectly clean and smooth floor"; (2) "failed to place her feet securely on the floor"; and (3) "permitted or caused herself to get off balance and to fall."

Upon the trial, plaintiff's evidence tended to show: Plaintiff had an account with defendant and, about 9:30 a.m. on 10 November 1962, she went to its place of business to get a check which was being held for her at the counter. The floor was "real shiny with wax." Plaintiff was wearing "flats" — shoes with flat heels. Just as she walked in the door her foot slipped; she fell and fractured her left kneecap. As she got up from the floor, a "girl who was employed at the Home Credit Company said something to (her)." Defendant's objection to what the girl said was sustained. In the absence of the jury, plaintiff testified that just as she was getting up, she said to the girl, "This is a slick floor." The girl's reply was, "It sure is; I have almost slipped down myself." Then she added that "the janitor had waxed the floor the night before."

At the conclusion of plaintiff's evidence, the court dismissed the action "as in the case of involuntary nonsuit," and plaintiff appealed.

Turner and Harrison for plaintiff appellant.
White and Aycock for defendant appellee.

PER CURIAM. Plaintiff's first assignment of error is:

> "That the court erred in its ruling on the admissibility of evidence, when it refused to allow the plaintiff to testify to a conversation with an employee of the defendant, said conver-

> sation having on a short time after the plaintiff's fall and before she left the premises. EXCEPTION No. 2 (R. p. 15)."

This statement of the assignment ignores Rule 19(3) of the Rules of Practice in the Supreme Court. An assignment of error to the admission *or* exclusion of evidence must include so much of that testimony as will enable the Court to understand the question sought to be presented without the necessity of going beyond the assignment itself. *Darden v. Bone,* 254 N.C. 599, 119 S.E. 2d 634; *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492; 1 Strong, N. C. Index, Appeal and Error § 23 (Supp.) (1957). Notwithstanding appellant's failure to comply with the rule, because of the brevity of the record, we have considered the assignment and find it to be without merit.

The statements of "the girl who was employed at the Home Credit Company" that she herself had almost slipped and that the janitor had waxed the floor the night before were merely narrative of past occurrences. It was, therefore, incompetent hearsay as against her employer, the defendant. *Edwards v. Hamill,* 266 N.C. 304, 145 S.E. 2d 884; *Branch v. Dempsey,* 265 N.C. 733, 145 S.E. 2d 395; *Brown v. Montgomery Ward & Co.,* 217 N.C. 368, 8 S.E. 2d 199. Even if this evidence had been admitted without objection, the judgment of nonsuit would have still been inevitable.

> "The fact that a floor is waxed does not constitute evidence of negligence. Nor does the mere fact that one slips and falls on a floor constitute evidence of negligence. *Res ipso loquitur* does not apply to injuries resulting from slipping or falling on a waxed or oiled floor." *Barnes v. Hotel Corp.,* 229 N.C. 730, 731-32, 51 S.E. 2d 180, 181.

Accord, Hedrick v. Tigniere, 267 N.C. 62, 147 S.E. 2d 550; *Murrell v. Handley,* 245 N.C. 559, 96 S.E. 2d 717. Plaintiff's evidence, including that which was excluded, merely tends to show that the floor in defendant's place of business had been waxed and polished. Evidence that the wax had been applied other than in the usual and customary manner is lacking. It shows neither an excessive quantity used nor any "unusual patch of wax" left on the floor. See *Copeland v. Phthisic,* 245 N.C. 580, 96 S.E. 2d 697; *Lee v. Green & Co.,* 236 N.C. 83, 72 S.E. 2d 33; annot., 63 A.L.R. 2d 591 (1959).

The judgment of nonsuit is

Affirmed.

STATE v. J. B. MILLER.

(Filed 18 October, 1967.)

1. *Constitutional Law* § 32; *Criminal Law* § 21—

It is not required that defendant be represented by counsel upon the preliminary hearing.

2. Criminal Law § 23—

The acceptance of a plea of guilty on the day after the appointment of counsel for the indigent defendant will not be held for error when there is no request for continuance and the interrogation of the court discloses that defendant entered the plea freely, understandingly, and voluntarily, without compulsion or duress or promise of leniency.

3. Same—

Tender and acceptance of defendant's pleas of guilty upon particular charges renders unnecessary proof of defendant's guilt thereof.

4. Criminal Law § 171—

Where defendant validly pleads guilty to one count and the sentence therefor is within the statutory maximum and is made to run concurrently with the sentence on the other counts, any error relating to the other counts cannot be prejudicial.

APPEAL by defendant from *Campbell, J.*, May 1967 Criminal Session of CALDWELL.

At said May 1967 Criminal Session, the grand jury returned as true bills six two-count indictments, each indictment charging defendant with two felonies, namely, (1) the forgery of a described check, a violation of G.S. 14-119, and (2) the uttering of said check with intent to defraud, a violation of G.S. 14-120. The court, based on defendant's affidavit of indigency, appointed Paul Beck, Esq., to represent defendant in these criminal actions. Defendant, through his said counsel, tendered pleas of guilty to the *second* count in each of the six indictments, namely, the uttering of a forged instrument, to wit, the check described therein, with intent to defraud. After careful inquiry, and in accordance with defendant's oral and written statements, the court determined and adjudged that defendant's pleas were entered freely, understandingly and voluntarily, without undue influence, compulsion or duress, and without promise of leniency. Thereupon defendant's said pleas of guilty were accepted.

In the case identified by Criminal Docket No. 2183, judgment imposing a prison sentence of not less than five nor more than seven years was pronounced.

In the case identified by Criminal Docket No. 2184, judgment imposing a prison sentence of not less than five nor more than seven years was pronounced. It was provided that the sentences imposed

in No. 2183 and in No. 2184 "run concurrently and at the same time."

In the four cases identified by Criminal Docket No. 2211, Criminal Docket No. 2212, Criminal Docket No. 2213, and Criminal Docket No. 2125, prayer for judgment was continued "for a period of 5 years upon the condition defendant remains of good behavior, (and) not violate any of the laws of the State or anywhere else."

Defendant excepted to the foregoing judgments and appealed. Orders were entered enabling defendant, as an indigent, to perfect his appeal at the expense of Caldwell County.

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

Paul L. Beck for defendant appellant.

PER CURIAM. Defendant was arrested May 9, 1967, on six warrants issued by the District Court of Caldwell County. These warrants charged the felonies subsequently charged in the said indictments. After preliminary hearing on May 12, 1967, the district court found probable cause and ordered defendant to appear at said May 1967 Criminal Session of Caldwell Superior Court. Mr. Beck was appointed counsel on May 15, 1967. The pleas of guilty were tendered and accepted on May 16, 1967.

Although no exceptions were noted during the proceedings in the superior court, assignments of error entered on behalf of defendant by his court-appointed counsel in connection with the appeal are as follows: (1) The failure of the District Court of Caldwell County to appoint counsel for defendant at his preliminary hearing when defendant stood charged with six felony offenses; (2) the acceptance of defendant's pleas of guilty the day following the court's appointment of counsel to represent him; and (3) the acceptance of defendant's pleas of guilty without hearing evidence from any of the persons listed as witnesses against defendant.

Nothing in the record shows defendant was in any way prejudiced by the fact that he was not represented by counsel at his preliminary hearing. In the present factual situation, the preliminary hearing "was not such a 'critical stage' of the proceeding as to require the presence of counsel," and the failure to supply counsel for such preliminary hearing was not "a deprivation of any constitutional right of appellant." See *Gasque v. State,* 271 N.C. 323, 156 S.E. 2d 740.

Nothing in the record indicates defendant or his counsel requested or desired a continuance of the case. On the contrary, the

record shows affirmatively that the pleas of guilty were entered freely, understandingly and voluntarily.

It does not appear affirmatively whether, after tender and acceptance of defendant's pleas of guilty, the court heard testimony of persons listed as State's witnesses. Proof of the charges in the *second* counts of the six bills of indictment was rendered unnecessary by defendant's pleas of guilty thereto. *State v. Caldwell,* 269 N.C. 521, 524, 153 S.E. 2d 34, 36; *State v. Dye,* 268 N.C. 362, 150 S.E. 2d 507; 21 Am. Jur. 2d, Criminal Law § 495; 22 C.J.S., Criminal Law § 424(4).

It is noteworthy that the active (concurrent) sentences imposed were within the permissible punishment provided in G.S. 14-120 based on defendant's plea of guilty in respect *of any one* of the six indictments.

No error having been shown, the judgments of the court below are affirmed.

Affirmed.

STATE v. ROBERT VERNON LOVELACE.

(Filed 18 October, 1967.)

APPEAL by defendant *in forma pauperis* from *Anglin, J.,* May 1967 Criminal Session of RUTHERFORD.

Criminal prosecution upon two separate indictments. The first indictment charges that defendant on 20 January 1967, with intent to commit a felony, to wit, larceny, did feloniously break and enter the dwelling house of J. R. Greene, wherein merchandise, chattels, money, and valuable securities of the said J. R. Greene were being kept, a felony, and a violation of G.S. 14-54. The second indictment charges defendant on the same date and in the same place with the felonious larceny of 13 guns consisting of 16 Ga. Remington 3526518, 12 Ga. Winchester 68047, 20 Ga. Mossburg & Son 85V-10726, 20 Ga. Ranger (Sears) 1967, 12 Ga. Stevens Mod 58, 16 Ga. Winchester Mod 37, 20 Ga. Winchester Mod 37, 22 Cal. Revelation Mod 115, of the value of more than $200 of the goods and chattels of J. R. Greene.

Defendant, who is an indigent, was represented by his court-appointed counsel, Jack Freeman, and through his counsel he entered a plea of guilty to each one of the two indictments. When he entered his pleas of guilty, the court interrogated him at length, and, based

upon his reply to the court's questions, the court found as a fact that his pleas of guilty in both cases were understandingly and voluntarily made by him in person in open court, and the plea in each case was made by him without any compulsion or duress and without any promise of leniency. The court ordered that the questions by the court and the answers by the defendant with reference to his pleas of guilty in both cases be entered into the minutes of the court.

The court consolidated the two cases for judgment. From a judgment that the defendant be imprisoned for a term of not less than four years nor more than six years, he appeals.

Attorney General T. W. Bruton and Deputy Attorney General James F. Bullock for the State.

J. H. Burwell, Jr., for defendant appellant.

PER CURIAM. Soon after the defendant was sentenced to prison, he mailed a written notice of appeal to the clerk of the Superior Court of Rutherford County. The court, upon receiving the defendant's notice of appeal, appointed new counsel to perfect his appeal, because the defendant's original court-appointed counsel, shortly after the imposition of the sentence, had been sworn in as solicitor of the Rutherford County recorder's court. The court also entered an order that the court reporter furnish his new counsel with a transcript of the evidence and that the case on appeal and the brief of his counsel on appeal should be mimeographed and filed in the Supreme Court at the expense of the taxpayers of Rutherford County, thus giving this indigent defendant the opportunity to perfect his appeal and present his case to this Court in the same fashion as if he were a rich man.

This is a succinct summary of the State's evidence: J. R. Greene lives in West Henrietta. He had 13 guns in his residence on 19 January 1967. He is not a gun collector. He trades guns. The value of his guns was around $600 or $700. His wife runs a cafe in the same building in which they maintain living quarters. There are two bedrooms, in which he lives with his wife and daughter, just behind that portion of the building which is used as a cafe. The guns were kept in a separate room which had been built on to the cafe for that purpose. He was working ten hours a day. He went to work at 4 p.m. on 19 January 1967. The guns were then in the house in their customary place. His wife and daughter were in the house when he left, and they stayed there that night. They were asleep and unaware of the presence of anyone in or about the building. He returned from work about 3 a.m. and found that his guns were gone.

Mr. Damon Huskey, the sheriff of Rutherford County, investigated the larceny and stated on the witness stand that the top glass of the front door had been broken out, and someone had reached in and opened the door and carried off the 13 guns. His testimony implicated a man by the name of Story, who was arrested and brought back to Rutherford County. It further appeared from the sheriff's testimony that Story on the night in question was driving past J. R. Greene's place with defendant in the car with him; he let defendant out and defendant was gone about five minutes and came back with a sack full of guns. The guns returned to J. R. Greene had been carried about 90 miles away into South Carolina where they were sold or pawned. Defendant told Deputy Sheriff Gene Biggerstaff about this matter the morning he picked him up and brought him to the county jail. The evidence was amply sufficient to carry the case to the jury.

Defendant has one assignment of error, and that is that the judge erred in passing judgment upon him. This assignment of error is overruled. A violation of G.S. 14-54 is a felony, and this statute provides for imprisonment in the State's prison or county jail for not less than four months nor more than ten years. The term of imprisonment was substantially less than the maximum set forth in the statute. In interrogating the defendant, the judge asked him, "Do you understand that upon a plea of guilty to the felony of breaking and entering you could be imprisoned for as much as ten years?" The defendant replied, "Yes." The indictments in this case correctly charge the criminal offenses of a felonious breaking and entry and of a felonious larceny. Defendant's counsel candidly states this in his brief: "The defendant appellant entered his appeal in this case without the advice of counsel. Counsel for the defendant appellant has conferred with him at length with regard to this appeal without being able to ascertain any specific grounds for the same. Counsel for the defendant appellant has therefore closely examined the record of this case in search of an error therein. He has not been successful. Therefore, counsel respectfully requests the Court to examine the record in this case and, if error be found, grant the defendant appellant a new trial." We have examined carefully the record in this case, and find no error in the trial below.

This is another appeal *in forma pauperis* to this Court at the expense of the taxpayers without any merit in it, taken solely because, according to the laws of this State, defendant has an unrestricted right to appeal.

In the trial below we find

No error.

STATE OF NORTH CAROLINA v. CHARLES DONALD YOES
AND
WILLIE HALE, JR. (ALIAS WILLIE HAILE, JR.) AND LEROY DAVIS, PETITIONERS, v. STATE OF NORTH CAROLINA.

(Filed 1 November, 1967.)

1. **Criminal Law § 146—**

Upon appeal from a sentence of life imprisonment, the Supreme Court must be careful to ascertain that the established procedures have been observed, and if there has been a substantial and prejudicial departure therefrom the Supreme Court must set aside such conviction and resulting judgment, irrespective of the court's opinion of the innocence or guilt of the accused.

2. **Constitutional Law § 28; Indictment and Warrant § 2—**

A valid indictment is a condition precedent to the jurisdiction of the Superior Court in a criminal prosecution for a capital felony and the return of such indictment by a legally constituted grand jury is necessary to such indictment.

3. **Constitutional Law § 36; Rape § 7—**

The statute fixing death as the punishment for rape, G.S. 14-21, unless the jury in its discretion recommends life imprisonment, is authorized by the Constitution of North Carolina, Art. XI, § 2, and since such punishment is specifically authorized both by the State Constitution and by statute it cannot be cruel or unusual punishment in the constitutional sense.

4. **Same; Constitutitonal Law § 30—**

The contention that the statutory punishment for rape, G.S. 14-21, is unconstitutional because it is enforced in a discriminatory manner against Negro defendants is untenable, since the punishment applies to all persons convicted of the offense without discrimination on account of the race of the convicted defendant or the race of the victim, and discriminatory enforcement is not shown by a tabulation of results reached in different cases.

5. **Same; Constitutional Law § 31—**

It is not error for the court to quash Negro defendants' subpoenas *duces tecum* to clerks of court of other counties and to refuse to hear purported evidence of racial discrimination in prosecutions for rape, since such discrimination cannot be established by a tabulation, even if accurate and complete, of results reached in different cases tried before different juries upon evidence which necessarily varies from case to case.

6. **Indictment and Warrant § 2—**

By constitutional provision in this State, Art. I, § 17, which antedates like holding by the Supreme Court of the United States under the Fourteenth Amendment to the Federal Constitution, the indictment of a Negro defendant by a grand jury from which members of defendant's race have been intentionally excluded on account of race is not a valid indictment and confers upon the court no jurisdiction of the prosecution.

7. **Grand Jury § 1—**

A grand jury is not unlawful merely because it is drawn from the tax list of the county.

8. Same—

It is not required that the Negro race be represented on the grand jury panel in the same ratio as the total Negro population of the county bears to the total population.

9. Same—

It is not the right of any party to be indicted by a jury of his own race or to have a representative of any particular race on the jury, but it is his right to be tried by a competent jury from which members of his race have not been unlawfully excluded.

10. Same—

While a Negro moving to quash an indictment on the ground of racial discrimination must prove affirmatively the intentional exclusion of members of his race from the grand jury, he may do this by circumstantial evidence, and a showing that in the county over a substantial period a small proportion of Negroes had served on the jury or a showing that the jury scrolls had a symbol indicating the race of those appearing thereon, while not conclusive, does raise a *prima facie* case of discrimination, casting the burden upon the State to go forward with evidence sufficient to overcome such *prima facie* case.

11. Same— Evidence held to support finding that there was no racial discrimination in selection of grand jury.

Any intimation of racial discrimination arising from the fact that the scrolls in the jury box carry a symbol designating race is not conclusive of racial discrimination in the selection of grand jurors therefrom, and such intimation is rebutted when the record contains uncontradicted evidence that the name of every person listing property or poll for taxation in the county went into the jury box, except those purged for lack of moral character or mental incapacity, and there is no evidence that any name placed in the box was withdrawn therefrom after it was placed therein, and there is uncontradicted testimony that no name drawn from the jury box for the panel was laid aside for any reason whatsoever, and there is further uncontradicted evidence that no member of the board of commissioners was aware of the significance of the code designation of race and that the grand jury was drawn from the jury box in their presence by a child under the age of ten years.

12. Same; Jury § 3—

The provisions of G.S. 9-1 and G.S. 9-2 are directory, and while the statutes contemplate that the county commissioners shall examine the lists and eliminate therefrom those lacking good moral character or sufficient intelligence, the fact that this is done by the sheriff and his deputies or any other person does not vitiate the indictment when there is nothing in the record to raise even the suspicion that the name of any person possessing good moral character and sufficient intelligence was stricken from the list, or that there was any discrimination in the purging of the lists, or any deviation from the material procedures prescribed by the statutes.

13. Same—

The county commissioners themselves cannot reject a name drawn from the box for service upon a grand jury panel upon the ground of bad char-

acter or lack of mental capacity, this power being vested in them only while the jury list is being prepared for the insertion of names into the box.

14. Jury § 4—

Challenge to the array of the jury on the ground of racial discrimination is properly denied when the record affirmatively discloses no such discrimination in the selection of the names for the jury box or in the selection of a special venire from the residents of the county, and it further appears that those called were actually interrogated in open court, and that the presiding judge had this visual evidence before him in passing upon each challenge on the ground of racial discrimination, found no racial discrimination and the record and defendants' brief are silent upon this demonstration concerning the composition of the jury.

15. Jury § 3—

Objection to the fact that members of the regular panel were present in the courtroom during the taking of evidence in support of motion to quash the bills of indictment on the ground of racial discrimination is without merit when the record discloses that nothing was said in those proceedings relating to the merits of the case.

16. Jury § 2—

There is no error in ordering a special venire to be summoned from the body of the county after the exhaustion of three such venires drawn from the jury box.

17. Same— Record held to show absence of discrimination in summoning special venire from body of county's residents.

Where the evidence discloses that the sheriff and his deputies, in summoning from the body of the county a special venire, selected at random a name out of every five or ten pages of the tax books and then summoned such person by telephone without regard to race, the fact that they knew the significance of code numbers in the tax books designating race and knew the streets of the city upon which white and Negro citizens were likely to reside, while disclosing the possibility of racial discrimination in the selection of the persons summoned, is insufficient to support a motion for quashal for racial discrimination, when the record affirmatively shows the absence of such discrimination, the proportion of Negroes so summoned being substantially in excess of the proportion of the Negro population to the total population of the county, nor is this result affected by the fact that the deputy sheriff supervising the selection of the veniremen had participated in the investigation of the alleged offense and was a witness for the State.

18. Same—

Motion of defendant that a venire be summoned from another county is addressed to the sound discretion of the presiding judge and will not be disturbed in the absence of a showing of abuse. G.S. 1-86.

19. Criminal Law § 92—

A motion by the State to consolidate indictments against four defendants for successively raping the same female during a single episode, and the motion of defendants for separate trials are addressed to the discre-

tion of the trial court, G.S. 15-152, and his ruling allowing the motion for consolidation will not be disturbed in the absence of a showing of abuse.

20. Criminal Law § 98—

Defendants' motion for sequestration of witnesses is addressed to the sound discretion of the trial court, and the denial of the motion will not be disturbed in the absence of a showing of abuse.

21. Constitutional Law § 30—

The exclusion of bystanders during the testimony of the prosecutrix in a prosecution for rape, representatives of the press and parents of the defendants not being excluded during her testimony, is not a denial of defendants' right to a public trial, the matter being within the discretion of the trial court and no abuse of discretion being shown.

22. Criminal Law § 126—

Upon the polling of the jury in regard to its verdict of guilty of rape returned against one defendant, one juror stated that his verdict as to such defendant was guilty but that he recommended mercy, whereupon the court sent the jury back for further deliberations after instructing them that the verdict must be unanimous. *Held:* The contention that the instruction required that the same verdict be returned as to all defendants is untenable, the court having expressly charged the jury to the contrary, saying as to each defendant by name that the jury might return one of three verdicts, guilty as charged in the bill of indictment, guilty as charged in the bill of indictment with recommendation for life imprisonment, or not guilty.

23. Jury § 4—

There is no error in permitting the solicitor to ask each prospective juror if he had conscientious scruples against returning a verdict carrying the death penalty if the evidence convinced him to a moral certainty of defendant's guilt of the capital crime charged.

24. Jury § 3; Criminal Law § 161—

It is reprehensible for appellant in an assignment of error to quote widely separated portions of the record in such a manner as to give the impression that there is no omission when in fact the statements so placed in the assignment of error are wholly unrelated and occurred in connection with the examinations of different prospective jurors.

25. Jury § 3—

Remarks of the trial judge, considered in context, during the interrogation of prospective jurors *held* not to contain, by any reasonable interpretation, an expression of opinion by the court concerning the guilt or innocence of defendants.

26. Criminal Law § 120—

The charge of the court in the present case *held* not to contain any statement tending to influence the jury in regard to whether it should return a verdict of guilty without recommendation of life imprisonment, and in any event the verdict of guilty with such recommendation discloses that there could not have been any prejudice.

27. Jury § 3—

Defendant's question to a prospective juror *held* not framed so as to elicit information as to whether such juror might feel justified in returning a verdict of guilty with recommendation of life imprisonment and did not state any hypothesis upon which such recommendation might or might not be justified, and therefore the sustaining by the court of objection to the question was not error.

28. Criminal Law § 111—

The charge of the court in this case *held* to contain a full and fair summary of the evidence and the contentions of the parties, together with an accurate statement and explanation of the principles of law applicable thereto, with no expression or intimation of an opinion by the court as to whether any fact was or was not sufficiently proved, and defendants' assignments of error thereto are overruled.

29. Rape § 5—

The State's evidence tending to show that defendants accosted prosecutrix and her escort as they were parked in their automobile, ordered her escort out of the car and struck him unconscious when he attempted to fight, and that defendants disrobed prosecutrix and had successive intercourse with her one after the other despite her resistance, a rifle being pointed to her side throughout the occurrences, *held* amply sufficient to overrule each defendant's motion for nonsuit and not to require the submission to the jury of any less degree of the offense.

30. Criminal Law § 99—

There could have been no prejudice to defendants in the court's direction to their counsel that a recording device be removed from the courtroom when the record discloses that the recording device in question was not connected or in operation.

31. Criminal Law § 89—

It will not be held for error that the court refused to allow defendants' counsel to play, in the presence of the jury, an alleged recording of previous statements by a State's witness then under cross examination, which recording device had not been authenticated or offered in evidence, there being no circumscription of defendants' right to cross-examine any witness for the State as to whether such witness had theretofore made contradictory statements and the court having specifically stated that the defendants at the proper stage of the trial might recall as their witness any person whose voice was purportedly recorded to identify his voice and the statement so recorded.

ON *certiorari* upon petitions of the defendants to review the judgment of *Gambill, J.*, at the 30 November 1964 Criminal Session of GUILFORD, Greensboro Division.

In separate indictments these defendants and their co-defendant, Julian Odell Hairston, were charged with successive rapes of the same woman in Guilford County on 21 June 1964. The cases were consolidated for trial over their objections. As to each defendant, the jury returned a verdict of guilty, with a recommendation for

life imprisonment. Sentences were imposed accordingly. Each defendant gave notice of appeal.

Subsequently, Yoes, represented by privately employed counsel, petitioned for permission to appeal as a pauper and for an order directing the county to furnish a transcript to him at its expense. This petition was denied by the presiding judge. This Court granted *certiorari*, permitting Yoes to appeal *in forma pauperis*, and directing a full transcript to be supplied to him at the expense of the county. Thereafter, this Court allowed other motions by Yoes for extensions of time for docketing the record in this Court for review. The record so docketed in this Court consists of 1562 pages, being replete with needless and multiple repetitions of utterly immaterial matter, to a degree unparalleled in cases in which the appellant bears the expense of preparing the record for review.

On 4 March 1965, the presiding judge allowed the motion of the solicitor to dismiss the appeals of the defendants Davis, Hale and Hairston for failure to perfect the same within the time allowed. A little more than one year thereafter, Davis and Hale filed separate petitions for post conviction relief, each alleging that his right of appeal had been denied. These petitions were heard before Shaw, J., who so found, and on 15 July 1966 ordered their court appointed counsel to prepare and file their respective cases for review by this Court, directing that a complete transcript of the trial proceedings be furnished them at the expense of the county. Petitions for *certiorari* were thereupon filed in this Court on behalf of Davis and Hale. *Certiorari* was granted in each instance 20 September 1966, and the cases were set for argument in this Court for the Fall Term 1966. Motions by the defendants for extension of time were subsequently granted.

Acting upon the advice of his court appointed counsel, Hairston did not perfect his appeal, has not sought post conviction relief and has not otherwise sought appellate review of the judgment entered against him.

The cases of Yoes, Davis and Hale were consolidated for argument in this Court and were argued 6 September 1967. The three appealing defendants have joined in presenting to this Court the same record for review, the same assignments of error and a common brief.

MOTIONS TO QUASH THE BILLS OF INDICTMENT

Each defendant, in apt time, moved in the superior court to quash the bill of indictment against him on the grounds that (1) Negroes were systematically and arbitrarily excluded from service

on the grand jury, each of the defendants being a Negro; (2) the statutory requirements were not observed in the selection of the grand jurors; (3) the statute providing for the death penalty upon conviction of rape is unconstitutional upon its face; and (4) the said statute is unconstitutional as applied in this State. The motions to quash were overruled.

The evidence relating to the selection of the grand jury may be summarized as follows:

The grand jury which indicted the defendants was selected from a panel of 50 names. The panel was drawn from the jury box in the presence of the county commissioners by a child under ten years of age, on 1 June 1964, three weeks prior to the alleged offenses, six weeks prior to the returning of these indictments, and six months prior to the commencement of the trial.

The 50 names so drawn from the jury box were placed on a list which was then cut into scrolls, each scroll containing one name. In open court, under the supervision of the presiding judge, these 50 scrolls were placed by the clerk in a hat, stirred and then drawn from the hat, one at a time, by a child seven years of age. The first 18 names so drawn constituted the grand jury, two Negroes (11%, plus) being included and serving on the grand jury. The foreman was then designated by the presiding judge.

The jury box, from which the panel was so drawn, consisted of two compartments, designated No. 1 and No. 2 and separated by a partition. There was no opening in the box except a hinged top, which was locked shut by two substantial padlocks, opened by different keys.

Except when a jury is being drawn, the box is in the possession of the sheriff. The key to one lock is kept by the clerk to the board of county commissioners in the office of the county manager. The key to the other lock is kept in the custody of a deputy sheriff, who leaves it hanging on a keyboard in a portion of the sheriff's office to which other members of the sheriff's staff have access in the absence of this deputy. There are no other keys which fit either lock.

When a jury panel is to be drawn, the box is brought by the sheriff into the presence of the board of county commissioners, then sitting in a meeting open to the public. The names are drawn from Compartment No. 1 of the box in the presence of the commissioners by a child under ten years of age, the commissioners paying close attention. The names so drawn are placed in an envelope which is sealed in the presence of the commissioners and delivered to the deputy sheriff. The sheriff then summons those whose names are in the envelope. The scrolls bearing such names are then returned to the

jury box, being put into Compartment No. 2. When the drawing of a jury panel is thus completed, the box is relocked and it and the two keys are returned to their respective custodians.

After the names of a jury panel are so drawn, no name is added to or taken from the panel. A person so summoned may apply to the clerk of the court or to the presiding judge to be excused from service because of a statutory exemption or personal hardship.

This procedure was followed in the drawing and handling of the panel from which the grand jury in question was selected. The child who drew these names from the jury box drew the scrolls, one by one, from Compartment No. 1 and handed each scroll to the deputy sheriff in the presence of the county commissioners and other persons attending the meeting of the board.

The jury list of names to go into the box is compiled anew each two years. At the proper time, the names of approximately 70,000 persons, each written on a separate scroll, were placed in Compartment No. 1 of the jury box. Except as noted below, all names so placed in the jury box were taken from the tax lists of the county for the year 1963. The names of approximately 70,000 individuals appear on the tax lists. Except as noted below, all of those names were placed in Compartment No. 1 of the jury box.

There is no evidence as to how many of these 70,000 persons whose names appear on the tax lists for 1963 were white and how many were Negro, except that of the males listed for poll tax (all males between the ages of 21 and 50), 32,946 were white and 4,432 (11%, plus) were Negro.*

The county is divided into 18 townships for each of which a tax list is compiled. From the annual tax listings, an IBM card for each person listing property or poll for taxation is prepared by the county's data processing office. These cards are used for various purposes, including the preparation of tax bills, various statistical reports and studies, and the preparation of the list of names to go into the jury box. Each card carries the name and certain code numbers applicable to such taxpayer.

The purpose of these code numbers is to enable the Data Processing Department of the county to prepare quickly and accurately various statistical studies and reports. For example, the county is

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*For the year 1962, there is an obvious misprint in the record. The North Carolina Department of Tax Research reports for that year that 32,829 white males and 4,321 Negro males (11%, plus) were listed for poll tax in Guilford County. The United States Census for 1960 shows 194,984 white and 51,159 Negro residents (20%, plus) of all ages and both sexes in Guilford County, there being only a negligible number of residents of other races.

required to report annually to the State Department of Tax Research the number of white males and Negro males, respectively, listed for poll tax purposes. To facilitate the preparation of this report, and possibly other statistical reports, the code number "1" on a card designates a white person and the code number "2" designates a Negro person. Other code numbers on these cards designate such things as the taxpayer's residence in a particular school or fire district, the last four digits of the taxpayer's social security number for identification purposes, the year of birth of males for poll tax purposes, whether the taxpayer is a nonresident or in military service, and the township in which property so listed is located.

At the time of the drawing of the jury panel from which this grand jury was selected, the county commissioners were not aware of the significance of the code numbers "1" and "2". The scrolls which went into the jury box carried, in addition to the name and address of the person, these code numbers and other code numbers, but the commissioners did not know their significance and were concerned only with the name and address of the person whose scroll was drawn by the child.

For the preparation of the jury list, the Data Processing Department, using the IBM machines, prepared a complete list of all names shown on the IBM cards for 1963. The original and a carbon copy of this list were delivered to the Tax Department, the carbon copy being ultimately filed with the clerk of the board of county commissioners. This list contained the name of every person listing property or poll for taxation in Guilford County in 1963. The Tax Department eliminated duplications, as where the same taxpayer listed property in two or more townships. It also deleted from this list the name of any wife listing property jointly with her husband and then prepared a separate slip for the wife, showing her name, address and appropriate code numbers.

Pursuant to instruction from the county commissioners, the Tax Department then turned to telephone directories and city directories and added to the list the names and addresses of a relatively few persons not appearing on the tax list, these names not carrying any code numbers, and the race of these persons being unknown to the Tax Department.

The sheriff and his deputies then examined the list and eliminated therefrom persons who had died or moved out of the county or who had been convicted of a felony, or other crime involving moral turpitude, and persons not mentally competent to serve as jurors. The county commissioners made no exclusions of names whatsoever from the list. They delegated to the sheriff the task of so purging it, giv-

ing him no standards whatever for his guidance. He and his deputies relied on their personal knowledge and judgment in striking off the names they deemed improper for inclusion for these reasons. The sheriff knows of no instance of any person's being excluded from the list because of his race, creed or color.

The list so compiled and revised was then cut into pieces or scrolls, each scroll bearing the name, address and the several code numbers of one person as shown on the IBM card in the Data Processing Department, no code numbers appearing on the scrolls of persons selected from city and telephone directories. All of these scrolls were then placed in Compartment No. 1 of the jury box From this compartment of the box, the panel of 50 names, from which the grand jury was selected, was drawn as above described. Except for the exclusions by the sheriff and his deputies, above mentioned, the name of every person listing property or poll for taxation in Guilford County in 1963 was so placed in Compartment No. 1 of the box.

This process is repeated every two years, at the end of each such period the jury box being completely emptied of scrolls and refilled. The members of the board of county commissioners did not see, and habitually do not see, the list, so compiled by the Tax Department and so purged by the sheriff and his staff, prior to its being cut apart and the scrolls being placed in the jury box.

There is no evidence that the name of any person whose scroll was drawn from the jury box for the panel in question, or any other jury panel, was excluded from such panel by any person for any reason whatsoever. Some, of course, were not found and so were not summoned.

The sheriff, the clerk of the court, the former solicitor, the tax supervisor, the chairman and other members of the board of county commissioners, all of whom had served for many years, each testified that he did not know of any instance in which the name of any person had been excluded from the jury list, or from any panel drawn, because of race, color or creed.

Upon this evidence the trial court made findings of fact, including findings that Negroes were drawn and appeared on the grand jury that indicted these defendants; that the above mentioned code numbers indicating the race of the respective taxpayers remained on the scrolls placed in the jury box; when the panel from which the grand jury was selected was drawn from the box, the commissioners were not aware that the code numbers were on the scrolls and did not know their significance; no person's name was left out of the box, or added to the box, or laid aside upon the drawing of the panel because of race, creed or color; there has been no arbitrary or

systematic exclusion from jury service in Guilford County at any time because of race, creed or color, and none with reference to the panels from which the grand jury and the trial jury in this case were chosen. The court further found that the selection of the names going into the jury box and the drawing of names therefrom for jury service were in accord with Chapter 9 of the General Statutes of North Carolina. Upon these findings of fact, the court denied the motions to quash the bills of indictment.

CHALLENGES TO THE ARRAY.

In due time, the defendants filed challenges to the array, thus attacking the validity of the trial jury and of each panel or venire from which its members were chosen. Of the 12 jurors returning the verdict, one was a member of the regular panel drawn for the term from the above described jury box in the above described manner. The regular panel having been exhausted, the trial judge ordered three successive special venires, a total of 400 prospective jurors, and directed that their names be drawn from the jury box, which was done over the objection of each defendant entered in apt time. From these drawings a total of nine jurors was selected. The trial judge thereupon, over the objection of each defendant, issued another venire *facias* directing the sheriff to summon 50 additional persons, "freeholders, qualified to act as jurors, from the body of" the county. From this group two of the 12 jurors were selected.

For the selection of the 50 persons, pursuant to the fourth venire *facias,* the sheriff used five pairs of deputies. All were under the immediate direction of Lt. Allred, a member of the sheriff's staff, who had participated in the investigation of the alleged offense with which the defendants were charged, and who was then under subpœna as a witness for the State. Lt. Allred instructed the deputies to take a city directory, select at random a name out of every five or 10 pages, and then summon such persons by telephone. He, himself, went to High Point, took the tax books of that area of the county, choose names from those books, and summoned by telephone the person so chosen by him. He did not discuss the case with any of these persons. He testified that no prospective juror was included or excluded because of race, though he could determine the race of each prospective juror so summoned by him by the address. He did not know any of them personally.

Deputy Frank Smith, who assisted Lt. Allred in the selection of these veniremen from the High Point area, and who was also under subpœna as a witness for the State, testified that they took 28 names

at random from the tax books in High Point and telephoned these people until they reached and served their quota of 10. He testified that they did not exclude or include any person for any reason whatever, but simply took the names as they came to them by the above process. He did not know any of the persons so selected and summoned by him, but did know the general areas of the city of High Point in which white people and Negro people, respectively, reside, and knew from the code numbers "1" and "2" appearing on the tax books which persons were white and which were Negro. He had helped to select juries previously in Guilford County and knew of no case in which any person had been excluded from or included upon a jury because of race, creed or color.

The 12 jurors having been selected from the regular panel, and the four special venires above mentioned, the court, over the objection of each defendant, issued a fifth venire *facias* directing the sheriff to summon 50 additional "freeholders, qualified to act as jurors, from the body of" the county. The same procedure was used in selecting this venire as was followed in the fourth, except that, the tax office in High Point being closed, the names from the High Point area were selected for the fifth venire from the city directory. From the fifth venire an alternate juror was selected but, before the jury retired to begin its deliberations, this alternate juror was discharged and took no part in the deliberations or verdict of the jury.

The defendants' challenge to the array was upon the ground that the regular jury panel and the first three special venires were drawn from the jury box which, the defendants allege, afforded the opportunity for selective exclusion and discrimination against members of the Negro race. As to the fourth special venire, which was not drawn from the box, the ground of challenge was that G.S. 9-29 and G.S. 9-30 are unconstitutional, and any special venire drawn pursuant to the provisions of G.S. 9-29 affords the opportunity for selective exclusion and discrimination against members of the Negro race and other citizens qualified to serve as jurors. They further challenge the fourth special venire on the ground that the officers who selected the veniremen were witnesses for the State and had participated in the investigation of the alleged offenses, and, under all the circumstances, an opportunity was afforded for the selective exclusion and inclusion of persons upon such special venire in violation of the State and Federal Constitutions.

Both as to the regular panel and as to each special venire, the names of all prospective jurors constituting such panel were written upon new scrolls and, in the presence of the court, placed in a box and drawn therefrom by a child under the age of 10 years, the members of each such panel being called for interrogation and re-

jection or selection as jurors in the order in which their respective names were so drawn from the box.

The presiding judge overruled the challenges to the array, reciting that the same findings of fact, made by him with reference to the grand jury in passing upon the motions to quash the bills of indictment, applied equally to the petit jurors chosen from the regular panel and from the first three special venires, all of which were drawn from the jury box. As to the defendants' challenges to the fourth and fifth special venires, not drawn from the jury box, the court found as facts that Lt. Allred is the regular officer in charge of the service of such writs, that the names chosen from the tax lists in High Point by him were chosen at random, that he did not know any of the persons whose names were so chosen or any of the 50 persons who were summoned in response to each such venire *facias,* and that each such person was chosen in the usual and regular manner without regard to race, approximately 12 members of the Negro race being included in each such special venire of 50. Accordingly, the challenges to the fourth and fifth special venires were overruled and denied.

OTHER PRETRIAL MOTIONS.

In apt time, the defendants moved for separate trials. Conversely, the solicitor moved to consolidate the four indictments for trial. The solicitor's motion was allowed.

In apt time, the defendants moved that a jury be drawn from a county other than Guilford on the ground that the alleged offenses had received so much publicity and attention in Guilford County that a fair and impartial jury could not be obtained therein. This motion was denied.

For the purpose of introducing evidence in support of his contention that the statute of North Carolina providing for the death penalty upon conviction of rape was unconstitutional, in that it has been applied in North Carolina in a manner such as to discriminate against Negro males, the defendant Yoes caused to be issued certain subpœnas *duces tecum* for the clerks of the superior courts of various counties other than Guilford, and for the Director of the North Carolina State Prison System. Upon motion of the solicitor, these subpœnas *duces tecum* were quashed and the court refused to hear evidence as to the number of prosecutions for rape, the race of the defendants so prosecuted, and the number of white and Negro males sentenced to death for this offense in counties other than Guilford.

SELECTION OF THE TRIAL JURY.

More than 250 prospective jurors were called into the box and examined in the process of selecting the 12 who were empaneled and who rendered the verdicts. In the course of the examination of those prospective jurors, each defendant excepted to numerous denials of his challenges for alleged cause. Each defendant exhausted the peremptory challenges allowed him.

The defendants also entered numerous exceptions to questions propounded by the court to prospective jurors and explanations of the law by the court in the course of such interrogations with reference to the meaning of questions propounded by the solicitor or by counsel for a defendant.

The defendants interposed numerous other exceptions to the allowance by the court of a challenge for cause by the solicitor to each prospective juror who stated that he or she was conscientiously opposed to capital punishment, and therefore could not render a verdict which would result in the imposition of a death sentence, and to the court's permitting the solicitor to ask prospective jurors questions concerning such conscientious objection to the death penalty.

ASSIGNMENTS OF ERROR.

The defendants assign as error each of the above rulings of the trial court, various portions of and alleged inadequacies in the charge and other rulings at the trial, which are set forth in the opinion.

Attorney General Bruton, Staff Attorney Vanore and Staff Attorney Partin for the State.

Elreta Melton Alexander for appellant Yoes.

Jordan J. Frassineti for appellant Hale.

Konrad K. Fish for appellant Davis.

LAKE, J. The crime of which these defendants were found guilty in the superior court is deemed by the law of this State to be unsurpassed by any other in its vicious nature or in its threat to a peaceful, well ordered society. The accumulated wisdom and experience of the people of North Carolina have caused them, in the Constitution of this State and through their representatives in the General Assembly, to declare this crime to be the equal in seriousness to cold-blooded, premeditated murder, and to provide by law that one found guilty of it shall be put to death unless the jury which so convicts him sees fit, in its discretion, to make his punishment imprisonment for the remainder of his life. N. C. Constitution,

Article XI, § 2; G.S. 14-21. It has been the experience of this State that no other offense is so likely to inflame the people of a community to the point of taking the punishment of the offender into their own hands without invoking judicial processes.

The interest of the State in the protection of its innocent people both from such criminal acts and from the resulting incitement to lawless reprisal, as well as the severity of the penalty to be imposed in event of a conviction, require the trial and the appellate courts to observe carefully the established procedures for the determination of the guilt or innocence of one so charged. When there has been a substantial and prejudicial departure from those procedures in a trial resulting in the conviction of the accused, it is the duty of this Court, upon an appeal by the defendant to it, to set aside such conviction and the resulting judgment, irrespective of our opinion as to the guilt or innocence of the accused, and, thereupon, to direct his release from custody or the remanding of the case to the superior court for such further proceeding as may be in accordance with the law of this State. Consequently, we have considered carefully each assignment of error by these defendants.

The Motions to Quash — Alleged Racial Discrimination.

It is axiomatic that a trial of an accused person in a court which has no jurisdiction of the matter cannot result in a valid determination of his guilt or innocence of the offense with which he is charged. Consequently, a judgment rendered by such court is void and, upon appeal, must be vacated irrespective of the sufficiency of the evidence presented in the trial court to establish the guilt of the accused.

A valid indictment is a condition precedent to the jurisdiction of the superior court to determine the guilt or innocence of a defendant accused of this or any other capital felony and to the authority of the court to render a valid judgment in the matter. N. C. Constitution, Article I, § 12; *State v. Bissette,* 250 N.C. 514, 108 S.E. 2d 858; *State v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283; *State v. Beasley,* 208 N.C. 318, 180 S.E. 598. An indictment returned by a grand jury not legally constituted is not a valid indictment. Consequently, "A valid indictment returned by a legally constituted grand jury is an essential of jurisdiction." *State v. Wilson,* 262 N.C. 419, 137 S.E. 2d 109; *State v. Covington,* 258 N.C. 501, 128 S.E. 2d 827; *State v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166.

In apt time, *i.e.,* before pleading to the indictment, each of the appellants moved to quash the bill of indictment returned against him on four distinct grounds: (1) The grand jury which returned

the bill of indictment, was illegally constituted for the reason that persons of the Negro race were, and have been for the past several years, arbitrarily and systematically excluded from service upon the grand jury, each of these defendants being a Negro; (2) the grand jury which returned the bill of indictment was illegally constituted because its members were not selected in accordance with the statutes of this State; (3) G.S. 14-21 is unconstitutional in that it permits the imposition of the death penalty upon a conviction for rape without the taking or endangering of a life; and (4) this statute is unconstitutional because it is enforced in a discriminatory manner against Negro defendants.

We are directed to no authority supporting the position of the defendants upon their third ground for the motion to quash the bills of indictment. The imposition of the death penalty upon conviction of the crime of rape is not unconstitutional *per se.* Being specifically authorized both by the Constitution of this State and by the statute, it is not cruel and unusual punishment in the constitutional sense. *State v. Daniels,* 197 N.C. 285, 148 S.E. 244. The fourth ground for the motions to quash is equally untenable. G.S. 14-21, imposing the penalty of death upon conviction of rape, unless the jury at the time of rendering its verdict recommends that the punishment shall be imprisonment for life, applies to all persons convicted of the offense, without discrimination on account of the race of the convicted defendant or the race of the victim. Obviously, an allegation of discriminatory enforcement of the statute cannot be established by a tabulation, even if accurate and complete, of results reached in different cases tried in different courts before different juries upon evidence which necessarily varies from case to case. This contention of the defendants is clearly without merit, and there was no error in the quashing of their subpœnas *duces tecum* to clerks of the courts of other counties and in the refusal to hear such purported evidence of discriminatory enforcement of the statute. We turn, therefore, to their contentions with reference to the legality of the grand jury which returned the bills of indictment against them.

In *State v. Lowry* and *State v. Mallory,* 263 N.C. 536, 139 S.E. 2d 870, Moore, J., speaking for a unanimous Court, said, "This Court has held in a long and unbroken line of cases beginning with *State v. Peoples,* 131 N.C. 784, 42 S.E. 814 (1902), that arbitrary exclusion of citizens from service on grand juries on account of race is denial of due process to members of the excluded race charged with indictable offenses." To the same effect, see: *State v. Wilson, supra; State v. Arnold,* 258 N.C. 563, 129 S.E. 2d 229, reversed on another ground in *Arnold v. North Carolina,* 376 U.S. 773; *State v. Miller,*

237 N.C. 29, 74 S.E. 2d 513; *State v. Brown,* 233 N.C. 202, 63 S.E. 2d 99. Consequently, the indictment of a Negro defendant by a grand jury from which members of the defendant's race have been intentionally excluded on account of their race is not a valid indictment and confers upon the court no jurisdiction to determine the defendant's guilt or innocence of the offense charged in the indictment. *State v. Covington, supra; State v. Perry,* 250 N.C. 119, 108 S.E. 2d 447; *State v. Speller,* 229 N.C. 67, 47 S.E. 2d 537; *State v. Koritz,* 227 N.C. 552, 43 S.E. 2d 77, questioned on another point in *State v. Brunson,* 229 N.C. 37, 47 S.E. 2d 478.

This is true by reason of Article I, § 17, of the Constitution of North Carolina, as well as by reason of the provisions of the Fourteenth Amendment to the Constitution of the United States. So far as this State is concerned, this principle of the law did not originate with the decisions of the Supreme Court of the United States. As long ago as 1879, Smith, C.J., speaking for a unanimous Court, in *Capehart v. Stewart,* 80 N.C. 101, said, "The law knows no distinction among the people of the State in their civil and political rights and corresponding obligations and none such should be recognized by those who are charged with its administration." Applying that principle, the Court said in the *Capehart* case that a judge may not direct the sheriff in summoning a tales juror to summon a member of a specified race. It was not until the following year that the Supreme Court of the United States, in *Strauder v. West Virginia,* 100 U.S. 303, 25 L. Ed. 664, by a divided Court, held invalid a West Virginia statute expressly limiting jury service to members of the white race. Since that early date there has been no conflict between the decisions of that Court and this concerning this basic principle and its fundamental corollaries, though there have, on occasion, arisen differences of opinion as to the proper application of these rules to the facts of a particular case.

Through the years since 1879, the following rules have been evolved and declared in cases before this Court and are now deemed by us elementary.

A jury list is not discriminatory, and a grand jury drawn therefrom is not unlawful, merely because it is made from the tax list of the county. *State v. Lowry* and *State v. Mallory, supra; State v. Wilson, supra; Brown v. Allen,* 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469. It is not required that the Negro race be represented on a jury panel in the same ratio to the total membership as the Negro population of the county bears to the total population. *State v. Lowry* and *State v. Mallory, supra; State v. Wilson, supra; State v. Miller, supra;* 24 Am. Jur., Grand Jury, § 27; 38 C.J.S., Grand Juries, § 12. "It is not the right of any party * * * to be tried

[or indicted] by a jury of his own race, or to have a representative of any particular race on the jury. It is his right to be tried by a competent jury from which members of his race have not been unlawfully excluded." Stacy, C.J., speaking for the Court, in *State v. Koritz, supra.* To the same effect, see: *State v. Wilson, supra; State v. Miller, supra; State v. Speller,* 231 N.C. 549, 57 S.E. 2d 759; and *Thiel v. Southern Pacific Co.,* 228 U.S. 217, 90 L. Ed. 1181.

A Negro, moving to quash a bill of indictment on the ground that the grand jury, which returned it was unlawful, because of discrimination against Negroes in its selection, must prove affirmatively that qualified Negroes were intentionally excluded from the grand jury because of their race. *State v. Wilson, supra; State v. Miller, supra; State v. Perry, supra.* This, however, may be shown by circumstantial evidence. Neither a showing that, over a substantial period, in a county with a relatively large Negro population only a few Negroes had served on juries, nor a showing that the race of the persons whose names appeared on scrolls in the jury box was designated on such scrolls, is conclusive proof of arbitrary and systematic exclusion of Negroes from the grand jury which indicted the defendant. A showing of these circumstances does, however, constitute a *prima facie* showing of the discrimination forbidden by the law of this State. Such *prima facie* showing casts upon the State the burden to go forward with evidence sufficient to overcome it. *State v. Lowry* and *State v. Mallory, supra.*

Just as a showing that no Negro served on the particular grand jury which returned the bill of indictment does not make the bill of indictment invalid, so a showing that a Negro did serve on the particular grand jury, or that a token number of Negroes had served on other grand juries, is not necessarily sufficient to rebut a *prima facie* case of unlawful discrimination. *State v. Wilson, supra.*

The practice of designating the race of prospective jurors upon the scrolls in the jury box, either by the words "colored" or its abbreviation, or by the use of different colored scrolls for the names of white and Negro prospective jurors, has been expressly disapproved by this Court. *State v. Lowry* and *State v. Mallory, supra; State v. Speller,* 229 N.C. 67, 47 S.E. 2d 537. Proof that the scrolls in the jury box carried such racial designation does not, however, compel the conclusion that all indictments returned by a grand jury drawn from such jury box are invalid.

The test is not whether a Negro did or did not serve on the grand jury in question, nor is it whether there has been discrimination in the selection of other grand juries in the past. The determinative question is whether, in the selection of the grand jury which returned the indictment under attack, there was or was not

systematic and arbitrary exclusion of qualified Negroes either in the composition of the jury box from which the grand jury was drawn or in the drawing therefrom of the grand jury in question.

Where a *prima facie* showing of such discrimination has been made, as by a showing that the scrolls in the jury box contained racial designation and that for a substantial period in the past relatively few Negroes have served on the juries of the county notwithstanding a substantial Negro population therein, the *prima facie* case is not rebutted by the mere denial by the officials, charged with the duty of administering the selective process, that there was any intentional, arbitrary or systematic discrimination on account of race in the selection of the grand jury. *State v. Wilson, supra; Hernandez v. Texas,* 347 U.S. 475, 74 S. Ct. 667, 98 L. Ed. 866; *Norris v. Alabama,* 294 U.S. 587, 55 S. Ct. 579, 79 L. Ed. 1074. "To overcome such *prima facie* case, there must be a showing by competent evidence that the institution and management of the jury system of the county is not in fact discriminatory." *State v. Wilson, supra.*

In the present case, there was no evidence whatever as to the number of Negroes serving upon grand juries or petit juries in Guilford County prior to the selection of the grand jury which returned these bills of indictment. Thus, there is a complete absence of any basis for a finding that over a substantial period of time there has been only token representation of the Negro race upon the juries of Guilford County. Consequently, there is in this record a complete failure of the proof which the United States Supreme Court deemed determinative with reference to the juries of another county in *Arnold v. North Carolina,* 376 U.S. 773, 84 S. Ct. 1032, 12 L. Ed. 2d 77.

This grand jury was drawn from a panel of 50 names, which panel, in turn, was drawn from the regular jury box. From the same jury box, more than 400 names were drawn for the regular panel and for three of the special venires consumed in the selection of the petit jury which tried these defendants. The record does not contain any direct showing as to the number of Negroes so drawn for service on the petit jury. However, more than 200 of the persons whose names were so drawn were actually called and examined individually in open court as prospective trial jurors in this case. While these prospective jurors were not so called until after the presiding judge had denied the motion to quash, upon his finding of no systematic and arbitrary discrimination against Negroes in the selection of the grand jury, and, therefore, their respective appearances before the trial judge did not serve as a basis for his finding of fact at the time it was made, it is significant that this long pa-

rade of prospective petit jurors constituted a visual demonstration of the racial composition of the same jury box from which this grand jury was selected. We deem it reasonable to conclude that had it thus become apparent that there was only a token sprinkling of Negro names among the 70,000 scrolls contained in the box, the learned judge would have reconsidered the motion to quash the bills of indictment, and we are confident that, in that event, counsel for the defendants would not have left us in ignorance concerning such convincing evidence in support of their contention.

It does appear from the record that when the sheriff was sent by the court to summon another special venire of 50 persons, not from the jury box but from the "body of the county," the deputy, whom the defendants contend was prejudiced against them by reason of his having participated in the investigation of the case, brought in a panel of 50 persons, of whom the presiding judge found that approximately 12 were Negroes. Dispatched by the court to bring in another panel, he again included approximately 12 Negroes among the panel of 50 so summoned.

There is no evidence whatever in this record of discrimination against members of the Negro race, in the selection of the grand jury which indicted these defendants, unless it be found in the fact that upon each scroll in the jury box there appeared certain code numbers taken from the IBM cards in the Tax Department, which code numbers indicated a variety of things about the person named on the scroll. The code numbers "1" and "2" indicated his or her race. Other code numbers indicated other facts, such as the township in which he or she resided. Unquestionably, it would have been better practice to eliminate all such code numbers from all such scrolls. *State v. Lowry* and *State v. Mallory, supra; State v. Speller,* 229 N.C. 67, 47 S.E. 2d 537. We are advised in the record that this has now been done. However, the evidence is conclusive that these code numbers were designated to serve a purpose entirely separate from the selection of jurors. The evidence is also abundant and uncontradicted that no member of the board of commissioners was aware of the significance of the numbers "1" and "2" when the panel from which this grand jury was selected was drawn from the jury box in their presence by a child under the age of ten years.

Two of the 18 members of this particular grand jury were Negroes, this being the same percentage of the total (11%) as the percentage of Negro males in the total number of males listed for poll taxes in the county. There is in the record repeated, and uncontradicted testimony by members of the board of county commissioners, and by other officials participating in the preparation of the jury list and in the selection of the members of this grand jury, not

simply that there was no intentional, arbitrary, systematic exclusion of Negroes from jury service in Guilford County, but that no person whomsoever had been excluded from the jury box by reason of his race.

If the presence of the code numbers on the scrolls in the jury box be deemed a *prima facie* showing of discrimination against the Negro race in the selection of juries, a point which is not necessary for us now to decide, the evidence in this record is abundant, clear and otherwise uncontradicted that there was no systematic or arbitrary exclusion of members of the Negro race from the jury box or from this grand jury on account of race. The uncontradicted evidence is that the name of every person listing property or poll for taxation in Guilford County in 1963 went into the jury box, except for the names purged from the list on account of their lack of good moral character or lack of sufficient mental capacity. There is no evidence whatever that any name placed in the jury box was withdrawn therefrom between the time when it was placed in the box and the time the names of the grand jury which indicted these defendants were drawn from it. There is uncontradicted testimony in the record from the officials of the county that no name drawn from the jury box for the panel from which this grand jury was selected was laid aside for any reason whatever.

These facts clearly distinguish the present case from *Whitus v. Georgia,* 385 U.S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599. With reference to the contention of racial discrimination, the procedures used in Guilford County for making up the jury list, placing the names in the jury box, and drawing the panel from which the grand jury was selected, were the same as those used in the adjoining county of Forsyth which were found unobjectionable by the Supreme Court of the United States in *Brown v. Allen, supra.*

We conclude, therefore, that the record contains abundant evidence to support the finding by the trial judge that, in the selection of the grand jury which indicted these defendants, there was no arbitrary or systematic exclusion of members of the Negro race. This alleged ground for the motion to quash the bills of indictment is, therefore, utterly without merit.

The Motions to Quash — Alleged Violations of Statutes.

The remaining ground urged by the defendants in support of their motions to quash is that the provisions of Chapter 9 of the General Statutes were not observed in the selection of the names placed in the jury box and in the securing of the box against tampering with its contents. The pertinent statutory provisions are the following:

G.S. 9-1. "*Jury list from taxpayers of good character.*— The board of county commissioners * * * shall cause their clerks to lay before them the tax returns for the preceding year * * * and a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners * * * shall select the names of such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of names thus selected by the board of county commissioners * * * shall constitute the jury list of the county and shall be preserved as such. * * * There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged *non compos mentis*.

G.S. 9-2. "*Names on list put in box.*—The commissioners * * * shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board."

It is the clear intent of G.S. 9-1 that the county commissioners, themselves, shall examine the lists prepared by their clerical staff and, in the exercise of their own discretion, eliminate therefrom the names of persons found by them to lack either good moral character or sufficient intelligence to serve as grand or petit jurors. Preparatory to the exercise of this discretion, the commissioners may, of course, seek information from the sheriff and his deputies, but for the commissioners to delegate to the sheriff or his deputies the determination of the names to be stricken from the list for these reasons is not in accord with the statutory provision.

G.S. 9-2 specifies the authorized custodians of the box and of the two keys. When this statute is obeyed, the jury box cannot be opened without the joint action of three people, or the breaking of the lock or the removal of the box from the possession of its custodian. The record discloses that these statutory safeguards were not in full effect.

There is nothing whatever in the record to indicate, or to raise the suspicion, that the name of any person, possessing both good moral character and sufficient intelligence to serve as a juror, was stricken from the list by the sheriff or his deputies or by any other

person. Likewise, there is nothing in the record whatever to indicate, or to raise the suspicion, that the jury box was ever opened by anyone, except in the presence of the board of county commissioners for a proper and lawful purpose. There is nothing in the record to indicate the slightest departure from the statutory procedures in the drawing from the jury box of the names of the persons constituting the panel from which this grand jury was selected, or to indicate that any member of it did not possess the full statutory qualifications for service upon the grand jury. Therefore, the question for us to determine is whether the above mentioned departures from the statutory procedures for the compilation of the jury list, prior to the insertion of the names into the jury box, compels the conclusion that the grand jury which returned these indictments was unlawfully constituted so that the bills of indictment returned by it were void.

Far more than a century ago, Ruffin, C.J., speaking of substantially identical statutes adopted in the infancy of our State, said, in *State v. Seaborn,* 15 N.C. 305:

> "A perusal of them must satisfy any mind, that all these statutes are directory in their nature. There is not an annulling clause or word in any one of them; and from many of the provisions it must be deduced, that no such consequences of an irregularity was intended. If we advert, for instance, to the very particular directions of (St. 1806, c. 694,) relative to the forming of the jury lists from the tax list, to be furnished by the clerk of the county court; to the writing the names on scrolls of equal size; to the putting them in a box having a certain number of divisions, marks, locks and keys; to the locking the box, *the custody of the keys and of the box;* and to the drawing of the names by a child under a certain age; when I say, we advert to these provisions, and also recollect that many of the matters can by no method get into the record of the Superior Court, and that the statute contemplates that no part of them will get there, by communication from the county court, except the list of jurors to be summoned, that is, the result of all the previous ceremonies; the impression on the mind must amount to conviction, that the enactments are merely directory, and if so, that others upon the same subject in the same statute, or in another statute *in pari materia,* partake of the same character. *But the prevailing consideration is the want of any words importing that the proceeding shall be void, if the directions of the acts be not strictly observed.*" (Emphasis added.)

While these remarks of the great Chief Justice were *obiter dicta,* our reports are replete with decisions sustaining the validity of in-

dictments against the charge that the statutory procedures were violated in the compilation of the jury list, the ground of the decision in each case being that the statute was directory and a departure from it does not render the grand jury unlawful, and its actions void, in the absence of a showing of corrupt intent in the compilation of the list or of the presence upon the grand jury of a member not qualified to serve. *State v. Brown, supra; State v. Mallard,* 184 N.C. 667, 114 S.E. 17; *State v. Daniels,* 134 N.C. 641, 46 S.E. 743; *State v. Dixon,* 131 N.C. 808, 42 S.E. 944; *State v. Perry,* 122 N.C. 1018, 29 S.E. 384; *State v. Smarr,* 121 N.C. 669, 28 S.E. 549; *State v. Stanton,* 118 N.C. 1182, 24 S.E. 536; *State v. Potts,* 100 N.C. 457, 6 S.E. 657; *State v. Hensley,* 94 N.C. 1021; *State v. Haywood,* 73 N.C. 437. See also: *State v. Koritz, supra; State v. Fertilizer Co.,* 111 N.C. 658, 16 S.E. 231; *State v. Martin,* 82 N.C. 672.

In addition to the above quoted remarks by Ruffin, C.J., the matter of deviation from the statutory provisions concerning the custody of the jury box and of keys thereto was specifically dealt with in *State v. Potts, supra,* and in *State v. Hensley, supra.* In the latter case, the departure from the statute was far more extensive than that shown in the record before us and the challenge to the panel of jurors drawn from the box was nevertheless overruled.

At the most, the unauthorized acts of the sheriff and his deputies in striking names from the jury list could result in no more than the exclusion from the jury box of the names of some who were qualified to serve. In *State v. Haywood, supra, State v. Perry, supra,* and *State v. Daniels, supra,* an actual showing that qualified persons had been omitted from the box (no question of racial discrimination being involved in those cases) was held not ground for quashing an indictment returned by a grand jury drawn from such box.

The cases of *Moore v. Guano Co.,* 130 N.C. 229, 41 S.E. 293, and *Boyer v. Teague,* 106 N.C. 576, 11 S.E. 665, did not involve irregularities in the compilation of the jury list, but involved irregularities in the handling of names drawn from the box, so flagrant as to raise a strong suspicion of wrongful intent. It is clear that even the county commissioners, themselves, cannot reject a name drawn from the box for service upon a jury panel even on the ground of bad character or lack of mental capacity, this being a power vested in them only while the jury list is being prepared for the insertion of names into the box. *State v. Wilson, supra.* The *Moore* and *Boyer* cases are, therefore, distinguishable from the present case.

In view of the numerous repetitions in the decisions and opinions of this Court of the rule that the statutes setting forth the procedures for the preparation of the jury list are directory only, and that a departure therefrom does not make void a bill of indictment

returned by a grand jury drawn from the jury box, and in view of the acquiescence by the Legislatures therein, through their silence over the one hundred thirty-four years since Chief Justice Ruffin spoke upon the subject, we are unable to reach a different conclusion with respect to the irregularities shown in the present record. Consequently, this ground urged by the defendants as basis for their motions to quash the bills of indictment is also held by us to be without merit, and there was no error in the denial of these motions. These assignments of error are overruled.

Challenges to the Array.

In due time, the defendants challenged the regular panel of trial jurors and each special venire drawn from the jury box upon the same grounds advanced by them as the basis for their attack upon the grand jury. For the reasons above discussed, those grounds of challenge to the array are not sustained.

It does not appear in the record, but in oral argument we were advised by counsel for the defendants that two of the 12 members of the trial jury (16%, plus) were Negroes. While the racial composition of the four panels drawn from the jury box does not appear in the record, it does appear that a total of 220 persons whose names were so drawn were actually interrogated in open court as prospective jurors. The presiding judge had this visual evidence before him when he passed upon each challenge on the ground of racial discrimination. He found no such discrimination and denied the challenge. The silence of the record and of the defendants' brief upon this demonstration concerning the composition of the jury box raises a strong inference that the finding of the presiding judge concerning this question was correct.

An additional ground advanced for the challenge to the regular panel was that its members were present in the courtroom during the taking of evidence in support of the motion to quash the bills of indictment. There is no merit in this contention, the record disclosing that nothing was said in those proceedings relating to the merits of this case.

The defendants also challenged each special venire summoned from the body of the county pursuant to the order of the court. Their first ground for this challenge is that the deputy sheriff who supervised the selection and summoning of these veniremen had participated in the investigation of the alleged offense and was a witness for the State. This is not ground for challenge to the panel of jurors so selected and summoned. *Noonan v. State,* 117 Neb. 520, 221 N.W. 434, 60 A.L.R. 1118; 31 Am. Jur., Jury, § 108; Anderson on Sheriffs, § 280.

There was no error in ordering a special venire to be summoned from the body of the county after the exhaustion of three such venires drawn from the jury box. *State v. Stanton, supra.*

The contention that the special venire so summoned by the sheriff was defective because the sheriff, at the time of this activity, knew the significance of the code numbers "1" and "2" upon the tax books from which he selected at random names of those to be summoned, and knew the streets of High Point upon which white and Negro citizens were likely to reside, is without merit. Had the deputy sheriff desired to discriminate between white and Negro citizens in choosing veniremen "from the body of the county," it would not have been necessary for him to rely on code numbers in the tax books to enable him to distinguish between the two races. Obviously, it would be possible for a sheriff, sent out to execute such an order of the court, to discriminate in the selection of the persons to be summoned. This mere possibility does not make the panel actually summoned by him objectionable where, as here, the record shows that he did not so discriminate. The trial judge, having the members of each such special venire before him, found that in each of the two panels, so summoned by the deputy sheriff, approximately 12 of the 50 veniremen were Negroes, a proportion substantially in excess of the proportion of the Negro population to the total population of the county.

The defendants' exceptions to the denial of their challenges to the several jury panels are without merit, and these assignments of error are overruled.

Other Motions and Rulings.

The motion of the defendants that a jury be summoned from another county was addressed to the sound discretion of the presiding judge. G.S. 1-86; *State v. Allen,* 222 N.C. 145, 22 S.E. 2d 233. The same is true of the motion by the State to consolidate the four cases for trial and the opposing motion by the defendants for separate trials. G.S. 15-152; *State v. Overman,* 269 N.C. 453, 466, 153 S.E. 2d 44; *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506; *State v. Combs,* 200 N.C. 671, 158 S.E. 252. There being nothing in the record to suggest abuse of discretion in the ruling of the court upon any of these motions, these assignments of error are without merit and are overruled.

The motion of the defendants for the sequestration of the witnesses was also addressed to the discretion of the court. *State v. Hamilton, supra.* No abuse of this discretion appears upon the record. There is no merit in the contention of the defendants that

the exclusion of bystanders during the testimony of the prosecutrix denied them the right to a public trial. See *Commonwealth v. Blondin*, 324 Mass. 564, 87 N.E. 2d 455, cert. den. 339 U.S. 984. This was authorized by G.S. 15-166. Representatives of the press and parents of the defendants were not excluded during her testimony. The announcement by the court on the preceding day that it intended to so exclude bystanders when the prosecutrix testified was merely information to the public for its convenience and in no way excluded from the courtroom anyone who wished to attend the proceedings prior to or after the conclusion of her testimony. The record shows that when she took the stand there were bystanders in the courtroom who then left pursuant to the direction of the court. There was no showing of an abuse of discretion in connection with any of these rulings. These assignments of error are overruled.

When the jury announced it had reached a verdict, it was brought back into the courtroom and the foreman stated that as to the defendant Davis the jury found him guilty as charged in the bill of indictment. Before any verdict was announced as to the other defendants, counsel for Davis moved that the jury be polled. Upon the polling, the third juror stated that such was his verdict as to Davis but he recommended mercy. Thereupon, the court sent the jury back for further deliberation, with this comment:

> "I'll let the jury go back and make up its verdict. One juror has said he recommends life imprisonment. I'll let you go back and make up your verdict. A verdict must be a unanimous verdict."

The defendants now assign this as error, contending that the import of this instruction was that the jury must return the same verdict as to all four of the defendants. The court in its charge had expressly instructed the jury to the contrary, saying as to each defendant, by name, that the jury might return one of three verdicts: guilty as charged in the bill of indictment, guilty as charged in the bill of indictment with a recommendation for life imprisonment, or not guilty. He instructed the jury:

> "Should you find the defendant — and when I say 'defendant', I mean either of them, or all of them, any of them — should you find the defendant guilty of rape, if the evidence is sufficient to satisfy you beyond a reasonable doubt the defendant is guilty of rape and you so find, then the defendant must suffer death unless in the discretion of the jury, in your discretion, you make a recommendation of life imprisonment as authorized by law and from the defendants' standpoint such a

recommendation is not a matter of right in any sense but an exercise of grace based exclusively and unconditionally within the discretion of you, the jury, and no one else; * * * The jury has been entrusted with the State's conscience or power to extend grace with respect to the punishment to be meted out between life and death in capital cases and not the judge nor the solicitor but only you, the jury."

It borders upon the absurd to contend that, in the face of these instructions, the jury understood the court's statement that a verdict must be unanimous to mean that the same verdict must be rendered against each of the four defendants. The action of the court in returning the jury to its room for further deliberation and the returning of a unanimous verdict was not error. *State v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84; *State v. Wilson,* 218 N.C. 556, 11 S.E. 2d 567. These assignments of error are overruled.

There was no error in permitting the solicitor to ask a prospective juror if it would do violence to his conscience to vote for a verdict which carried the penalty of death if the juror was satisfied to a moral certainty and beyond a reasonable doubt from the evidence that the defendants were guilty. *State v. Childs,* 269 N.C. 307, 318, 152 S.E. 2d 453. This is a proper ground for challenge for cause by the State. These assignments of error are overruled.

The defendants' assignments of error relating to interrogatories, remarks and rulings by the court in the interrogation of prospective jurors for the selection of the trial jury occupy 130 pages of the record and are based on 127 exceptions. No useful purpose would be served by discussing these separately or in groups. We find no merit in any of them and these assignments of error are overruled. In numerous instances the assignment of error quotes widely separated portions of the record in such a manner as to give the impression that there is no omission, whereas a voyage of discovery through the record discloses that the statements so placed in the assignment of error were wholly unrelated and occurred in connection with the examinations of different prospective jurors. Obviously, the quotation in an assignment of error of unrelated passages from the record, in such a manner as to indicate no break in the continuity, could easily lead an appellate court into a misconception of what transpired in the trial of the case and should be avoided by counsel. We have carefully studied not only the assignments of error but also the complete record in relation to each of these many exceptions. In no instance do we find any remark of the trial judge which, in its proper context, could reasonably be interpreted as an indication of any opinion whatever concerning the guilt or innocence of the

defendants. On the contrary, the trial court repeatedly and clearly, throughout the examination of the prospective jurors, stated correctly the law of this State with reference to the burden of proof, the elements of the offense charged, the right of the defendants to elect not to introduce evidence and the duty of a juror to consider only the evidence adduced at the trial, as distinguished from newspaper stories and other comments which the juror might have read or heard prior to being summoned as a juror in this action.

We find in the remarks of the trial court during the selection of the trial jury, and at other times in the course of the trial, no support for the contention of the defendants that he expressed in the presence of the jury an opinion upon the facts of the case, or otherwise sought to influence the jury to return a verdict of guilty without a recommendation of a sentence of life imprisonment. If such effort could be found in the language of the judge, it was not successful, for the jury, by its verdict, fixed the penalty at life imprisonment. This distinguishes the present case from *State v. Canipe*, 240 N.C. 60, 81 S.E. 2d 173. These assignments of error are overruled.

The question propounded by counsel for the defendant Yoes to the prospective juror Goolsby, subsequently challenged peremptorily by the defendant Davis without any prior challenge for cause, was apparently designed to determine whether this prospective juror would, under any circumstances, feel justified in returning a verdict of guilty with a recommendation for life imprisonment. The question was not framed so as to elicit that information and did not state as an hypothesis any facts upon which such a recommendation might or might not be deemed justified. The ruling sustaining the objection to the question propounded was not error and this assignment of error is overruled.

The charge of the court to the jury contained a full and fair summary of the evidence and of the contentions of the parties, together with an accurate statement and explanation of the principles of law applicable thereto, with no expression or intimation of an opinion by the court as to whether any fact was or was not sufficiently proved. There is no merit in any of the defendants' several assignments of error thereto and each of them is overruled.

The evidence presented by the State was ample to survive the motion of each defendant for judgment of nonsuit and to support the verdict rendered as to each defendant by the jury. In view of the evidence presented, there was no error in the failure of the trial court to instruct the jury concerning any lesser offense, included within the offense charged in the bills of indictment. *State v. Lentz*,

270 N.C. 122, 153 S.E. 2d 864; *State v. Jones,* 249 N.C. 134, 105 S.E. 2d 513; *State v. Brown,* 227 N.C. 383, 42 S.E. 2d 402; *State v. Jackson,* 199 N.C. 321, 154 S.E. 402.

The prosecutrix positively identified, in the courtroom, each of the four defendants as one of the four men who, in succession, assaulted her on 21 June 1964. She and her male escort both testified that, in the early evening of that day, they were sitting in his automobile, stopped on a lonely road, discussing their plans for getting married when another car drove up and stopped behind them. The evidence is that the four defendants got out of the other car and approached that in which the prosecutrix and her escort sat, two of them on each side. After improper demands upon the prosecutrix, one of the defendants thrust a rifle in the car, threatened to shoot her companion if he did not keep his mouth shut, and ordered him to get out of the car. He did so and struck at the two defendants on his side of the vehicle. In the resulting fight, he was beaten into unconsciousness and thrown or left in the woods nearby. Hale then demanded that the prosecutrix partially disrobe, which she refused to do. Thereupon, the rifle muzzle was put at her temple and the hammer cocked. Again she was instructed to remove her clothing and again she refused, whereupon the defendants did so, pushed her down upon the car seat and, one after the other, the four of them had sexual intercourse with her despite her resistance, the rifle being held pointed into her side meanwhile. During the course of one of these acts of intercourse, a female companion of the defendants was standing beside the car pulling the prosecutrix' hair, trying to strip the ring from her finger, and urging the defendants to kill her, to which they replied, "Wait 'til we get through and we will." Upon this evidence, it is a strain upon credulity to ask us to take seriously the contention that the motion for nonsuit should have been allowed or that the jury should have been instructed concerning the possibility of returning a verdict of a lesser offense.

There could have been no prejudice to the defendants in the court's direction to their counsel that a recording device be removed from the courtroom, since the record plainly shows that the recording device in question was not connected or in operation.

The refusal of the court to allow defendants' counsel to play, in the presence of the jury, an alleged recording of previous statements by the State's witness then under cross examination, which recording had not been authenticated or offered in evidence, was not error. The court did not deny the defendants an opportunity to present evidence contradicting the testimony of the State's witness. The defendants elected, as was their right, to offer no evidence whatever.

They were not entitled to offer evidence of their own, under the guise of cross examination, in the midst of the State's presentation of its case against them. Of course, the defendants had the right to cross examine a witness for the State as to whether such witness had made contradictory statements on another occasion. This right was not denied them. The court specifically stated that if the defendants, at the proper stage of the trial for the introduction of their evidence, desired to call as their witness the person whose voice was purportedly recorded to identify his voice and statement so recorded, they would be permitted to do so. Furthermore, the record does not indicate that the witness, then under cross examination, would have identified the recording as a recording of his voice or as his statement. These assignments of error are overruled.

The jury found each defendant guilty of the offense of rape and recommended that he be punished by imprisonment for life, thus fixing the sentence to be imposed upon him. The evidence is ample to support the conviction as to each defendant. We have carefully considered every assignment of error, and every contention advanced by each defendant, and find therein no reason to disturb the verdict as to any of the defendants or the judgment rendered thereon.

No error.

STATE v. WILLIAM R. MILLER AND HOUSTON L. WILSON.

(Filed 1 November, 1967.)

1. Burglary and Unlawful Breakings § 5; Indictment and Warrant § 17—

There is a fatal variance between pleading and proof where the indictment alleges the felonious breaking and entering of a building "occupied by one Friedman's Jewelry, a corporation", and the evidence is that the building is occupied by "Friedman's Lakewood, Incorporated" and that there are three "Friedman's" stores in the city where the offense took place, and it was error to deny defendants' motions of nonsuit at the close of all the evidence.

2. Criminal Law § 26—

Prosecution on an indictment charging the felonious breaking and entering of a building "occupied by one Friedman's Jewelry, a corporation" will not bar a subsequent prosecution on an indictment charging the felonious breaking and entering of a building occupied by "Friedman's Lakewood, Incorporated."

3. Larceny § 7; Indictment and Warrant § 17—

There is no fatal variance where the indictment charges the felonious larceny of rings, the property of "Friedman's Jewelry, a corporation", and

the undisputed evidence is that the rings were the property of "Friedman's Jewelry, Incorporated", it appearing that, in respect to the ownership of the rings stolen, the witnesses were referring to one and the same corporation.

4. Criminal Law § 104—

When the State has introduced no exculpatory evidence, defendant's evidence tending to exculpate him of the offense charged is to be disregarded on motion of nonsuit.

5. Larceny §§ 5, 7— Evidence held sufficient to raise presumption of defendants' guilt of larceny.

Evidence of the State that a store was broken into and that a quantity of rings was taken therefrom, and that some few minutes later the defendants were seen traveling at a rapid rate of speed some three or four miles from the scene of the crime, and that as a police car was giving pursuit a pillowcase containing the stolen rings was thrown from the defendant's car, *held* sufficient to raise a presumption that the defendants were guilty of the larceny, and defendants' motion for nonsuit was properly denied.

6. Criminal Law § 102—

Wide latitude is allowed counsel in their arguments to the jury, and, except in capital cases, an exception to improper remarks of counsel during the argument must ordinarily be taken before verdict.

7. Same—

In a prosecution for felonious breaking and entering and for larceny, statements of the solicitor in his argument to the jury to the effect that the defendants were habitual storebreakers are prejudicial, the defendants not having testified in their own behalf nor having introduced any evidence as to their reputation or character.

8. Same—

A statement by the solicitor in his argument to the jury that, in order to arrive at a verdict of not guilty, "you must be able to accept the proposition that people lie", is prejudicial, since it excludes the possibility that conflicting evidence in a case may be due to mistake or other factors.

9. Same—

A remark of the solicitor uncomplimentary to defendant's counsel, while not so prejudicial as to warrant a new trial, was expressly disapproved by the Supreme Court in this case as violative of professional ethics proscribing derogatory attacks upon opposing counsel.

10. Same—

A statement by the solicitor in his argument to the jury that he knew a witness for the defendant "was lying the minute he said that", *held* improper.

11. Same—

An improper argument to the jury ordinarily may be corrected either at the time it is made or at the time the court charges the jury; yet, where the argument is grossly unfair and calculated to mislead and to prejudice the jury, it is the duty of the court, whether or not objection

is entered, to intervene at once in order to restrain the improper argument.

12. Criminal Law § 146—

The Supreme Court, in the exercise of its supervisory jurisdiction, may order a new trial for the failure of the trial court to restrain a grossly prejudicial argument by the solicitor, even though counsel for defendant failed to object to the remarks at the time they were made.

APPEAL by defendants from *Clarkson, J.,* 3 April 1967 Regular Criminal Session of MECKLENBURG.

Criminal prosecution upon an indictment containing two counts: The first count charges defendants William R. Miller and Houston L. Wilson on 5 January 1967 with the felonious breaking and entry into a building occupied by one Friedman's Jewelry, a corporation, with intent to commit the felonious and infamous crime of larceny, a violation of G.S. 14-54; the second count in the indictment charges the same defendants on the same date in the same place with the felonious larceny of 4 white-gold men's diamond rings, 8 yellow-gold men's diamond rings, 9 white-gold ladies' wedding sets, 3 yellow-gold ladies' wedding sets, 1 ladies' white-gold dinner ring, 2 white-gold ladies' and gentlemen's wedding sets, 3 yellow-gold princess rings, 3 white-gold princess rings, 2 white-gold men's Sapphire rings, 1 Masonic ring, 1 white-gold Sapphire and 1 cocktail ring of the value of more than $200, the property of Friedman's Jewelry, a corporation, of the value of $4,500.

The defendants, who were represented in court by their attorneys, entered pleas of not guilty. Verdict: Guilty on both counts as to both defendants.

From a judgment of imprisonment as to each defendant on both counts in the indictment to run consecutively, both defendants appeal.

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

Sanders, Walker & London by James E. Walker and Arnold M. Stone for defendant-appellant Miller.

Morrow, Cutter and Collier by John H. Cutter for defendant-appellant Wilson.

PARKER, C.J. The State began its case against the defendants with evidence offered by Robert E. Beach who testified that his employer, a business engaged in burglar, fire and holdup protection known as the A-D-T Protection Service, installed and maintained a burglar alarm system in the building occupied by "Friedman's Jewelry Company on Pineville Road." He stated that this system worked on an electrical principle so that when a certain foil around the window is broken the A-D-T Protection Service will receive an alarm on tape down at its office. He further testified that at 1:07 a.m. on 5 January 1967 the Friedman's Jewelry alarm system went off and that he conveyed this information, *via* a direct telephone line, to a dispatcher in the Charlotte Police Department and thereafter telephoned Jerry Mountain, the manager of "Friedman's Jewelry," notifying him of the break-in.

Mr. Mountain testified in substance as follows: He is the manager of "Friedman's Jewelry Store at the K-Mart Plaza Shopping Center on Pineville Road." The merchandise which is offered for sale to the general public is the property of "Friedman's Jewelry, Incorporated." After receiving the call informing him of the break-in, he left his home and went to the store where he arrived about 1:25 or 1:30 a.m. and found two patrol cars and an A-D-T man. The entire front diamond window was broken through and glass was lying on the sidewalk. He had put a new display in the window the day before and had taken an inventory; and, by subtracting the portion which remained, he was able to ascertain that 75% of the diamonds were gone from the showcase. At this point in his testimony, the solicitor requested Mountain to examine individually certain objects contained in a pillowcase. Thereupon he testified that he had seen the objects before; that they were the display boxes he used for diamonds and a display stand all of which are the property of "Friedman's Jewelry, Incorporated." The solicitor then produced another object which the witness identified as a display unit manufactured at the jewelry company's home office. He stated that there are only three of them in Charlotte, one at each of the "Friedman's Jewelers." He further testified that he did not know defendants Wilson and Miller; that neither had been employed at the store to his knowledge; and that neither had his permission to take anything out of the store. The solicitor then handed Mountain a paper envelope and asked him to pour its contents out in front of him and examine each item. After having done so, he stated that the articles consisted of a quantity of men's diamonds, ladies' wedding sets, princess rings, cocktail rings, wedding bands, sapphire rings, and matching wedding bands. He identified them as the property of "Friedman's Jewelry" by the letters H-D inscribed in the band,

which is a mark peculiar to the Friedman's Jewelry chain. He stated that he has been in the jewelry business for two years, and, in his opinion, the reasonable market value of the stolen rings is between four and five thousand dollars. During the course of his testimony, the witness stated that each of the items examined and identified by him were in the showcase window of the store at six o'clock, closing time, on 4 January 1967 but that they were not there when he returned to the premises around 1:30 a.m. on 5 January 1967.

On cross-examination Mountain testified in essence that there are three Friedman's stores in Charlotte each of which is a separate corporation; that the name of this particular corporation the business premises of which were unlawfully broken into and entered is "Friedman's Lakewood, Incorporated"; that all the merchandise in the store is owned by "Friedman's Jewelry, Incorporated," the home office of which is located in Augusta, Georgia; and that he does not know if "Friedman's Jewelry, Incorporated" owns all the stock in "Friedman's Lakewood, Incorporated."

The pertinent portions of the remainder of the State's evidence tended to show the following:

Officers K. E. Smith and L. A. McCoy, members of the Charlotte police department assigned to the patrol division, were each alone operating their respective police cruisers in their separate areas of the city of Charlotte on the morning of 5 January 1967 when they each received the radio communication from the police department's dispatcher that "Friedman's Jewelers" had been broken into. Shortly thereafter and at approximately 1:15 a.m., officer Smith saw a black 1961 Ford headed north on Park Road. He was headed south on the same road. Immediately upon observing the car he went to the nearest crossover and proceeded after it. He saw three people inside the car. Officer Smith then radioed ahead to officer McCoy, who was some distance to the north of him in the Park Road area, telling him that a black Ford was proceeding into town on Park Road, that he should be on the lookout for it, and that it should be approaching Senaca about this time. Smith was then two or three blocks behind the suspect car trying to catch up. Officer McCoy first observed the car as it was headed north coming through the intersection of Senaca and Park Road approaching him at which time he was at the intersection of Mockingbird Lane and Park Road. He waited there for the car to pass him and as it did he pulled out behind it thus coming between the black Ford and officer Smith's patrol car. McCoy never let the Ford get more than 100 or 200 feet away from him. McCoy testified that he was familiar with the building that faces Park Road

known as the Hamilton House, and when he first saw the Ford it was already north of the Hamilton House. After McCoy had traveled approximately half a block someone on the right-hand side of the car threw a pillowcase out of the right-hand side of the car. It struck the pavement and the grass on the easterly side of the road and sprayed the contents all over the ground. After he saw the pillowcase thrown from the car, McCoy radioed back to Smith, who was still in pursuit also, and advised him of the location at which it had been ejected and asked him to mark the spot. Thereupon, McCoy turned on his red light and the Ford turned a corner and stopped between 1:15 and 1:20 a.m. The driver of the automobile was Jerry Stutts. Defendant Miller was seated in the center of the front seat, and defendant Wilson was seated on the right-hand side of the front seat.

Meanwhile, officer Smith arrived in his patrol car. Thereupon, officer McCoy went back to the area where the objects had been discharged from the vehicle, and he found the white pillowcase, the jewelry cases, and the assortment of rings which had spilled out of the pillowcase and which were scattered all about on the ground. All of these items were offered into evidence and the jewelry boxes, rings, etc., were identified by witness Mountain as having been in the jewelry store showcase window on the afternoon prior to the break-in. These objects were out of McCoy's sight for maybe three or four minutes from the time they were thrown out of the car.

There are two available routes over which an automobile can be driven from the jewelry store to the Hamilton House on Park Road. During the course of his investigation of this case, officer McCoy drove his police car over both these routes; and, in his opinion, the distance between these two points by either course is somewhere between three and four miles and, hence, roughly the same.

McCoy testified on cross-examination that when the Ford passed him it was headed toward town and traveling about forty-five to fifty miles per hour.

In his testimony, officer Smith stated that he "arrested Mr. Stutts for driving under the influence." He said that he observed him walk and that in his opinion Stutts was under the influence of an alcoholic beverage or a narcotic drug on that occasion. Officer Smith told about finding the small "plastic object" or "stand" lying against Miller's leg on the seat between Miller and Stutts. This object was introduced into evidence. Smith then testified that he observed a "long, oblong sort of roundish stain on the front of" defendant Wilson's sweater. He stated that the color of the stain was red.

After the State had rested its case, defendant Wilson offered the evidence of Jerry Stutts, Jo Nell Guest, and Helen Godfrey.

On direct examination Stutts testified in substance as follows: Early on the morning of 5 January 1967 he drove out to Friedman's Jewelry and parked his car behind it. He took a tire tool from the trunk of his car, walked around to the front of the building, broke the showcase window out, and grabbed all the jewelry he could reach without crawling through the window. He put this jewelry in a pillowcase which he placed on the back seat of his car and then drove away. He broke into and entered the jewelry store alone and has been tried and convicted for it. After stealing the diamonds he went to Park Road to the Hamilton House apartments. Earlier in the evening he had talked with Jo Nell Guest over the telephone at which time he had told her to have defendant Miller meet him at the Hamilton House apartments as soon as possible. He made the telephone call from a pool room at about 12:30 a.m. He then left the pool room and drove to Friedman's Jewelry where he committed the acts specified above. Stutts identified the various items offered into evidence by the State as having been the articles which he removed from the jewelry store's showcase window. After leaving Friedman's Jewelry, he went to the Hamilton House where the defendants and two girls, Jo Nell Guest and Helen Godfrey, were sitting in a car waiting for him. When he pulled up, defendants got out of the girl's car and came around and got in his car. Thereafter he drove up the street a few blocks from the Hamilton House, and the police pulled in behind him. He told defendant Wilson to reach in the back seat, get the bag, and throw it out. Wilson did so and shortly thereafter the police pulled the car over and arrested Stutts for drunk driving. He called defendant Miller that evening because he wanted Miller to show him where someone lived that would "fence" the jewelry. He did not know when he telephoned Jo Nell Guest that defendant Wilson was with Miller and the girls that evening. After the defendants got in his car, he did not have time to tell them what he had done because the police fell in after him just as he left the Hamilton House.

On cross-examination Stutts testified in substance as follows: He is not serving time for breaking into Friedman's Jewelry, but instead is serving a sentence for breaking and entering and stealing property from another building in the city of Charlotte. He was convicted in January of 1967 for storebreaking and larceny at three separate places in the city of Charlotte. He had been tried and convicted of storebreaking, larceny, assault, speeding and running stop signs before that. In one hand, on the occasion in question, he carried the tire tool with which he hit the showcase window twice. In

the other hand he carried the pillowcase into which he put as much of the jewelry, etc., as he was able to gather up. He does not deny that there were roughly thirty-one boxes taken from the window. Nor does he deny that it was seven minutes after 1 a.m. when he first struck the window with the tire tool. When he had taken the jewelry, he came out on Park Road north of the Hamilton House apartments. He made a right turn and went to the Hamilton House. He drove there as fast as he could without having a wreck, reaching speeds of up to seventy miles per hour. He was not stopped in the lot at Hamilton House for more than a minute — just long enough to pick up defendants. He has known defendant Wilson as a friend for several years and has been associated with him socially and in a business way. He has known defendant Miller for two years and ran around with him before January 1967. The man whom he was trying to locate and to whom he wanted to sell the property was Jack Fox.

Jo Nell Guest and Helen Godfrey testified in substance as follows: Defendants Miller and Wilson on the afternoon and night of 4 January 1967 were at their apartment helping them move. At about 12:25 or 12:30 a.m. that night (5 January 1967), Jerry Stutts telephoned that he wanted to get in touch with defendant Miller and was told that he was there at the apartment. Stutts asked them to bring defendant Miller out to the Hamilton House. They brought defendants Miller and Wilson to the Hamilton House in Helen Godfrey's automobile, arriving there around 1:10 a.m. Stutts was not there when they arrived, but he drove up within a few minutes. Defendants Miller and Wilson got in Stutts' car and drove away, and the two girls returned to their apartment.

Defendants contend that their motions for judgment of compulsory nonsuit, made at the close of all the evidence, on the first count in the indictment should have been sustained for the reason that there is a fatal variance between the allegation in the indictment and the proof.

The first count in the indictment charges defendants with feloniously breaking into and entering a building "occupied by one Friedman's Jewelry, a corporation." The undisputed State's evidence is that the felonious breaking and entering was in a building occupied by "Friedman's Lakewood, Incorporated"; that there are three Friedman's stores in Charlotte and that each is a separate corporation, but that all the merchandise that was stolen from the store that was broken into and entered was owned by "Friedman's Jewelry, Incorporated," with its home office located in Augusta, Georgia. In *S. v. Brown*, 263 N.C. 786, 140 S.E. 2d 413, the indictment charged defendant in the first count with feloniously breaking into and en-

tering a certain building occupied by "Stroup Sheet Metal Works, H. B. Stroup, Jr., owner," with intent to steal; the second count in the indictment charged defendant with the larceny of personal property, the property of the same owner as charged in the first count. The only evidence in the case showed that the occupant and owner was "Stroup Sheet Metal Works, a corporation." This Court held in that case the record disclosed a fatal variance between the indictment and proof, that the verdict and judgment are vacated and the case dismissed as in case of nonsuit. In accord: *S. v. Stinson,* 263 N.C. 283, 139 S.E. 2d 558; *S. v. Law,* 227 N.C. 103, 40 S.E. 2d 699; same case, *S. v. Law,* 228 N.C. 443, 45 S.E. 2d 374; *S. v. Jenkins,* 78 N.C. 478. In the instant case, the motions for judgment of compulsory nonsuit, made at the close of all the evidence, as to the first count in the indictment should have been allowed for fatal variance between the allegation in the indictment and the proof. Even so, as pointed out in *S. v. Brown, supra,* at 787, defendants' conviction in the present prosecution will not bar a subsequent prosecution based on charges correctly stating that the building in question was occupied by Friedman's Lakewood, Incorporated.

There is no merit in defendants' assignment of error that there is a fatal variance in the allegation and proof as to the second count charging a felonious larceny. The second count charges the felonious larceny of a number of specified rings of the value of $4,500, the property of "Friedman's Jewelry, a corporation," and the undisputed State's evidence is that the rings that were stolen were the property of "Friedman's Jewelry, Incorporated."

In *S. v. Davis,* 253 N.C. 224, 116 S.E. 2d 381, the Court said: "The fact that the property was stolen from T. A. Turner & Co., Inc. rather than from T. A. Turner Co., a corporation, as charged in the bill of indictment, is not a fatal variance." In *S. 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 these names and "Pestroy Exterminating Corporation" interchangeably. The Court there held no fatal variance existed between the allegation 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 in respect to the ownership of the stolen rings all the witnesses were referring to the same corporation, also.

Defendants contend further in respect to the overruling of their motions for judgment of compulsory nonsuit, made at the close of all the evidence, as to the second count in the indictment charging a felonious larceny as follows: The State relied upon the presump-

tion that a person found in possession of recently stolen property is presumed to have been the thief; that there was no evidence that the defendants at any time had possession of any part of the jewelry or in any way assisted in the theft of the jewelry; and that at best the record shows that defendants were passengers in the car in which recently stolen jewelry was contained, and that mere presence by a passenger in an automobile containing recently stolen property does not constitute possession. Defendants rely upon the case of *S. v. Gaines,* 260 N.C. 228, 132 S.E. 2d 485. That case is distinguishable factually. In the *Gaines* case the State alone introduced evidence; the defendant introduced no evidence. The State offered in evidence statements made by Billy Hill, Gaines, and Andrews to the effect that Gaines and Andrews had nothing to do with the theft and had no knowledge that Billy Hill entered the store with intent to steal. In its opinion the Court quoted from *S. v. Carter,* 254 N.C. 475, 119 S.E. 2d 461, as follows: "When the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements." And then the Court said: "Here, the statements of Billy Hill, Gaines, and Andrews, offered in evidence by the State, tend to exculpate Gaines and Andrews." In the instant case the State has introduced no evidence that tends to exculpate the present defendants; the evidence tending to exculpate them was given by their witness, Jerry Stutts. Considering the State's evidence that the store was broken into at 1:07 a.m. on 5 January 1967 and a quantity of diamond rings was stolen therefrom, that between 1:15 and 1:20 a.m. thereafter defendants and Stutts were seen riding in a Ford automobile on Park Road three or four miles away from the scene of the break-in headed north; that while a police car was following them defendant Wilson threw out of the car a pillowcase containing the stolen rings; that after the car was stopped a plastic stand stolen from the store was in the front seat lying between Stutts and the defendant Miller; and that the car was traveling at a rapid rate of speed, we are of the opinion, and so hold, that the jury would be permitted to find that the recently stolen rings came into the possession of the defendants and Jerry Stutts by their own acts or with their undoubted concurrence and so recently and under such circumstances as to give reasonable assurance that such possession could not have obtained unless the defendants as well as Stutts were the thieves, and that the defendants together with Stutts were present at the place of the felonious larceny and were aiding, abetting, assisting or advising in the commission of the larceny or were

present for such purpose to the knowledge of the actual perpetrator, and, consequently, the jury could find that they were all principals and all equally guilty. The admissibility of circumstantial evidence, otherwise competent, to prove the commission of the offense and the guilty participation therein of the defendants may not be successfully questioned. The judge properly overruled the motion for judgment of compulsory nonsuit, made at the close of all the evidence, as to the second count in the indictment charging larceny. *S. v. Holloway,* 265 N.C. 581, 144 S.E. 2d 634; *S. v. Allison,* 265 N.C. 512, 144 S.E. 2d 578; *S. v. Gaines, supra; S. v. Hargett,* 255 N.C. 412, 121 S.E. 2d 589; *S. v. Horner,* 248 N.C. 342, 103 S.E. 2d 694; *S. v. Ham,* 238 N.C. 94, 76 S.E. 2d 346.

The speech of the solicitor for the State was taken down and transcribed by the court reporter and is in the record before us. We quote from the solicitor's speech certain parts of it challenged by defendants' assignment of error: "Do you sit there in your chairs and think for one minute that before he [Stutts] gets ready to break a man's building, that he doesn't case it from beginning to end, top to bottom and left to right. No stumble-bumble job. No teenage kid out breaking in a service station. This is big time business. You've got to realize that. I knew he was lying the minute he said that. He could tell you the name, curve and direction of every road between South Boulevard and Park Road. I believe it in my heart. He and Houston, and Mr. Miller knew exactly where they were going. Do you think this is the first time they've been in a building?"

Later on the solicitor in his speech said: "What is State's Exhibit 1-A [the small plastic stand] doing between Bill Miller and Jerry Stutts? Because they are storebreakers. Both of them. Sure, turn them loose. I could stand it myself. Personally, I could, just insofar . . . I don't own any buildings. It would be . . . it would hurt me. Turn them loose they say. And if you do, buckle your knees tight and lock your houses in the evening. Get the merchant patrol in your front yard with you, German police dogs! And when they break through your defenses, ladies and gentlemen, don't cry on me down at the solicitor's office, and say 'What are you doing about it?' I'm fighting my very heart out right now. And I'm a peace loving man. This thing of having to do this is contrary to the way my brain lies. If I thought it would do any good, I'd fall down on my knees in front of them and beg them to stay out of these people's buildings, and to lay down their burglary tools." At this point, Mr. Walker, attorney for defendant Miller, objected "to that part about other people being in buildings" and moved to strike it out. The court replied, "Well, sustained," and said to the solicitor, "Just argue

the evidence in this case, and any reasonable inferences arising therefrom." And the solicitor replied, "Yes, sir."

Defendants did not object to the first part of the above quoted argument of the solicitor, but they have an exception to it. They did object to the second part of the above quoted argument of the solicitor, but the trial judge while sustaining the objection did not instruct the jury to disregard it. Defendants properly admit in their brief that wide latitude must be given to counsel in their arguments and that as a general rule, other than in death cases, exception to improper remarks of counsel during the argument must be taken before verdict. *S. v. Smith,* 240 N.C. 631, 83 S.E. 2d 656.

In the instant case the appealing defendants did not testify in their behalf, and they did not introduce any evidence as to their reputation for character. Yet, with no supporting evidence the solicitor defiled the characters of the defendants in his argument to the jury. His remarks in this connection are accurately summarized in the briefs for the defendants: "(T)he solicitor deftly inferred that the defendants were habitual storebreakers, that they had broken into buildings before the incident charged in the indictment, that they were involved in a big time business, none of which was in evidence." The record discloses, as stated above, the solicitor said in his argument: "This is big time business . . . He and Houston and Mr. Miller knew exactly where they were going. Do you think this is the first time they've been in a building?" and "If I thought it would do any good, I'd fall down on my knees in front of them and beg them to stay out of these people's buildings, and to lay down their burglary tools," all of which is a direct statement to the effect that the present defendants are habitual storebreakers.

There is nothing in the record to justify such abuse of the defendants and it was highly objectionable. Defendants in criminal prosecutions should be convicted upon the evidence in the case, and not upon prejudice created by abuse administered by the solicitor in his argument.

S. v. Tucker, 190 N.C. 708, 130 S.E. 720, was a criminal prosecution tried upon an indictment charging the appealing defendant and another with violations of the prohibition laws. The State offered evidence tending to support the charges; the defendants, while offering evidence, did not go upon the stand as witnesses in their own behalf. The record discloses the following exception: Mr. J. G. Lewis, who assisted the solicitor in the prosecution of the case, made the concluding argument to the jury, and in the course of his remarks, among other things, said: "Gentlemen of the jury, look at the defendants, they look like professed (professional) bootleggers,

their looks are enough to convict them." Counsel for defendants immediately objected, but the court held the argument to be proper and overruled the objection. From an adverse verdict and judgment pronounced thereon, defendant Melvin Tucker appealed. The Court in its opinion, written by Stacy, C.J., *inter alia,* said:

> ". . . Similar remarks were said to be prejudicial, and were either held for error or disapproved, in *S. v. Murdock,* 183 N.C. 779; *S. v. Saleeby, ibid,* 740; *S. v. Davenport,* 156 N.C., p. 610; *S. v. Tyson,* 133 N.C., p. 699; *Jenkins v. Ore Co.,* 65 N.C. 563; *S. v. Williams, ibid,* 505; *Coble v. Coble,* 79 N.C. 589 (the 'upas-tree' case).
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> ". . . Such denunciatory comments when seriously made, are universally disapproved. Not only do we find a uniform disapproval of such remarks in our own reports, but to like effect are the expressions in other jurisdictions. (Citing authority.)."

For this improper argument by counsel for the private prosecution, the Court awarded a new trial.

Defendants assign as error this part of the solicitor's argument: "But, in order to arrive at a verdict, ladies and gentlemen of the jury, which speaks the truth, you must be able to accept the proposition that people lie. If you cannot accept that proposition there will be no justice." We think this statement by the solicitor is highly objectionable. Quite frequently conflicting evidence in a case is not due to lying but to an honest mistake or other factors, and it is unrealistic to state that if a jury cannot accept the proposition that people lie there will be no justice.

Defendants assign as error the following part of the solicitor's argument: "There is something in this case that is not very pretty. Mr. Walker, himself a former solicitor of this court until other things tempted him to the place where he now is . . ." The statement about Mr. Walker, who represented defendant Miller at the trial, is not clear, but it is manifest that it was uncomplimentary, and there is nothing in the record before us to justify it. While not so prejudicial as to warrant a new trial, we disapprove of it. Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. Canons of Professional Ethics, 62 Reports of American Bar Association 1105 § 17.

Defendants assign as error the solicitor's stating the following in his argument: "I knew he [Stutts] was lying the minute he said that." We disapprove of such argument. It is improper for a lawyer in his argument to assert his opinion that a witness is lying. He can argue to the jury that they should not believe a witness, but he should not call him a liar.

The Canons of Ethics and Rules of Professional Conduct of the North Carolina State Bar are found under Part II of the pamphlet entitled "North Carolina Statutes, Rules and Regulations and Ethisc Opinions of the North Carolina State Bar," issued by the North Carolina State Bar in 1961. Canon 15 reads in part as follows: "It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause."

Arguments to a jury should be fair and based on the evidence or on that which may be properly inferred from the case. This is said in 88 C.J.S. Trial § 169, at 337-38: "However, the liberty of argument must not degenerate into license, and the trial judge should not permit counsel in his argument to indulge in vulgarities; he should, therefore, refrain from abusive, vituperative, and opprobrious language, or from indulging in invectives, or from making any statements or reflections which have no place in argument but are only calculated to cause prejudice."

Ordinarily, the court may correct improper argument at the time or when it comes to charge the jury. *S. v. O'Neal,* 29 N.C. 251; *Melvin v. Easley,* 46 N.C. 386; *McLamb v. R. R.,* 122 N.C. 862, 29 S.E. 894; *S. v. Little,* 228 N.C. 417, 45 S.E. 2d 542. If the impropriety be gross, it is the duty of the court to interfere at once. *Jenkins v. Ore Co.,* 65 N.C. 563; *S. v. Tucker, supra.* It is especially proper for the court to intervene and exercise the power to curb improper arguments of the solicitor when the State is prosecuting one of its citizens, and should not allow the jury to be unfairly prejudiced against him. *S. v. Williams,* 65 N.C. 505. Every defendant should be made to feel that the solicitor is not his enemy, and that he is being treated fairly. *S. v. Smith,* 125 N.C. 615, 34 S.E. 235; *S. v. Tucker, supra.* Counsel have wide latitude in making their arguments to the jury. *S. v. O'Neal, supra; McLamb v. R. R., supra; S. v. Little, supra.* However, it is the duty of the judge to interfere when the remarks of counsel are not warranted by the evidence, and are calculated to mislead or prejudice the jury. *McLamb v. R. R., supra; Perry v. R. R.,* 128 N.C. 471, 39 S.E. 27; *S. v. Howley,* 220 N.C. 113, 16 S.E. 2d 705. "Courts should be very careful to safeguard the rights of litigants and to be as nearly sure as possible that each party shall stand before the jury on equal terms with his adversary, and not be hampered in the prosecution or de-

fense of his cause, by extraneous considerations, which militate against a fair hearing." *Starr v. Oil Co.,* 165 N.C. 587, 81 S.E. 776.

The remarks of the solicitor in his argument as above quoted were grossly unfair and well calculated to mislead and prejudice the jury, particularly in his references to defendants as being in effect habitual storebreakers, because defendants did not go upon the stand themselves, did not offer any evidence in respect to their reputation for character, and because there is no evidence in the record to justify a statement that defendants were habitual storebreakers. Counsel for the defendants should have objected to these improper remarks as soon as they were begun, and before they were elaborated in detail. Counsel for defendants objected several times, and the objections were sustained. The error in the case at bar consists in the fact that the court did not forbid the grossly unfair and improper argument of the solicitor well calculated to mislead and prejudice the jury in respect to their being in effect habitual storebreakers, and did not charge the jury to disregard such grossly unfair argument. To uphold the argument of the solicitor in the present case would be to sanction the vituperative language used in the present case and also to open the door for advocates generally to engage in vilification and abuse — a practice which may be all too frequent, but which the law rightfully holds in reproach. We can see how the vigorous solicitor in the heat of debate made these grossly unfair and improper remarks without conscious intent to mislead and prejudice the jury, but such remarks were disastrous to the defendants' right to a fair and impartial trial, and sitting here in calm review we are unable to overlook such a grossly unfair argument. We overrule the defendants' assignments of error to the charge because they were not made in apt time and they are not based on any exceptions duly noted. 1 Strong's N. C. Index 2d, Appeal and Error, § 24, at 146. However, this Court is vested with authority to supervise and control the proceedings of the inferior courts. N. C. Constitution, Art. IV, Sec. 8; *S. v. Cochran,* 230 N.C. 523, 53 S.E. 2d 663. This Court has exercised this power very sparingly, and rightly so.

Considering the argument of the solicitor as a whole, and particularly that part of his argument which in substance states that the appealing defendants are habitual storebreakers, we are of opinion, and so hold, that to sustain the trial below would be a manifest injustice to the defendants' right to a fair and impartial trial. Acting under the supervisory power granted to us by the State Constitution, a new trial is ordered to the end that the defendants may be tried before another jury, where passion and prejudice and

facts not in evidence may have no part. *S. v. Smith,* 240 N.C. 631, 83 S.E. 2d 656.

The record before us discloses serious misconduct on the part of a juror. After the verdict was in and judgment against the defendants was imposed and the jury had dispersed, counsel for defendant Miller made a motion for a mistrial — not a new trial — because of the misconduct of this juror. The presiding judge heard evidence and concluded as a matter of law that the misconduct of the juror did not influence the deliberation of the jury, that the defendant was not prejudiced thereby, and denied in his discretion the motion for a mistrial. Defendant Miller assigns this as error. Defendant Wilson by order of the court was given leave to make a motion for a mistrial, which motion was made and denied by the court, and defendant Wilson excepted and assigns this as error. The motions should have been for a new trial instead of a mistrial, because the trial was over when the motions were made and the jurors were dispersed. A very serious question is raised by that assignment of error, but it is not necessary for us to discuss and pass upon it for the reason that we have awarded a new trial because of the grossly unfair and prejudicial argument by the solicitor for the State, and upon a retrial the misconduct of this juror will not occur again.

We approve of what is said in *S. v. Tucker, supra:*

> ". . . We would not be understood as saying anything which might have a tendency, even in the slightest degree, to suppress the highest enthusiasm of forensic effort on behalf of the State in a criminal prosecution, or in any case at the bar, but counsel should always remember that the ends of justice are best subserved by fair, open and legitimate debate. To arrive at the exact truth, according to the facts and the law of a case, is the aim of every legal contest, and to this end the utmost power of logical reasoning may be employed. Indeed, to master the facts and to marshal them in such a way as to lay bare the truth of a matter are marks of the accomplished advocate."

For the grossly unfair and prejudicial argument of the solicitor for the State, defendants are entitled to a

New trial.

HUSKI-BILT, INC., A CORPORATION, v. THE FIRST-CITIZENS BANK & TRUST COMPANY, A CORPORATION.

(Filed 1 November, 1967.)

1. Trial § 57—

Where the parties waive a jury trial and agree that the court find the facts, the court has the function of weighing the evidence, and its findings are conclusive on appeal if supported by any competent evidence, notwithstanding that evidence to the contrary may also have been offered.

2. Corporations § 1—

The fact that one corporation and its officers own substantially all of the stock of another corporation does not justify a disregard of the separate corporate entities unless there are additional circumstances showing fraud, actual or constructive, or agency.

3. Insurance § 9.1; Banks and Banking § 13— Lender collecting an paying credit life insurance to insurance company is not liable for unearned premiums.

The fact that a bank in discounting notes payable to a construction company requires credit life insurance to be taken out on the lives of each purchaser for the balance due on the houses purchased from the construction company, and further requires that such insurance be placed with a company in which the bank and its officers own a majority of the insurance company stock, and collects the premiums, but then delivers the entire amount of the premiums to the insurance company, *held* not to render the bank liable for the unearned premiums upon prepayment of the loans, since, there being no basis for disregarding the separate corporate entities of the bank and the insurance company, such refunds would not be the liability of the bank but a liability of the insurance company, which refunds the insurance company would be required to pay to the individual borrowers rather than to the construction company. G.S. 58-44.7.

4. Usury § 1—

The fact that a bank lending money to a construction company on notes executed to the construction company by purchasers of houses from the construction company requires that the construction company pay premiums for credit life insurance on each of the purchasers, which premiums the bank delivers *in toto* to the insurance company issuing the policies, *held* not to constitute an exaction of usury in requiring such premiums in addition to the legal rate of interest, even though the bank and its officers own the majority of the stock of the insurance company, there being nothing to warrant disregard of the separate corporate entities of the bank and the insurance company. G.S. 58-32.

5. Same—

It is customary for a bank to charge interest in advance, and therefore where it lends a specified sum and adds thereto the interest on such sum for four years, the total to be repaid in installments during the four year term, the transaction does not constitute usury, provided the total amount of the interest paid does not exceed six per cent on the amount borrowed. G.S. 53-43(6).

APPEAL by plaintiff from *Riddle, S.J.*, 20 March 1967, Schedule "C" Session of the Superior Court of MECKLENBURG County.

The plaintiff alleged that it built homes in the Charlotte area, sold them to various purchasers, obtained down-payments, and took notes and deeds of trust for the balance due. Being unable to finance all of these balances, it sought a loan from the defendant, and a contract was entered between the parties whereby the Bank would lend fifty per cent (50%) of the balance due upon the notes and deeds of trust, taking them as security. It also required the personal endorsement of Cecil G. Huskey, the President of the plaintiff Corporation, and of his wife, and also that credit life insurance be taken upon the lives of the debtors, with the death benefits payable to the Bank. The plaintiff paid the premium on these policies to the Bank which in turn paid American Guaranty Life Insurance Company. This company later changed its name to American Defender Life Insurance Company, and it issued the policies.

In its first cause of action, the plaintiff alleged that the life insurance company was ninety per cent (90%) owned and controlled by the defendant and three of its principal officers; that he could have obtained the insurance for one-fourth the amount charged but that the defendant required that the insurance be issued by American Defender; that it executed its note for $324,442.80 on 4 February 1963; expended $27,962.35 for insurance premiums, paid the note before its due date on 17 March 1965, and was therefore entitled to a rebate of $15,411.94 for unearned premiums. The plaintiff demanded payment of this amount by the defendant which was refused, and the plaintiff sued to recover it.

For its second cause of action, the plaintiff alleged that upon its note of $324,442.80, it paid $41,329.92 interest which it claims to be usurious and seeks to recover double that amount: $82,659.84. It further alleged that the requirement that it take credit life insurance policies upon its debtors was a form of usury, since the insurance company was almost wholly owned by the defendants and its principal officers; and it sued to recover $40,512.76 as usury based upon these charges.

The defendant denied any charge of usury or that it controlled the insurance company, said that it had paid over all premiums collected to the insurance company, and that if the plaintiff were entitled to any rebate it was due from the insurance company, which is not a party to the action.

Mr. Cecil G. Huskey testified, in summary, that he was the President of Huski-Bilt, Inc., which was engaged in the construction business and that it built homes for people who already owned their own lots. The houses were financed by a down payment with an

eight-or ten-year note for the balance, secured by a deed of trust on the house and lot payable in monthly installments. His corporation needed financing, and after negotiations with Mr. Ernest Hicks, Assistant Vice President in charge of the Installment Loan Department of First Citizens Bank and Trust Company in Charlotte, an arrangement was made whereby the bank would lend Huski-Bilt one-half of the balance due on the note from the home owner. It executed its note for the amount borrowed, assigning the home owner's notes and deeds of trust to the bank as collateral. In addition, the bank required the personal endorsement of Mr. Huskey and his wife. After the first loan, the bank also required that a credit life insurance policy be carried upon the life of each of the home owners, benefits of which were to be paid to the bank upon the death of the debtor. A premium of one per cent per annum of the amount due on the deed of trust was required, and it was paid to the bank who remitted it in full to the American Defender Life Insurance Company. The witness protested the life insurance requirement, seeking to have the insurance taken on his life as guarantor and asserting that he could get credit life insurance for one-fourth the premium charged through the Bank, but without avail, and a total of $28,819.95 was paid as premiums.

The plaintiff introduced exhibits showing that as of October 1, 1961 his individual net worth was $332,583.15, and a later one showing his net worth to be $553,982.00 as of October 1, 1962.

Financial statements of Huski-Bilt showed it to be worth $32,866.00 as of November 10, 1960. A later one showed net worth of $153,361.00 as of December 31, 1961; still another showed net worth of $397,882.34 as of September 30, 1962.

The plaintiff testified that he first borrowed $33,000.00 from the defendant, giving a note for $40,920.00, which included interest on the amount borrowed and which was payable $852.50 per month. He testified that based upon a six per cent amortization schedule the monthly payments should have been $775.02 but that he was required to make payments of $77.48 more than the above figure. He further testified that later loans were made to his company with similar requirements and payments; that on February 4, 1963 the corporation executed its note to the defendant in the sum of $324,442.80 which represented the total amount due at that time, that it included interest of $41,329.92, and that the note was fully paid on March 17, 1965.

As to the requirement of credit life insurance on Huski-Bilt debtors, he testified that he requested that insurance be taken on his own life since he was the one who was borrowing from the bank;

that he was borrowing the money for only four years but he was required to take insurance for eight and ten years; that he wanted to purchase the insurance which he could get on a reduced term and a premium substantially less (one fourth) than that charged by the bank by going into the insurance business himself and getting seventy-five per cent (75%) commission back, but that the bank required that the insurance be purchased through it, and that the policy be issued by American Guaranty Life Insurance Company (later changed to American Defender Life Insurance Company). It was stipulated that the bank owned forty-four per cent (44%) of the stock of the life insurance company, and that the president, vice president, and chairman of the board of the bank, each owned seventeen per cent (17%) of its stock, making a total of ninety-five per cent (95%) of the insurance company's stock held by the bank and its principal officers.

In addition to the conversations with Mr. Hicks, Huskey testified that he also dealt with Mr. Robert Johnson, who succeeded Hicks as manager of the bank. These conversations related largely to the insurance arrangement in which the plaintiff sought to purchase insurance from other companies, asserting that it could become agent for them and get a commission or rebate of seventy-five per cent (75%) of the premium, which would reduce its costs to twenty-five per cent (25%) of the amount charged by the bank. He testified that Mr. Johnson told him that this proposal was not acceptable because "we've got to make some money too." Mr. Johnson told the witness that in the event of prepayment of a deed of trust a refund of the unearned insurance premiums would be made. At one time the bank refunded $3,003.17 for unearned premiums on certain mortgagors. After its indebtedness was paid on 17 March 1965, the plaintiff requested refunds for the unearned premiums which were refused, the bank claiming that any refund due was the obligation of the insurance company and not of the bank.

The witness identified the certificate issued by the insurance company which provided that upon due proof of death of a borrower the insurance was payable to the bank as its interest may appear and a surplus "to any relative by blood or connection by marriage of the Borrower or to the Estate of the Borrower."

Mr. Ernest L. Hicks, Assistant Vice President, was adversely examined by the plaintiff. He testified that the bank required that deeds of trust and notes of the home owners be assigned to it as collateral for any loans, and that Mr. and Mrs. Huskey act as sureties thereon. And further, that credit life insurance for the period of the borrower's loan in an amount equal to the face amount

of the note from the customer be furnished. That he was a licensed agent for American Defender Life Insurance Company of Fayetteville, and that he collected the premiums which were transmitted in full to the insurance company with no deduction or commission being charged by the bank. Mr. Hicks testified that in the event Huski-Bilt paid off its master note that there would be a rebate to it of any unearned premiums on condition that the customer presented the original certificate of insurance or a lost policy release. He said that as to any rebate for unearned premiums where a note was paid prior to its due date, he could only present to the insurance company the original certificate of insurance, and that the insurance company, rather than the bank would be responsible for any rebate.

Mr. Hicks also said that for the first loan requiring credit life insurance coverage, one hundred per cent (100%) on the outstanding balance was required but that only fifty per cent (50%) was demanded in subsequent transactions.

The defendant offered the evidence of Robert L. Johnson, Assistant Vice President of the Bank, who testified that after Mr. Hicks had negotiated the first three loans with the plaintiff, he was transferred to the Asheville Branch of the bank and that he, Johnson, succeeded him in the Charlotte office and negotiated the other loans; that after Mr. Huskey paid off his note in March 1965, the witness told the latter that if he would deliver the original policies or lost policy releases issued to the home owner that refunds would be issued; that this was done as to one policy and it was forwarded to American Defender to be canceled; that a refund was offered by the insurance company to Mr. Huskey which he would not accept. At the time the loan was paid off, Johnson said he had in his possession what would be required to cancel any coverage and to pay the unearned premium to Huski-Bilt, which he turned over to Huskey, and that Mr. Huskey had not brought them back to process.

The above summary of the evidence offered by the plaintiff and the defendant does not purport to be complete, but it is a synopsis of all of the evidence considered pertinent to the decision.

The parties agreed that the Judge could hear and determine the matter without the intervention of the jury.

Judge Riddle made findings of fact and thereupon held as a matter of law that upon the first cause of action there were no unearned premiums due the plaintiff by the defendant, and that the plaintiff was not entitled to recover. As to the second cause of action, he held that the payment of premiums for life insurance did not constitute payments of interest to the defendant; that defendant did not

charge nor collect from plaintiff interest greater than six per cent (6%) and that the plaintiff was not entitled to recover on this cause.

The plaintiff made numerous exceptions to the findings of fact and conclusions of law, and appealed.

Warren C. Stack and James L. Cole, Attorneys for plaintiff appellant.

Ward and Tucker; Boyle, Alexander and Carmichael by R. C. Carmichael, Jr., Attorneys for defendant appellee.

PLESS, J. The plaintiff's first cause of action is based upon its claim that the American Defender Life Insurance Company was almost fully owned by the defendant and its three principal officers. It contends that when the bank required it to expend some $38,000.00 for insurance premiums, which went to its alleged subsidiary or alter ego, it constituted gross profit; that premiums were required to be paid for the entire length of the term of the deeds of trust assigned as security (in most cases ten years), although the loans to the plaintiff were for a term of only four years; that defendant covenanted with plaintiff that unearned premiums would be refunded if defendant released any of plaintiff's mortgages assigned to defendant as security, and that on one occasion premiums were so refunded; that on March 17, 1965, plaintiff repaid all loans obtained from the defendant and defendant released to plaintiff all deeds of trust and notes held by it as security for the loan; that plaintiff has made numerous demands for refund of unearned premiums since that time and defendant has refused to make such refund. Therefore, it is claimed defendant is now indebted to plaintiff in the amount of the unearned premiums, to wit: $15,411.94.

Upon hearing the evidence, considering the motions, and the plaintiff's requested findings of fact, the Court made its own findings of fact and entered its judgment to the effect that the parties entered into an agreement on 3 January 1961; that the defendant agreed to and did make loans to the plaintiff. The loans were secured by notes and deeds of trust upon the property of the plaintiff's debtors guaranteed by Mr. and Mrs. Huskey, and that in addition the plaintiff obtained policies of credit life insurance upon the lives of its customers; that all policies were written by American Defender Life Insurance Company (formerly American Guaranty Life Insurance Company), and as each policy was issued it was delivered to the named insured; that they were written for the terms of the debtor's indebtedness which are still in being and are in effect and enforce-

able by the beneficiaries thereof. The Court further found that the premiums for these policies were paid by the plaintiff to the defendant, and the defendant then delivered the entire amount of the premiums to the insurance company.

The Court found as a fact that the bank and the insurance company were separate corporations; that if the plaintiff were entitled to any refund it was due by the insurance company (which is not a party to the action) and not by the bank.

The Court concluded as a matter of law that there were no unearned premiums due the plaintiff by the defendant, and the plaintiff was not entitled to recover anything from the defendant on this cause of action.

It is the rule in North Carolina that where the parties waive a jury trial and agree that the Court may find the facts, they thereby transfer to the Judge the function of weighing the evidence, and his findings are conclusive on appeal if supported by any competent evidence, notwithstanding the fact that evidence to the contrary may have been offered. *Young v. Insurance Company,* 267 N.C. 339, 148 S.E. 2d 226 (1966); *Williams v. Williams,* 261 N.C. 48, 134 S.E. 2d 227 (1964).

From the Court's statement of facts, in which the evidence is summarized, it will be seen that the evidence, even though controverted, supports the findings of fact, which, in turn, support the conclusions of law.

Throughout the plaintiff's case is its basic contention that since the bank and its officers owned substantially all of the stock of American Defender Life Insurance Company that the two were, in effect, one entity, and that the insurance company was merely an *alter ego* or puppet of the bank. Unless it can prevail upon that assertion, the plaintiff has no case. Upon the argument before us, counsel for the plaintiff, with his usual candor, said that without that contention, "we wouldn't be here."

The plaintiff is being realistic in his position. But it is confronted by almost unanimous authorities which afford little comfort. 1 Fletcher, Cyclopedia Corporations, § 28, p. 124, states the rule:

> "That one person or corporation may own a majority or even all of the stock of a corporation does not establish a legal identity between the stockholder and it, so as to make acts by one the acts of the other. The powers of two such corporations are distinct and proper to each other, and the powers of a corporation are not denied to it merely because it is subsidiary to another."

The Judge's ruling upon the second cause of action was in accord. He found that the loans were made by the bank to the plaintiff upon the terms alleged in the first cause of action; that at the time each loan was made "the defendant deducted from the proceeds of such loan interest at a rate not exceeding six per cent (6%) per annum" and held as a matter of law that the payments of premiums by the plaintiff for credit life insurance did not constitute payments of interest to the defendant; that the defendant did not charge nor collect from plaintiff at any time interest at a rate greater than six per cent (6%) per annum, and the plaintiff was not entitled to recover anything on its second cause of action, and the cause was thereupon dismissed.

91 A.L.R. 2d 1349, *et seq.*, fully digests the law on this subject. It says:

> "It has generally been held that the requirement by a lender, whether an insurance company or otherwise, that the borrower should, as a condition for obtaining the loan, take out and pay premiums on a policy of insurance, and assign it to the lender as additional security for the loan, . . . does not, though making the cost of the loan exceed the highest legal interest, necessarily constitute usury where there is no showing that the requirement is intended to be, or is exacted as, a mere shift or device to cover usury."
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> Other sections of the above annotation say "the fact that a lender required its borrowers to purchase . . . credit life . . . insurance . . . and to place such insurance with companies wholly owned by it, did not render the loan transactions usurious where the evidence showed that the insurance was actually written and put in force by the insurance companies for the premiums customarily charged for like insurance, and that the premiums charged for the insurance were actually paid over to the companies and the borrowers were mailed the policies. . . .
>
> "[T]he compensation which the lender might legally demand was determined not by what the borrower paid but what the lender received."

Dealing with the subject of separate corporate entities, we find that in the recent case of *Accept. Corp. v. Spencer,* 268 N.C. 1, 149 S.E. 2d 570, our Chief Justice Parker, writing the most thorough opinion we have found on the subject, said:

> "Ordinarily, a corporation retains its separate and distinct identity where its stock is owned partly or entirely by another

corporation. 18 C.J.S., Corporations, § 5(j), p. 375. See *Troy Lumber Co. v. Hunt,* 251 N.C. 624, 112 S.E. 2d 132.

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

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

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

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

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

" 'Restating the instrumentality rule, we may say that in

any case, except express agency, estoppel, or direct tort, three elements must be proved:

"'"(1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and

"'"(2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and

"'"(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of." See Powell "Parent and Subsidiary Corporations," chapters I to VI, *passim,* and numerous cases cited.'"

The plaintiff has not offered the proof to meet the above requirements. There is ample evidence to support the Judge's finding that the bank and the insurance company were separate corporations and that the payment of premiums by the plaintiff for credit life insurance did not constitute payments of interest to the defendant. Upon the latter ruling, the Court's finding is supported by G.S. 58-32 which provides that when an insurance company requires a borrower to insure either his life or that of another with the company as a condition of a loan, the premiums paid for the insurance shall not be considered as interest, and the loan will not be rendered usurious by reason of such requirement. The statute also includes this clause: "nor will any loan be rendered usurious by reason of any such requirements . . ." Without deciding that this broad provision would include a bank which required insurance as condition for a loan, we think it demonstrates the legislative intent which the cited decisions support.

In view of the foregoing, the plaintiff's claim of usury can be sustained, if at all, only upon the payments made to the bank, disregarding payment for insurance premiums. A careful mathematical calculation demonstrates that the charges denominating interest by the bank, standing alone, amount in each instance to less than six per cent (6%). In fact, less than five per cent (5%) was charged upon several. The plaintiff claims that when it borrowed $33,000 and was required to add a sufficient amount to pay interest on the sum borrowed for a four-year period (which came to $7,920) and it was thus required to execute a note for $40,920, that this was a usurious requirement. However, G.S. 53-43(6) provides that a bank, upon making a loan, may deduct in advance from the proceeds of the

loan interest at a rate not exceeding six per cent (6%) per annum from the date of the loan until materialization of the final installment, even though the principal amount of the loan is to be repaid in installments. It is general banking practice to require that interest be paid in advance. The plaintiff wanted $33,000. Had it been required to pay the interest from that sum, it would have received $7,920 less than it sought to borrow. By adding the interest to the principal of the note, it paid only six per cent (6%) on the amount borrowed, and this would appear to be the most convenient method of payment. In *Ray v. Insurance Co.,* 207 N.C. 654, 178 S.E. 89, a similar transaction was upheld, the Court saying: "None of the notes which plaintiff executed, and which were subsequently paid, were tainted with usury."

Upon the claim of the plaintiff that the bank failed to refund unearned insurance premiums, it must be recalled (1) that *if* a refund were due it was (a) due by the insurance company and (b) that since the plaintiff was not the beneficiary in the policies, the ones who were, that is, the heirs and next of kin of the insureds, would be entitled to the refund; and (2) that under G.S. 58-44.7 the bank could not have legally made a refund of money which had gone, even through its hands, to the insurance company. That statute provides that it is unlawful for an insurance company writing credit life insurance in connection with a loan to permit any agent to pay any rebate or refund any premiums without the consent of the policy holders.

We have considered the many authorities cited by the plaintiff but find that they are either not applicable to the facts found in this case, or that they represent minority rulings.

The quotations and citations in this opinion are not in every instance unanimously accepted by all courts, but they do represent the general rulings and have been approved by a majority of the courts dealing with the subjects discussed. We are of the opinion that they are sound, and we have therefore adopted them.

All of the exceptions filed by the plaintiff have been properly considered. We find that there was evidence to support Judge Riddle's findings of fact, that the rulings of law are correct, and that in the trial there was

No error.

ERLINE NIPPER, PLAINTIFF, v. GEORGE W. BRANCH AND S. & D. COFFEE, INC., ORIGINAL DEFENDANTS AND JAMES LARRY HACK, CAPITAL CAR DISTRIBUTING COMPANY, INC., AND CONCORD MOTORS, INC., ADDITIONAL DEFENDANTS.

(Filed 1 November, 1967.)

Automobiles § 23; Pleadings § 8—

In an accident caused by brake failure of original defendants' three year old truck, the defendants allege that a garage had repaired the brakes approximately a year before the accident, and that two or three times subsequent thereto (without specifying the dates) the garage had serviced the vehicle and adjusted the brakes, and filed a cross-action against the garage upon the assertion of primary and secondary liability. *Held:* Demurrer to the cross-action was properly sustained, since the facts alleged negate any legitimate inference that defective parts or faulty workmanship on the part of the garage at such remote times was a cause of the brake failure causing the accident in suit.

APPEAL by original defendants from *Jackson, J.,* February 20, 1967 Non-Jury Civil Session, GASTON Superior Court.

The plaintiff, Erline Nipper, instituted this civil action against S. & D. Coffee, Inc., owner, and George W. Branch, operator, of a 1961 Chevrolet truck which the plaintiff alleged negligently ran a stop sign on a servient road and entered its intersection with U. S. Highway 29 and collided with the Falcon stationwagon which the plaintiff was lawfully operating through the intersection on the through highway. She alleged defendants' actionable negligence caused the collision and her serious personal injuries.

The original defendants, by answer filed September 29, 1965, admitted the movement of the truck into the intersection without observing the stop sign. They alleged, however, that a sudden, total, and unexpected brake failure was the cause of Branch's inability to stop the truck and that, insofar as the defendants were concerned, the accident was unavoidable.

As a further defense and plea in bar, the defendants alleged the plaintiff was contributorily negligent in that she saw, or should have seen, the defendants' vehicle was out of control and could not be stopped and that this condition was, or should have been, obvious to the plaintiff in time for her to have stopped and avoided the accident.

As a second further defense, the defendants alleged that immediately after the plaintiff's stationwagon and the defendants' truck collided, that James Larry Hack negligently drove a Volkswagen owned by Capital Car Distributing Company, Inc. of Maryland into the rear of the stationwagon, thereby contributing to the plaintiff's injuries. On the original defendants' motion, Hack and Capital were made additional parties defendant.

On August 23, 1966, 8 months after the answer was filed, the original defendants filed a cross-action against Concord Motors, Inc., alleging that Concord Motors had repaired the Chevrolet truck and "worked on various portions of the brakes and subsequently returned it to S. & D. Coffee representing, expressly and impliedly, that it had done whatever was necessary or desirable to put the brakes in proper and safe operating condition . . ." and on at least 2 or 3 subsequent occasions had checked and serviced the vehicle and had adjusted the brakes; that the failure of the brakes to operate on March 2, 1965 was due to the failure of Concord Motors to make proper repairs and adjustments. The original defendants had Concord Motors, Inc. made an additional defendant on the alleged ground that if the original defendants should be held liable to the plaintiff, then and in that event, the original defendants' liability for the accident was secondary, and Concord Motors should be held primarily liable.

Concord Motors first moved to strike certain designated parts of the original defendants' cross-action. However, before the Court ruled on the motion, Concord Motors entered a demurrer *ore tenus* to the cross-action upon the ground the cross-complaint failed to state a cause of action against Concord Motors and the addition of Concord Motors as a party defendant constituted a misjoinder of parties and causes. The Court sustained the demurrer and dismissed the cross-action. The original defendants excepted and appealed.

Craighill, Rendleman & Clarkson by James B. Craighill for original defendants appellants.

Carpenter, Webb & Golding by William B. Webb for additional defendant Concord Motors, Inc.

HIGGINS, J. The appeal brings the case here for limited review while it is still in the pleading stage. The plaintiff alleged that Branch, as agent of S. & D. Coffee, Inc., negligently drove the corporation's Chevrolet truck through a stop sign, and collided with the stationwagon, which she was operating through the intersection in her proper lane of traffic. In the collision, she suffered serious personal injuries.

By answer, the original defendants admitted Branch failed to stop the truck at the intersection. They allege, however, that Concord Motors, Inc., in overhauling the truck, had used improper parts and performed faulty workmanship in the repair procedure. These, they say, caused the brake failure. The original defendants interpleaded Concord Motors as an additional defendant, specifically stating that on March 12, 1964 they delivered their 1961 Chevrolet

truck to Concord Motors to be "overhauled and serviced" and that on two or three occasions thereafter Concord Motors made some additional adjustments — once to the brake system. They allege that in overhauling the truck, Concord Motors used improper parts and carelessly installed them; that on two or three subsequent occasions they had opportunity to discover the defects in the brakes, but failed to make the discovery; that these negligent acts on the part of Concord Motors and their failure to observe the express and implied warranty to make proper repairs, triggered the brake failure on March 2, 1965. The sufficiency of these allegations to fix liability on Concord Motors is challenged by the demurrer.

To begin with, a truck at least 3 years old was overhauled on March 12, 1964. Two or three times after that date (nothing more definite as to time is given) the truck was back in Concord Motors' shop for service and adjustment. On March 2, 1965, while in use on the highway, the brakes failed. Almost a year intervened between the time the truck was overhauled and the accident in which the plaintiff sustained her injuries. Time and the normal business use of the truck, which we have the right to assume in the absence of allegation to the contrary, combine to negate any legitimate inference that defective parts or faulty workmanship on the part of Concord Motors caused the brake failure. We conclude the cross-complaint on the facts alleged fails to state a cause of action against Concord Motors.

When a cross-complaint fails to allege facts sufficient to constitute a cause of action, demurrer thereto should be sustained. *Edwards v. Hamill,* 262 N.C. 528, 138 S.E. 2d 151; *Stephens v. Southern Oil Co. of North Carolina, Inc.,* 259 N.C. 456, 131 S.E. 2d 39; *Webster v. Webster,* 247 N.C. 588, 101 S.E. 2d 325. Other questions need not be discussed. The judgment sustaining the demurrer and dismissing the action as to Concord Motors, Inc. is

Affirmed.

STATE v. ROGER WALL.

(Filed 1 November, 1967.)

1. Automobiles § 3—

A person convicted of operating a motor vehicle on the highways in this State without having first been licensed as an operator is guilty of a misdemeanor, G.S. 20-7(a), and is subject to punishment by imprisonment for a term of not more than six months. G.S. 20-7(n), G.S. 20-35(b).

2. Automobiles § 134—

The unlawful taking of an automobile in violation of G.S. 20-105, a misdemeanor, is not an included less degree of the crime of larceny, and a defendant may not be convicted of this offense when tried upon indictment charging the crime of larceny.

3. Courts § 3—

The Superior Court has original general jurisdiction throughout the State except as otherwise provided by statute. N. C. Constitution, Art IV, § 10(2) (1962).

4. Courts § 11—

The General Assembly is empowered to prescribe the jurisdiction and powers of the District Courts. N. C. Constitution, Art. IV, § 10(3) (1965).

5. Courts § 14—

The District Court has original jurisdiction over all criminal actions below the grade of felony, G.S. 7A-270, G.S. 7A-272, and has the exclusive original jurisdiction of all misdemeanors except in those instances specifically enumerated in G.S. 7A-271(a)(b)(c)(d).

6. Same; Automobiles § 3—

Defendant appeared in the District Court upon warrant charging the operation of an automobile without an operator's license in violation of G.S. 20-7(a), a misdemeanor, and moved for trial by jury. The case was transferred to the Superior Court for trial without adjudication in the District Court. *Held:* The District Court had exclusive original jurisdiction of this prosecution, and its failure to proceed to trial upon the warrant was erroneous.

7. Courts §§ 3, 14; Automobiles § 134—

Defendant was arrested and bound over to the Superior Court upon a warrant charging the felonious larceny of an automobile; a bill of indictment was returned charging defendant with the unlawful taking of an automobile in violation of G.S. 20-105, a misdemeanor. *Held:* The Superior Court is without original jurisdiction of the misdemeanor indictment, since, there being no charge of felony in the Superior Court, and the exceptions enumerated under G.S. 7A-271 being inapplicable, the judgment entered thereon is vacated with direction that the action be transferred to the District Court for trial.

8. Courts § 3; Indictment and Warrant § 14—

A prosecution initiated by warrant in the District Court is not a charge "initiated by presentment", G.S. 7A-271(b), so as to vest the Superior Court with original jurisdiction, since a presentment is an accusation of crime issuing upon action by a grand jury.

9. Criminal Law § 16; Courts § 14—

The statute, G.S. 7-64, divesting certain inferior courts of the exclusive original jurisdiction of criminal actions and providing for concurrent jurisdiction with the Superior Court, is rendered obsolete in those counties in which the District Court is established pursuant to the Judicial Department Act of 1965, G.S. 7A.

10. Constitutional Law § 6—

One General Assembly cannot restrict or limit by statute the right of a succeeding legislature to exercise its constitutional power to legislate in its own way.

APPEAL by defendant from *Campbell, J.*, May 15, 1967 Criminal Session of CALDWELL.

Defendant was arrested February 17, 1967, on two warrants issued by the District Court of Caldwell County. One warrant charged defendant with the larceny on February 16, 1967, of a 1961 model Nash automobile, serial #CS21875, of the value of more than $200.00, the property of Sylvia Bryant. The other warrant charged defendant with unlawfully and wilfully operating a 1961 Nash automobile on February 17, 1967, without an operator's license.

In the district court, defendant waived preliminary examination in respect of the warrant charging larceny; and the district judge ordered that defendant appear at the next criminal session of Caldwell Superior Court. In respect of the warrant charging operation of an automobile without an operator's license, the record shows the district judge allowed defendant's motion for a jury trial; and, without passing upon defendant's guilt, ordered that defendant appear at the next session of Caldwell Superior Court.

At the May 15, 1967 Criminal Session of Caldwell Superior Court, the solicitor submitted, and the grand jury returned as true bills, the following indictments, *viz.:*

1. An indictment charging that defendant, on February 16, 1967, "did unlawfully and wilfully drive and otherwise take and carry away a vehicle, to wit: a 1961 model Nash Automobile, Serial #CS21875, . . . not his own, without the consent of Sylvia Bryant, the owner thereof, with intent to temporarily deprive said owner of his possession of said vehicle, without intent to steal the same," etc.

2. An indictment charging that defendant, on February 17, 1967, "unlawfully and wilfully did drive and operate a motor vehicle upon the public highways of the State of North Carolina without being duly licensed operator, and without having a valid operator's license," etc.

The record shows defendant, *personally*, entered a plea of guilty to each of said bills of indictment; and that the court, based on defendant's testimony in response to questions by the court, found that defendant freely, understandingly and voluntarily entered said pleas of guilty.

In the "operating without a license" case, the court pronounced judgment imposing a prison sentence of two years. In the "temporary larceny" case, the court pronounced judgment imposing a prison

sentence of two years, providing that this sentence was to commence at the expiration of the sentence in the "operating without a license" case, "making a total of 4 years."

Defendant gave notice of appeal. Upon finding that defendant is an indigent, the court appointed Ted S. Douglas, Esq., an attorney at law, to represent defendant in connection with his appeal. An additional order by Ervin, J., enabled defendant to perfect his appeal at the expense of Caldwell County.

Attorney General Bruton, Assistant Attorney General Melvin and Staff Attorney Costen for the State.

Ted S. Douglas for defendant appellant.

BOBBITT, J. We consider first whether the superior court had original jurisdiction of the criminal (misdemeanor) offenses to which, in the superior court, defendant pleaded guilty and for which he was there sentenced.

Any person convicted of operating a motor vehicle over any highway in this State without having first been licensed as such operator, in violation of G.S. 20-7(a), is guilty of a *misdemeanor;* and under G.S. 20-7(n) and G.S. 20-35(b), as construed in *State v. Tolley,* 271 N.C. 459, 156 S.E. 2d 858, is subject to punishment by imprisonment for a term of not more than six months. It is noted that the superior court, even if it had jurisdiction in other respects, had no authority to pronounce judgment imposing a prison sentence of two years for this criminal offense.

G.S. 20-105, in pertinent part, provides: "Any person who drives or otherwise takes and carries away a vehicle, not his own, without the consent of the owner thereof, and with intent to temporarily deprive said owner of his possession of such vehicle, without intent to steal the same, is guilty of a *misdemeanor.*" (Our italics.) Violation of G.S. 20-105 is "punishable by fine, or by imprisonment not exceeding two years, or both, in the discretion of the court."

Under our decisions, the statutory criminal offense defined in G.S. 20-105, sometimes referred to as "temporary larceny," is not an included less degree of the crime of larceny; and a defendant may not be convicted of a violation of G.S. 20-105 when tried upon a bill of indictment charging the crime of larceny. *State v. Covington,* 267 N.C. 292, 148 S.E. 2d 138; *State v. McCrary,* 263 N.C. 490, 139 S.E. 2d 739; *State v. Stinnett,* 203 N.C. 829, 167 S.E. 63.

The cases were heard in the superior court upon bills of indictment charging misdemeanors, namely, (1) operation of a motor vehicle without a license in violation of G.S. 20-7(a), and (2) unlaw-

ful taking of an automobile for a temporary purpose in violation of G.S. 20-105. Defendant had not been tried for either of these criminal offenses in the District Court of Caldwell County. The question is whether the District Court of Caldwell County had *exclusive* original jurisdiction of these misdemeanor charges.

By virtue of the amendment adopted at the General Election held November 6, 1962, "(t)he Constitution of North Carolina (was) amended by rewriting Article IV thereof to read" as set forth in Session Laws of 1961, Chapter 313. Pertinent provisions of Article IV as set forth in the 1961 Act are quoted below.

"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. 10. Jurisdiction of the General Court of Justice.

"(1) . . .

"(2) Superior Court. Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State. The Clerks of the Superior Court shall have such jurisdiction and powers as the General Assembly shall provide by general law uniformly applicable in every county of the State.

"(3) District Courts; Magistrates. The General Assembly shall, by general law uniformly applicable in every local court district of the State, prescribe the jurisdiction and powers of the District Courts and Magistrates."

Although not germane to decision on this appeal, it is noted that, by virtue of the amendment adopted at the General Election held November 2, 1965, Article IV of the Constitution of North Carolina was amended "to authorize within the Appellate Division of the General Court of Justice an intermediate Court of Appeals" as set forth in Session Laws of 1965, Chapter 877.

Under the quoted provisions of Article IV, the superior court has original general jurisdiction throughout the State *except as otherwise provided by the General Assembly;* and the General Assembly is authorized by general law to prescribe the jurisdiction and powers of the district courts. Hence, we turn to Session Laws of 1695, Chapter 310, being the "Judicial Department Act of 1965," which was enacted to implement Article IV of the Constitution of North Carolina. The said 1965 Act provides a new chapter in the General Statutes, namely, "Chapter 7A — Judicial Department." Article 22 of G.S. Chapter 7A, entitled "Jurisdiction of the Trial Divisions in Criminal Actions," in pertinent part, provides:

"Sec. 7A-270. Generally. General jurisdiction for the trial of criminal actions is vested in the Superior Court and the District Court Divisions of the General Court of Justice.

"Sec. 7A-271. Jurisdiction of Superior Court Division in Criminal Actions. The Superior Court has exclusive, original jurisdiction over all criminal actions not assigned to the District Court Division by this Article, except that the Superior Court has jurisdiction to try a misdemeanor:

"(a) which is a lesser included offense of a felony on which an indictment has been returned, or a felony information as to which an indictment has been properly waived; or

"(b) when the charge is initiated by presentment; or

"(c) which may be properly consolidated for trial with a felony under G.S. 15-152; or

"(d) to which a plea of guilty or *nolo contendere* is tendered in lieu of a felony charge.

"Sec. 7A-272. Jurisdiction of District Court Division in Criminal Actions. (a) Except as provided in this Article, the district court has exclusive, original jurisdiction for the trial of criminal actions, including municipal ordinance violations, below the grade of felony, and the same are hereby declared to be petty misdemeanors.

"(b) The district court has jurisdiction to conduct preliminary examinations and to bind the accused over for trial upon waiver of preliminary examination or upon a finding of probable cause, making appropriate orders as to bail or commitment."

The "Judicial Department Act of 1965" became effective in the Twenty-Fifth Judicial-District Court district, composed of Burke, Caldwell and Catawba Counties, on the first Monday in December, 1966. G.S. 7A-131(a).

Under G.S. 7A-270 and G.S. 7A-271, the district court has original jurisdiction for the trial of all criminal actions below the grade

of felony, that is, of all prosecutions for misdemeanors; and the district court has *exclusive* original jurisdiction of all misdemeanors except in the four specific instances defined in subparagraphs (a), (b), (c) and (d) of G.S. 7A-271.

The district court had jurisdiction to try defendant on the warrant charging operation of an automobile without an operator's license in violation of G.S. 20-7(a). However, it failed to do so. On the contrary, upon defendant's demand for a jury trial, the court did nothing except order defendant to appear at the next session of Caldwell Superior Court. Apparently, the district judge was of opinion that the defendant by moving for a jury trial could avoid trial in the district court and have his case transferred forthwith for trial in the superior court. We find no statutory provision authorizing this procedure. In this respect, the court acted under a misapprehension of the law and erred by failing to proceed to trial of defendant for this criminal offense in accordance with the accusation contained in the warrant.

Obviously, subparagraphs (a), (b) and (d) of G.S. 7A-271 do not apply to the criminal prosecution for operation of an automobile without an operator's license in violation of G.S. 20-7(a). With reference to subparagraph (c) of G.S. 7A-271, it is sufficient to say that defendant was not tried for *or charged with* any felony.

With reference to the warrant and bill of indictment relating to the alleged unlawful taking of Sylvia Bryant's car, the warrant on which defendant was arrested and bound over to superior court charged a felony, to wit, the larceny of an automobile valued at more than $200.00, and the indictment charged a misdemeanor, to wit, a violation of G.S. 20-105, the "temporary larceny" statute. Since defendant, in the superior court, was not tried for or charged with *any felony,* subparagraphs (a), (c) and (d) of G.S. 7A-271 do not apply to the criminal prosecution for the violation of G.S. 20-105. There remains for consideration whether the prosecution for violation of G.S. 20-105 was "initiated by presentment" within the meaning of subparagraph (b).

Although the prerequisites to conviction for the felony charged in the warrant and the misdemeanor charged in the indictment are different, the prosecution for the alleged criminal conduct of defendant in respect of the alleged unlawful taking of Sylvia Bryant's car was initiated by warrant issued by the District Court of Caldwell County. It was not initiated in the Superior Court of Caldwell County by presentment or otherwise.

In this jurisdiction, the accepted definition of the word "presentment" is as follows: "A presentment is an accusation of crime made by a grand jury on its own motion upon its own knowledge or ob-

servation, or upon information from others without any bill of indictment, but since the enactment of G.S. 15-137 trials upon presentments have been abolished and a presentment amounts to nothing more than an instruction by the grand jury to the public prosecuting attorney to frame a bill of indictment." 2 Strong, N. C. Index, Indictment and Warrant § 7; *State v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283.

It is our opinion, and we so hold, that the superior court did not have original jurisdiction to proceed to trial on said two indictments charging misdemeanors. Presently, defendant is under indictment for misdemeanors. No sound reason appears why he cannot be tried on these indictments. However, the statutes contemplate that the district court shall have exclusive original jurisdiction of misdemeanors except in instances set forth in subparagraphs (a), (b), (c) and (d) of G.S. 7A-271. Since the district court had exclusive original jurisdiction, and the superior court was without jurisdiction to proceed to trial on said misdemeanor indictments, the proper procedure was to remand the cases to the district court for trial in that court on the charges set forth in said bills of indictment.

G.S. 7-64, to which the Attorney General directs attention, provides in pertinent 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. The provisions of this section shall remain in full force and effect, unless expressly repealed by some subsequent act of the General Assembly, *and shall not be repealed by implication or by general repealing clauses* in any act of the General Assembly conferring exclusive jurisdiction on inferior courts in misdemeanor cases which may be hereafter enacted. Appeal shall be, as heretofore, to the superior court from all judgments of such inferior courts." (Our italics.) Caldwell County is not one of the counties expressly excepted from the provisions of G.S. 7-64.

It is noted that Article II, Section 29, of the Constitution of North Carolina, as submitted by the 1915 General Assembly and ratified by the electorate in 1916, provided in pertinent part: "The General Assembly shall not pass any local, private, or special act or resolution *relating to the establishment of courts inferior to the Superior Court; relating to the appointment of justices of the peace;* . . . nor shall the General Assembly enact any such local, private or special act by the partial repeal of a general law, but the General Assembly may at any time repeal local, private or special laws enacted by it. Any local, private or special act or resolution passed

in violation of the provisions of this section shall be void. The General Assembly shall have power to pass general laws regulating matters set out in this section."

Simultaneously with said amendment rewriting Article IV thereof, the Constitution of North Carolina was also amended at the general election held November 6, 1962, by deleting, as set forth in Session Laws of 1961, Chapter 313, the words italicized above in Article II, Section 29.

Article IV provides for a General Court of Justice constituting "a unified judicial system for purposes of jurisdiction, operation, and administration," and consisting of "an appellate division, a Superior Court division, and a District Court division." When the "Judicial Department Act of 1965" became effective in the Twenty-Fifth Judicial-District Court district, G.S. 7-64 became obsolete with reference to the counties included in said district. G.S. 7-64 related to the previously existing court system. Section 4 of the "Judicial Department Act of 1965" provides: "G.S. 7-43.1, 7-43.2, and 7-43.3 are repealed effective the first Monday in December, 1966. G.S. 7-29.1, 114-11.1, the second paragraph of G.S. 143-6, and all other laws and clauses of laws in conflict with this Act are hereby repealed."

With further reference to G.S. 7-64, it is noted that "one Legislature cannot restrict or limit by statute the right of a succeeding Legislature to exercise its constitutional power to legislate in its own way." *State v. Norman,* 237 N.C. 205, 211, 74 S.E. 2d 602, 607; *Furniture Co. v. Baron,* 243 N.C. 502, 506, 91 S.E. 2d 236, 239; 2 Strong, N. C. Index 2d, Constitutional Law § 6; 82 C.J.S., Statutes § 9, p. 24; 50 Am. Jur., Statutes § 45.

Having reached the conclusion that the Superior Court of Caldwell County did not have jurisdiction of the misdemeanor charges set forth in said bills of indictment, defendant's pleas to said indictments and the judgments pronounced thereon are vacated; and the cause is remanded to the superior court with direction that the two actions be transferred to the District Court of Caldwell County, which court, in the exercise of its exclusive original jurisdiction, shall proceed to trial of defendant on the misdemeanor charges set forth in said bills of indictment.

Judgments vacated and cause remanded.

DAISY CREWS v. PROVIDENT FINANCE COMPANY.

(Filed 1 November, 1967.)

1. **Damages § 3—**

As a general rule, damages for mere fright or emotional disturbance are not recoverable unless there is a contemporaneous physical injury resulting from defendant's conduct, which injury defendant could have reasonably foreseen under the circumstances.

2. **Same— Evidence held sufficient to overrule nonsuit on question of damages for physical injury resulting from emotional disturbance.**

Plaintiff's evidence was to the effect that she was an uneducated, old Negro woman who was suffering from high blood pressure and a heart condition, that defendant's collecting agent knew of her condition, that after she had paid the total amount alleged due in claim and delivery papers served on her furniture, and thus retained her furniture, the collecting agent called at her residence, insisted she owed more, used abusive language, and threatened to have her arrested, that immediately after the agent left the premises she went back to her kitchen and resumed preparation of dinner when she suffered a heart attack, with further expert testimony that upon physical examination of plaintiff the next day she was suffering with acute angina, that her blood pressure had risen, and that the collecting agent's visit could have caused this condition. *Held:* The evidence was sufficient to overrule defendant's motion to nonsuit, defendant's evidence in conflict being disregarded in passing upon the motion.

APPEAL by plaintiff from *Bickett, J.*, March 1967 Civil Session, VANCE Superior Court.

The plaintiff alleged that she had borrowed money from the defendant, executed her note for the debt and secured it with a chattel mortgage upon her household furniture. When she failed to make the required monthly payments, the defendant caused claim and delivery papers to be issued to obtain possession of the plaintiff's furniture. The plaintiff was $45.00 in arrears at the time. When the papers were served on 24 August 1965, the plaintiff paid off the $45.00 plus $5.00 cost; and the claim and delivery papers were marked paid in full. She alleged that two days later Reid H. Jones, the agent of the defendant, came to her home and informed her that she still owed the sum of $244.90 on the note. She replied that she had the claim and delivery papers marked "paid in full" and that she was sick and unable to work. Thereupon, Jones became very angry, cursed the plaintiff and threatened to have her arrested and jailed if she would not pay the $244.90. She alleged that as a result of Jones' improper conduct and threats, she became nervous and excited; that she was already suffering from a heart condition which was thereby aggravated; that she became sick, was required to take medicine and have bed rest; and that she will suffer perm-

anent and irreparable injury as a result of the acts of the defendant. She sued to recover $500.00 actual damages and $5,000.00 punitive damages.

The defendant denied any improper conduct and moved that the cause be dismissed.

Upon the trial, the plaintiff testified that prior to the event she had borrowed money from the defendant and had been required to secure a loan with a chattel mortgage on her household furniture, bedroom suite, and other things. She did not state the exact amount borrowed but testified that her payments were to be $25.00 per month. She further said that when the claim and delivery papers were served on her "they told me how much they wanted and I got exactly what they wanted. They wanted $50.00. I . . . paid them exactly what they wanted. After I paid the $50.00 I thought that was taken care of in full. I had done got glad. . . . Two days later Reid Jones, agent for Provident Finance Company, came to my house at 509 Clark Street. I think it was about 4:30 or 5:00 in the afternoon that he came there, I know I was cooking supper. The children ran in and told me who was there and I went to the door glad to meet him because I did not owe him I thought. He asked if that was all I thought I owed him. I told him that was all the paper required. He asked me where did I get the money to pay them, the $50.00 I had paid them on claim and delivery two days before. I did not tell him; I just thought it was none of his business if I paid him. When I told him that he said that he had to have more money. He said then 'You have to pay more, you owe more.' I said 'That is all the paper required, and I gave you exactly what you asked for, what you wanted.' Then he said 'I have to have more or I will have your damned ass up.' He turned around and went to the car. I went on back in the kitchen and [*sic*] then and tried to cook supper; I got hot and had sharp pains in my chest. When he told me he was going to have . . . [me arrested] I did not say nothing to him; I thought I was all right with him. When Reid Jones told me he was going to have . . .[me] arrested he was not talking easy; he was talking loud. As a result of him talking to me at first I was all right because I did not owe him anything; I thought that paper settled everything, you know, and after he talked that way then I began to feel funny, so nervous I could not get in the kitchen. . . . I was standing in the door, and Mr. Jones was on the porch and Diane Thomas was there. After he finished talking and went toward his car, he went off the porch and was going so fast I thought he was going by the car, and thought he was going to have me up. I knew he was because he was in such a hurry. After he left I went back in the kitchen and tried to cook supper but my heart was

about to burn up; a different feeling in my heart up here, something like sharp pains. I could not finish cooking supper that night. I was in the kitchen going around and when I knew anything they had come in there and were taking me up and I did not know nothing until next morning. Next morning I went to Dr. Green. Dr. Green examined me all over. He prescribed some pills for me. I had to buy some medicine that Dr. Green prescribed. It had been so long I have forgotten a lot of it but when I got back home I went to taking the medicine. I had to go to bed. I had to lay down after I got back home that day and the next day too. Prior to August 26, 1965, Reid Jones had been to my house and collected money before. I had not been able to pay him every time. I told him why I could not pay him; I get some Social Security from my husband every month and I paid with that when I had it. I told him and Mr. Joe too when I stayed on Red Hill that I had heart trouble. He knew this prior to August 26, 1965, the day he came to my house and told me he was going to have me up, but I guess he had forgotten it."

Diane Thomas, the plaintiff's granddaughter, testified that she was present and heard the conversation between Reid Jones and her grandmother; that the plaintiff told him she had paid what the officer required when serving the claim and delivery papers; and that she heard the vulgar threat made by Jones. She said that when Daisy started to talk Jones told her to shut up; that the plaintiff was shaking and after Jones left "Daisy went back in the kitchen and started cooking, but the next thing I knew she was laying on the floor. . . . It was about five minutes after Reid Jones left that I found Daisy laying on the floor. I laid her on the bed and gave her her aspirin and heart medicine. I next carried Daisy to Dr. Green. I left Daisy at Dr. Green's office and got the prescription filled and went back to Dr. Green's office and carried her home and put her to bed. She had to go back to the doctor because she was dizzy and would fall. Prior to August 26, 1965, Daisy was not dizzy and would not have falling out spells." She testified that Jones knew Daisy had a heart condition because her grandmother had told him she could not work because she had heart trouble and was taking heart pills.

Dr. James P. Green testified that when the plaintiff came to his office "she was nervous and suffering with acute angina, nervous, trembling in speech and emotionally disturbed. I tried to find out from her what caused this condition. I had been treating Daisy Crews prior to this time. I had been treating her for hypertension, high blood pressure, heart disease. When she came in on August 27, 1965, I took her blood pressure. According to my record her blood pressure was 220/100. Prior to this we had been able to hold her

blood pressure to around 170 to 180. Prior to August 27, 1965, I had never treated her when she was in the state that she was in when she came in on August 27. In the course of my treatment of Daisy Crews, I do not have any history of her passing out prior to August 27. I prescribed a sedative and increased the dosage of her blood pressure medicine. Her blood pressure stayed around 220/100 about two weeks before it came back to 180. I have an opinion as to what caused Daisy Crews' blood pressure to increase. If the jury should find from the evidence, and by its greater weight that Reid Jones on the evening of August 26, 1965, visited the home of Daisy Crews and threatened to have her arrested, and told her . . ., I have an opinion satisfactory to myself as to whether this could have caused this increase in her blood pressure. My opinion is that in light of the fact her blood pressure had shown no symptom similar to that I saw on August 27, 1965, that it could have, some traumatic experience could have. I have an opinion satisfactory to myself as to whether or not this increase in blood pressure and emotional disturbance of Daisy Crews on August 27, 1965, will cause her irreparable damage. I have followed her up and up to this time it has caused irreparable damage. It has caused a suffering from chronic anxiety. To my knowledge this heart condition has existed in Daisy Crews for about three years."

At the conclusion of the plaintiff's evidence, the defendant moved for judgment as of nonsuit which was denied.

The defendant offered the testimony of Reid H. Jones who said he was employed by the defendant at the time in question and that he had known the plaintiff and had had transactions with her in 1965; that he had asked about the condition of her health and that she had said it was good; that he would not have made the loan unless she was in good health and that she had never told him otherwise. He stated that he had seen her ten or more times during 1965 because her payments were past due, and that she had made many promises to pay but had not done so. He said he called the plaintiff by telephone on July 19 and she hung the telephone up on him; that he then had claim and delivery papers issued, and that her account was marked off the books. That on August 26 her account was up to date and the next payment was due on September 6; that his purpose in going to the place where the plaintiff lived on August 26 was to see her daughter, Dorothy Thomas, who was three months past due on her account. He then said, "When I arrived I knocked on the door and Daisy [Crews] answered, and I asked to speak to Dorothy and she walked into the next room and I talked to Dorothy. I did not have any conversation with Daisy Crews that day. I did talk to Dorothy Thomas. . . . The only conversation I had with

Daisy Crews was to ask to speak to her daughter. . . . I never had any harsh words with Daisy Crews. At no time. And she did not at any time give me any excuse about her health. Never told me she was in anything but good health."

On rebuttal, the plaintiff denied having hung up the telephone on Jones and repeated "I told him I had paid everything I owed and he said 'No, you owe me more,' and I said, 'No, I don't,' and he said, 'If you don't pay me more I am going to. . . .' "

At the close of all the evidence, the Court granted the defendant's motion for judgment as of involuntary nonsuit, and the plaintiff appealed.

Bobby W. Rogers, Attorney for plaintiff appellant.

Watkins and Edmundson by R. Gene Edmundson; Pittman, Staton and Betts by William W. Staton, Attorneys for defendant appellee.

PLESS, J. This is a case of an uneducated old colored woman who, according to the accepted case on appeal, borrowed $70.00 from the defendant. The record is vague, and she probably borrowed more, but the defendants have not seen fit to show how much money she actually got. They are apparently content to let the record be explicit that she gave a chattel mortgage on her furniture for $244.90.

The defendant is not charged with usury, but the record is remindful of the saying "if you got it, you don't need it — if you need it, you don't got it!"

The plaintiff testified that she had paid up her arrearages on the chattel mortgage and that when Reid H. Jones, representing the defendant, came to her home two days later she had no fears and was glad to see him. Her happiness was short-lived for he demanded more and threatened her in vulgar language. His threats and demeanor caused her to get hot and have sharp pains in her chest. She began to feel funny and nervous; her heart was about to burn up with sharp pains; she was going around and did not know anything until the next morning. Jones knew she had had heart trouble before this.

Dr. James P. Green testified that when he saw her the next morning "she was nervous and suffering with acute angina, nervous, trembling in speech and emotionally disturbed." Her blood pressure had gone from 170/180 to 220 and stayed at 220 for two weeks. In answer to a hypothetical question, he gave it as his opinion that Jones' visit and threat could have caused this condition and that it "will cause her irreparable damage."

Jones denied any kind of threat or mistreatment of the plain-

tiff. He said that his call at her house was not to see the plaintiff but to collect more money out of her daughter.

In the light most favorable to the plaintiff — as it must be considered — we have a case in which a sickly, uneducated, old lady is threatened in vulgar language with imprisonment which causes her to have an acute angina attack, raises her blood pressure 40 points and does her heart irreparable damage.

As a general rule, damages for mere fright are not recoverable; but if there is a contemporaneous physical injury resulting from defendant's conduct, there may be a recovery. *Slaughter v. Slaughter,* 264 N.C. 732, 142 S.E. 2d 683.

It is also required that the defendant might have foreseen that some injury would result from his conduct or that consequences of a generally injurious nature might have been expected. In view of plaintiff's evidence that Jones had previous knowledge of her heart condition, we are of the opinion that there was evidence of foreseeability sufficient to meet this requirement.

Kirby v. Stores Corp., 210 N.C. 808, 188 S.E. 625, is probably the leading case in North Carolina on this subject. In that case the defendant's bill collector, in attempting to collect a past due account from the plaintiff, sat in his car and shouted abusive language to plaintiff and threatened to get the sheriff to arrest her. Plaintiff was far advanced in pregnancy, which fact was known to defendant's agent; and the fright caused by the collector's language and threats resulted in the premature stillbirth of plaintiff's child. The plaintiff testified that she became frightened because of this conduct and recovered damages on that account. The defendant claims that this case is not applicable since the plaintiff did not testify that she was frightened as in the *Kirby* case; however, she did testify that she was mad, and we do not interpret *Kirby* as limiting recovery to cases of fright.

98 A.L.R. 402, dealing with this question, says:

> "Under § 436 of the American Law Institutes Restatement of the Law of Torts, under the heading, 'Physical harm resulting from emotional disturbance,' it is stated: '(1) If the actor's conduct is negligent as violating a duty of care designed to protect another from a fright or other emotional disturbance which the actor should recognize as involving an unreasonable risk of bodily harm, the fact that the harm results solely through the internal operation of the fright *or other emotional disturbance* does not protect the actor from liability. (2) If the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to

fright, shock, *or other similar and immediate emotional disturbance,* the fact that such harm results solely from the internal operation of fright *or other emotional disturbance* does not protect the actor from liability.'" (Emphasis supplied.)

Madness or anger to the extent of causing an acute angina condition and substantially increasing the blood pressure must certainly qualify as an "emotional disturbance." In fact, Webster defines *mad* as "aroused or controlled by intense emotion" and "furious because of abnormal excitation."

The rule does not require that "physical injury" be visible, such as a cut or a broken arm, and it cannot be questioned that nervousness requiring bed rest brought on by an acute attack of angina and increased blood pressure constituted physical injury.

Upon the plaintiff's evidence that Jones had long known of her heart condition, coupled with the other features referred to above, we are of the opinion that it required that the case be submitted to the jury.

Reversed.

PINKY MURRELL PRICE, ADMINISTRATRIX OF THE ESTATE OF LAWYER MURRELL, DECEASED, v. GERALDINE MILLER.

(Filed 1 November, 1967.)

1. Trial § 21—

On motion to nonsuit, plaintiff's evidence must be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable inference to be drawn therefrom.

2. Negligence § 24a—

Nonsuit on the issue of negligence should not be allowed unless the evidence is free of material conflict, and the only reasonable inference that can be drawn therefrom is that there was no negligence on the part of the defendant, or that his negligence was not a proximate cause of the injury.

3. Automobiles § 62—

Evidence tending to show that defendant was driving 60 miles per hour in a 55 mile per hour zone and that she struck a pedestrian on a level, straight road in good weather, with her headlights burning and without seeing the pedestrian until after she hit him, *held* sufficient to be submitted to the jury on the issue of her negligence both in failing to keep a proper lookout and in violating the speed statute.

4. Negligence § 26—

Nonsuit for contributory negligence is proper when there is no conflicting inference permissible from plaintiff's proof and it appears there-

from that he was contributorily negligent which constituted a proximate cause of the injury.

5. Automobiles § 40—

A pedestrian crossing a highway at a point other than within a marked crosswalk or intersection must yield the right of way to vehicles upon the highway, G.S. 20-174(a), and while his failure to do so is not contributory negligence *per se*, it is sufficient to constitute contributory negligence as a matter of law when the evidence clearly establishes that such failure was one of the proximate causes of his injury.

6. Automobiles § 38—

Plaintiff's evidence tended to show that her intestate was struck as he was crossing a highway at a place other than a crosswalk at nighttime, that he was dressed in dark clothes, and that he could have seen defendant's car for a distance of some one-half mile as it approached on the straight highway with its lights burning. *Held:* The evidence discloses contributory negligence on the part of intestate as a matter of law.

APPEAL by plaintiff from *Hubbard, J.*, 31 July 1967 Civil Term of ONSLOW.

Civil action to recover damages for wrongful death of plaintiff's intestate.

It is admitted in the pleadings that U. S. Highway No. 258, at the time and place of the accident, was a straight and level road with no defects, and that the weather was clear and the road was dry.

It was stipulated that the speed limit at the place where the accident occurred was 55 miles per hour and that plaintiff's intestate, Lawyer Murrell, died as a result of the injuries he received in the collision.

The evidence, viewed in the light most favorable to plaintiff, tends to show that John F. Foust saw Lawyer Murrell on the evening of 6 September 1964, standing on the porch of Earl Mill's Shop. He and Murrell left the shop at about the same time and started toward the road. Foust, seeing an automobile coming from the direction of Richlands toward Kinston, turned to his left and walked down the shoulder of the road. He then heard a "lick." He further testified:

> "When I heard this lick, I turned around and saw the car that hit Lawyer. I saw Lawyer after he got hit and he was then on the opposite side of the road in front of Mary's place. I did have time to see the car coming towards me. I saw the automobile coming a good ways down the road. In my opinion the speed of the car would have been about 60 miles an hour. . . . From the point where the accident occurred there is a flat, level road for at least half a mile and from the point of

> accident, looking in the other direction a person can see for a distance of at least half a mile."

Foust further stated that the headlights on the car were burning.

That night there were a number of people at Earl's Place and Mary's place, which were taverns located beside Highway 258 where the accident occurred.

Earl F. Manning, a member of the North Carolina Highway Patrol, testified that he arrived at the scene at 11:05 P.M. He saw the body of a man lying on the pavement. Manning stated that Murrell was dressed in dark pants and a dark colored coat. The estimated point of impact was approximately 132 feet from the body. Defendant told Manning that she had stopped her car at a point approximately 75 feet from the point of impact. The hood and left front fender of defendant's car were damaged. There was no crosswalk anywhere near the location of the body. Highway 258 was level for about half a mile east of the accident scene and about seven-tenths of a mile to the west. The weather was clear that night. There were no street lights in the area. Defendant told Manning that she was traveling west at about 45-50 miles per hour and that as she met an oncoming car, she was momentarily blinded by the lights. Defendant further stated to him that she struck something which she did not see until she had hit it and then realized it was a person.

The plaintiff, mother of Lawyer Murrell and administratrix of his estate, testified that Murrell was 29 years old at the time of his death and in good health. He had been working for a construction company, and his average pay was about $100 a week.

At the conclusion of plaintiff's evidence, defendant's motion for judgment as of nonsuit was allowed.

Plaintiff appealed.

Beech & Pollock for plaintiff, appellant.
Joseph C. Olschner for defendant, appellee.

BRANCH, J. This appeal raises two questions. (1) Did plaintiff offer sufficient evidence of actionable negligence on the part of defendant to carry the case to the jury? (2) If so, does plaintiff's evidence establish contributory negligence as a matter of law?

> "In passing on a motion for a judgment of involuntary nonsuit, we are required to take plaintiff's evidence as true, and to consider it in the light most favorable to him, and to give him the benefit of every reasonable inference to be drawn

therefrom. . . ." *Jenkins v. Electric Co.,* 254 N.C. 553, 119 S.E. 2d 767.

In the case of *Williams v. Henderson,* 230 N.C. 707, 55 S.E. 2d 462, Barnhill, J. (later C.J.) speaking for the Court, said:

> "A motorist operates his vehicle on the public highways where others are apt to be. His rights are relative. Should he lapse into a state of carelessness or forgetfulness his machine may leave death and destruction in its wake. Therefore, the law imposes upon him certain positive duties and exacts of him constant care and attention. He must at all times operate his vehicle with due caution and circumspection, with due regard for the rights and safety of others, and at such speed and in such manner as will not endanger or be likely to endanger the lives or property of others. G.S. 20-140; . . ."
>
> "He must operate his vehicle at a reasonable rate of speed, keep a lookout for persons on or near the highway, *Cox v. Lee, ante* (230 N.C. 155), decrease his speed when any special hazard exists with respect to pedestrians, (G.S. 20-141(c), and, if circumstances warrant, he must give warning of his approach by sounding his horn. G.S. 20-174(e); . . ."

A nonsuit on the issue of negligence should not be allowed unless the evidence is free of material conflict, and the only reasonable inference that can be drawn therefrom is that there was no negligence on the part of defendant, or that his negligence was not the proximate cause of the injury. *Thomas v. Motor Lines; Motor Lines v. Watson,* 230 N.C. 122, 52 S.E. 2d 377. Here there is material conflict as to whether defendant met another car immediately before the accident, which might have blinded her and prevented her from seeing plaintiff's intestate.

Further, a reasonable inference may be drawn that defendant was not keeping a proper lookout from the fact that she was driving on a level, straight road, in good weather with her headlights on, and never saw plaintiff's intestate until *after* she hit him.

Moreover, there is evidence that defendant was operating her vehicle at a speed of 60 miles per hour in a 55-mile per hour speed zone. G.S. 20-141 sets out the various speed restrictions for motor vehicles. The stipulation of counsel brings this case within G.S. 20-141(b)(4).

"A violation of G.S. 20-141(b)(4) is negligence *per se.*" *Stegall v. Sledge,* 247 N.C. 718, 102 S.E. 2d 115.

These circumstances present a case for the jury on the issue of defendant's negligence.

Thus, there remains the decisive question whether plaintiff's evidence establishes contributory negligence on the part of her intestate as a matter of law.

> "The burden of showing contributory negligence is on the defendant and a motion for judgment as of nonsuit will not be allowed if the controlling and pertinent facts are in dispute, nor where opposing inferences are permissible from plaintiff's proof. (Citing cases.) But the plaintiff may relieve the defendant of the burden of showing contributory negligence when it appears from his own evidence that he was contributorily negligent." *Garmon v. Thomas,* 241 N.C. 412, 85 S.E. 2d 589.

It is provided by G.S. 20-174(a) that every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection, shall yield the right of way to all vehicles upon the roadway. This statute was construed in the case of *Blake v. Mallard,* 262 N.C. 62, 136 S.E. 2d 214, where Judge Sharp, speaking for the Court, said:

> "The failure of a pedestrian crossing a roadway at a point other than a crosswalk to yield the right of way to a motor vehicle is not contributory negligence *per se;* it is only evidence of negligence. (Citing authority.) However, the court will nonsuit a plaintiff-pedestrian on the ground of contributory negligence when all the evidence so clearly establishes his failure to yield the right of way as one of the proximate causes of his injuries that no other reasonable conclusion is possible. (Citing cases).

In the case of *Garmon v. Thomas, supra,* plaintiff's evidence tended to show that he was walking on a dual highway which was being used by two-way traffic. He was refueling flambeaux and setting them along the northern edge of the highway, which was being used for traffic, and that after he had waited on the edge of the pavement for a car traveling east to pass, and after he had looked both ways, he started across the highway and did not see defendant's vehicle until it was within five feet of him. Defendant's evidence showed that he was traveling about 20 miles per hour on the highway and did not see plaintiff until he was within 8 feet of him because he was blinded by the sun. Holding plaintiff to be guilty of contributory negligence as a matter of law on his own evidence, the Court stated:

> ". . . the plaintiff was at all times under the duty to see the defendant and to yield the right of way to him. In our

opinion, both parties were negligent. The defendant was negligent in failing to exercise due care to avoid colliding with the plaintiff on the highway, *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484, and the plaintiff was negligent in failing to exercise reasonable care for his own safety in that he failed to keep a timely lookout to see what he should have seen and could have seen if he had looked. (Citing cases.) The facts compel the view that the defendant's truck was near the plaintiff and plainly visible to him if he had looked at the time he walked into its path. 'There are none so blind as those who have eyes and will not see.' *Baker v. R. R.,* 205 N.C. 329, 171 S.E. 342."

This Court again approved a nonsuit on the ground of plaintiff's contributory negligence in the case of *Rosser v. Smith,* 260 N.C. 647, 133 S.E. 2d 499, where plaintiff, without lifting her head to look, stepped on the highway from a side road without stopping when she had a clear view of defendant's approaching vehicle and was injured when struck by defendant's vehicle. In affirming the lower court's nonsuit, the Court said:

"The law imposes upon a person *sui juris* the duty to use ordinary care to protect himself from injury, and the degree of such care should be commensurate with the danger to be avoided. (Citing cases.) It was the duty of Mrs. Rosser to look before she started across the highway. (Citation omitted). It was also her duty in the exercise of reasonable care for her own safety to keep a timely lookout for approaching motor traffic on the highway to see what she should have seen and could have seen if she had looked before she started across the highway. . . ."

Another principle of law pertinent to the instant case is set out in *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246, as follows:

"And there is another principle of law applicable to the situation here in hand, that is, that 'one is not under a duty of anticipating negligence on the part of others, but in the absence of anything which gives or should give notice to the contrary, a person is entitled to assume, and to act upon the assumption that others will exercise care for their own safety,' 45 C.J. 705. Indeed, the operator of a motor vehicle on a public highway may assume and act upon the assumption that a pedestrian will use reasonable care and caution commensurate with visible conditions, and that he will observe and obey the rules of the

road. See *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239, and authorities there cited. See also *Hobbs v. Coach Co., ante,* 323."

In *Blake v. Mallard, supra,* the plaintiff was walking across a 4-lane highway where there was no crosswalk. Defendant's automobile struck plaintiff in defendant's outside lane. The lights on defendant's car were burning, the road was straight and unobstructed so the lights could be seen for a mile. Following the rules enunciated in *Rosser v. Smith, supra, Garmon v. Thomas, supra,* and *Tysinger v. Dairy Products, supra,* the Court held that plaintiff's evidence revealed her negligence to be one of the proximate causes of her injury so as to constitute contributory negligence as a matter of law.

In the instant case, the evidence reveals that defendant's lights were burning and that plaintiff's intestate could have seen them at any time while defendant's automobile was traveling toward him for a distance of at least one-half mile. The road was straight and level. The weather was clear. We have concluded that plaintiff's evidence provided sufficient inferences of negligence to carry this case to the jury against the defendant on the theory that she failed to keep a proper lookout. If defendant were negligent in not seeing plaintiff's intestate, who was dressed in dark clothes, in whatever length of time he might have been in the vision of her headlights, then plaintiff's intestate must certainly have been negligent in not seeing defendant's vehicle as it approached, with lights burning, along the straight and unobstructed highway.

We must conclude that plaintiff's intestate saw defendant's automobile approaching and decided to take a chance of getting across the road ahead of it, or in the alternative, that he not only failed to yield the right of way to defendant's automobile, but by complete inattention started across the highway without looking.

In any event, the only conclusion that can be reasonably drawn from plaintiff's evidence is that plaintiff's intestate's negligence was at least a proximate cause of his death.

Affirmed.

PEOPLES OIL COMPANY v. ETHEL P. RICHARDSON.

(Filed 1 November, 1967.)

1. Pleadings § 34; Appeal and Error § 6—

A motion to strike which challenges the legal sufficiency of the pleadings will be treated as a demurrer.

2. Actions § 3—

Before a party can invoke the jurisdiction of a court to redress or protect against a wrongful act done or threatened, he must allege that he is or will be adversely affected thereby in some manner, and is thus the real party in interest.

3. Ejectment § 6—

Action in ejectment is properly brought by the owner of the legal title having the right to immediate possession.

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

A wife is not a real party in interest so as to interpose as a defense or counterclaim in an action in ejectment instituted by her husband's grantee that her husband had fraudulently conveyed the lands without her joinder in order to deprive her of the possession thereof, since G.S. 29-14, defining the share of the surviving spouse of an intestate, and G.S. 29-30, providing for a life estate at the election of the surviving spouse, do not give her a present right of possession.

5. Same—

Allegations of defendant that her husband conveyed property to a trustee without her joinder for the purpose of defeating her right to protect the property from a prior deed of trust, which contained her joinder, fail to state facts constituting a defense or counterclaim in an action in ejectment, since the husband's conveyance without her joinder does not prevent her from exercising her right to redemption from the prior deed of trust. G.S. 45-45.

6. Same; Divorce and Alimony § 21—

Defendant's allegations that a deed of trust was a voluntary conveyance executed by her husband and received by the plaintiff for the purpose of defeating her rights to alimony *pendente lite are held* sufficient to constitute a counterclaim entitling her to relief in defendant's action in ejectment.

APPEAL by defendant from *May, S.J.*, August 1967 Assigned Session of NASH.

Civil action in ejectment to obtain possession of land and for an accounting for rents and profits.

Plaintiff alleges that defendant's husband, Fred W. Richardson, was the owner in fee, subject to various liens and encumbrances, of a certain parcel of land with improvements thereon located in Nash County; that said property was sold on 26 November 1966 under the power of sale contained in a deed of trust from Fred W. Richardson to Robert L. Spencer, Trustee, dated 17 August 1966 and recorded in the Nash County Registry in Book 827, page 140; that plaintiff was the last and highest bidder at the sale, complied with the terms of the bid, and is the owner of said land by virtue of a deed to it from Robert L. Spencer, Trustee, dated 9 January 1967 and recorded in the Nash County Registry in Book 834, page

591; that Ethel P. Richardson was in possession of said land at the time of the foreclosure sale and has continued in possession and has failed and refused to vacate the same and plaintiff has been wrongfully deprived of possession.

Defendant, in her answer, admitted that Fred W. Richardson owned the land and the purported existence of the deed of trust, plaintiff's purported purchase of the land at trustee's sale, and execution of a trustee's deed for the property to plaintiff. Defendant denied the other material allegations in the complaint.

And for a further answer and defense and counterclaim, defendant alleges in pertinent part:

"I." Defendant is the wife of Fred W. Richardson, who is the owner in fee simple of the property in controversy; that she joined with him in a deed of trust dated 10 March 1964, of record in Book 785, page 376, Nash County Registry, conveying this property as security for an indebtedness in the amount of $4,540.67 due the Bank of Rocky Mount, N. C.; that, pursuant to G.S. 45-45, defendant had and presently has the right to redeem the above mortgaged property and to receive an assignment of the security instrument and the uncancelled obligation secured thereby.

"II." During the first week of the month of August, 1966, in an action for divorce from bed and board between defendant and her husband, order was entered that defendant's husband pay into the office of the Clerk of Superior Court of Nash County for the benefit of Ethel P. Richardson alimony at the rate of $35.00 per week, payable on Monday of each week, beginning Monday, August 8, 1966, during the pendency of this action, or until the further order of the court.

"III." The order mentioned in paragraph II was duly filed in the office of the Clerk of Superior Court of Nash County and recorded in the minutes of that court; that the attorney for defendant's husband, who was named as trustee in the deed of trust of 17 August 1966, prepared this instrument shortly after the entry of the order for alimony against his client, defendant's husband.

"IV." Defendant did not join in the deed of trust dated 17 August 1966 and recorded in Book 827, page 140. Shortly after the execution thereof, defendant's husband left Nash County for parts unknown.

"V." Fred W. Richardson executed the instrument of 17 August 1966 for the purpose of defeating defendant's right in the property, for the purpose of defeating and harassing defendant's right to protect the property from the deed of trust dated 10 March 1964 and recorded in the Nash County Registry in Book 785, page 376,

and for the purpose of defeating and delaying defendant in her right to collect alimony under the order of the Superior Court.

"VII." The instrument of 17 August 1966 was given to plaintiff ostensibly as security for past-due indebtedness and without the advancement by plaintiff of new credit or consideration therefor. ". . . that the same was received by plaintiff for the purpose of aiding defendant's husband in his purposes of defrauding this defendant, as set out in paragraph V above, in her rights of possession in the premises involved in this action, in her rights in the deed of trust described in paragraph I above and in the order of court for alimony . . .; that defendant is informed and believes and so alleges that the purported foreclosure of the instrument of August 17, 1966, was all in fulfillment of the fraudulent purposes which defendant's husband, with plaintiff's aid, knowledge and concurrence, has projected against defendant . . ."

Defendant prayed that plaintiff's action be dismissed; that on her counterclaim, she have a cancellation of the deed of trust dated 17 August 1966, recorded in Book 728 at page 140, Nash County Registry, and the deed to plaintiff dated 9 January 1967, recorded in Book 834, page 591, Nash County Registry, and that the same be declared null and void as against defendant.

Plaintiff moved to strike certain portions of defendant's answer and all of her further answer and defense and counterclaim "for the reason that the facts as alleged do not constitute a further defense or form the basis for a counterclaim, are immaterial, irrelevant and prejudicial to the plaintiff, said allegations showing on their face, that the defendant is the wife of the former owner of the property, owns no interest in the property and has no right to the possession thereof."

At the hearing on the motion to strike the further answer and defense and counterclaim, the court, treating plaintiff's motion as a demurrer *ore tenus*, entered an order allowing the motion.

Defendant appealed.

Battle, Winslow, Scott & Wiley for plaintiff.
Mitchell & Murphy; R. Conrad Boddie for defendant.

BRANCH, J. The sole question presented for decision is: Did the allegations of defendant's further answer and defense and counterclaim allege facts sufficient to constitute a defense or to state a cause of action entitling her to any relief?

It is apparent that plaintiff's motion to strike challenged the legal sufficiency of defendant's further answer and defense and coun-

terclaim, and therefore it will be treated as a demurrer. *Williams v. Hunter,* 257 N.C. 754, 127 S.E. 2d 546.

In the case of *Aman v. Walker,* 165 N.C. 224, 81 S.E. 162, the Court stated clearly the principles as to fraudulent conveyances. Three of these principles pertinent to the facts alleged herein are:

> "(3) If the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors, it is void, although this fraudulent intent is not participated in by the grantee, and although property sufficient and available to pay existing debts is retained.
>
> (4) If the conveyance is upon a valuable consideration and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee, and of which intent he had no notice, it is valid.
>
> (5) If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the grantor, participated in by the grantee or of which he has notice, it is void."

Defendant alleges in her further answer and defense and counterclaim that the deed of trust under which plaintiff claims was given ostensibly as security for a past due indebtedness and was received by plaintiff for the purpose of aiding defendant's husband (transferror) "in his purpose of defrauding this defendant . . . in her rights of possession in the premises involved . . . in her rights in the deed of trust described in paragraph I" of the further answer and defense and counterclaim (the first deed of trust) "and in the order of the court for alimony *pendente lite* which is set out in paragraphs II and III" of defendant's further answer and defense and counterclaim.

"Before one can call on a court to redress or protect against a wrongful act done or threatened, he must allege that he is or will in some manner be adversely affected thereby. He must be the real party in interest." *Sanitary District v. Lenoir,* 249 N.C. 96, 105 S.E. 2d 411.

The record shows that plaintiff is the owner of the record and legal title to the land concerned in this litigation, and, nothing else appearing, is the proper party to bring action for relief necessary to protect its legal interest. 1 McIntosh, N. C. Practice and Procedure, § 592, p. 298.

G.S. 29-14 defines the share of a surviving spouse of an intestate, and G.S. 29-30 has the practical effect of providing the benefits of

dower to the defendant, at her election, if she should become the surviving spouse of Fred W. Richardson.

Although decided prior to the act which repealed dower, as such, the case of *Gay v. Exum & Co.*, 234 N.C. 378, 67 S.E. 2d 290, is pertinent in that it holds that except for purchase money mortgages and deeds of trust, the conveyance of land by the husband without joinder of the wife does not affect the wife's right to dower, nor do statutes of limitation affect her right until the death of her husband, since "the wife cannot be heard until she becomes a widow."

A remainderman may not maintain an action for the possession of land until after the expiration of the life estate. *Narron v. Musgrave*, 236 N.C. 388, 73 S.E. 2d 6, and *Loven v. Roper*, 178 N.C. 581, 101 S.E. 263.

The defendant, Ethel P. Richardson, has no present right of possession. It is therefore apparent that she could not be adversely affected as to her possessory rights so as to be a real party in interest.

Neither can she support her cause of action by showing a better title outstanding in a third person. *Stewart v. Cary*, 220 N.C. 214, 17 S.E. 2d 29.

Nor can she state a cause of action based on allegations that the conveyance was made for the purpose of defeating and harassing her right to protect the said property from the first deed of trust, which contained her joinder as wife of the owner of the property.

G.S. 45-45 provides:

> "Spouse of mortgagor included among those having right to redeem real property. — Any married person has the right to redeem real property conveyed by his or her spouse's mortgages, deeds of trust and like security instruments and upon such redemption, to have an assignment of the security instrument and the uncancelled obligation secured thereby."

There is nothing to prevent defendant from exercising her rights under this statute. She did not join in the execution of the deed of trust which she now attacks, none of her property rights can be affected by this deed of trust. She may protect her interests in the first deed of trust since she joined in its execution. Again defendant fails to allege facts to show that she will be adversely affected so as to make her the real party in interest. *Sanitary District v. Lenoir, supra.*

The allegations that the deed of trust executed by defendant's husband to Robert L. Spencer, Trustee, in Book 827, page 140 of the Nash County Registry, was a voluntary conveyance made by

her husband and received by plaintiff for the purpose of defeating, delaying and defrauding defendant's rights in the order of court for alimony *pendente lite,* poses a more serious question.

"It has been held that a conveyance made by a husband in anticipation of the wife's action for alimony or support, and in frustration of a satisfaction of a court award to her, is fraudulent and may be set aside unless the purchaser took without notice and for value. Similarly held has been a conveyance made by a husband while his wife's suit is pending or after the decree has been made in her favor." 2 Lee, North Carolina Family Law, sec. 162, pp. 264-265; 27B C.J.S., pp. 166-167; 79 A.L.R. 421; 49 A.L.R. 2d 521.

"In *Walton v. Walton,* 178 N.C. 73, 100 S.E. 176, the holding of the court is succinctly stated in the third headnote as follows: 'The wife's inchoate right to alimony makes her a creditor of her husband, enforceable by attachment, in case of his abandonment, which puts everyone on notice of her claim and her priority over other creditors of her husband.' *Lambert v. Lambert,* 249 N.C. 315, 106 S.E. 2d 491.

"Both the statute, G.S. 1-151, and the decisions of this Court require that the pleading be liberally construed, and that every reasonable intendment and presumption must be in favor of the pleader. A pleading must be fatally defective before it will be rejected as insufficient." *Woody v. Pickelsimer,* 248 N.C. 599, 104 S.E. 2d 273.

Applying this principle in testing the sufficiency of defendant's pleading, we hold that the lower court's order treating plaintiff's motion to strike as a demurrer *ore tenus* and allowing the motion was improvidently entered.

Reversed.

RICHARD BOWMAN, EMPLOYEE, v. COMFORT CHAIR COMPANY, INC., EMPLOYER; LUMBERMENS MUTUAL CASUALTY COMPANY, CARRIER.

(Filed 1 November, 1967.)

1. Costs § 4—

Attorneys' fees are not ordinarily allowable as costs in civil actions or in special proceedings unless expressly authorized by statute.

2. Master and Servant § 82—

The Industrial Commission is a creature of the General Assembly and has only those powers and jurisdictions delegated to it by statute.

3. Master and Servant § 96—

The Industrial Commission is without authority to award attorney's fees to a plaintiff's attorney as part of the costs, except in the instance, expressly authorized by G.S. 97-88, where the Commission finds that the hearing or proceeding on appeal is brought by the insurer and orders the insurer to make or continue payments of compensation to the injured employee.

4. Same; Costs § 3—

The Statute, G.S. 6-21.1, authorizing a presiding judge to award attorney's fees as part of the costs in any personal injury or property damage suit where the judgment is $1000 or less, is inapplicable in cases arising under the Workmen's Compensation Act.

APPEAL by plaintiff from *Riddle, S.J.*, April 1967 Civil Session of CATAWBA.

This case originated as a workmen's compensation action before W. C. Delbridge, a hearing Commissioner of the North Carolina Industrial Commission, and involved a medical bill for one trip to the doctor. The parties stipulated that on 16 September 1965, the date of the alleged accident, the parties were subject to the Workmen's Compensation Act and the carrier on the risk was Lumbermens Mutual Casualty Company.

Richard Bowman testified that he was an employee of Comfort Chair Company. During a ten-minute break, he purchased a Coke from a drink machine located on employer's premises. He opened it with the scissors which he used in performing his job. The bottle broke as he opened it and he cut his left thumb. The doctor took four stitches in his thumb. Bowman lost no time from work other than the trip to the doctor.

Bruce Teague, Secretary and Treasurer of Comfort Chair Company, testified that the drink machine and lounge area were furnished by the employer for use by employees during lunch and break periods. It was his experience that these features helped the work.

Plaintiff's attorney at the hearing orally requested that a reasonable attorney's fee be allowed him, to be taxed as a part of the costs.

Based on his findings of fact and conclusions of law, the hearing Commissioner's award provided (1) that defendants pay all medical expenses incurred by plaintiff as a result of his accident, (2) that an attorney's fee for plaintiff's attorney be arranged between plaintiff and said attorney, and (3) that defendants pay the costs.

For failure of the hearing Commissioner to award a fee to plaintiff's attorney as a part of the costs of the case, plaintiff appealed to the Full Commission, and from its adverse ruling appealed to the

Superior Court. The decision of the hearing Commissioner and the Full Commission was affirmed by the Superior Court, and plaintiff appealed to the Supreme Court.

Williams & Pannell for plaintiff.
Hedrick, McKnight & Parham for defendants.

BRANCH, J. The question presented by this appeal is: Does a hearing Commissioner of the North Carolina Industrial Commission have authority to award plaintiff an attorney's fee as part of the costs upon an initial hearing in a workmen's compensation matter?

The general rule in this jurisdiction is that counsel fees are not allowed as a part of the costs in civil actions or special proceedings. This rule is not applicable where the courts exercise chancery powers to allow compensation to aid trustees or fiduciaries in the management of estates or trusts, or where in certain cases a litigant at his own expense successfully maintains a suit preserving or increasing the common fund or common property. The rule, of course, does not apply when there is express statutory authority for fixing and awarding attorney's fees. *Patrick v. Trust Co.,* 216 N.C. 525, 5 S.E. 2d 724; *Parker v. Realty Co.,* 195 N.C. 644, 143 S.E. 254; *Ragan v. Ragan,* 186 N.C. 461, 119 S.E. 882; *In re Will of Howell,* 204 N.C. 437, 168 S.E. 671; *Horner v. Chamber of Commerce,* 236 N.C. 96, 72 S.E. 2d 21; *Rider v. Lenoir County,* 238 N.C. 632, 78 S.E. 2d 745.

The North Carolina Industrial Commission is a creature of the General Assembly and was created by statute, which is now G.S. 97-77.

> "The Industrial Commission is not a court of general jurisdiction. It is an administrative board with quasi-judicial functions and has a special or limited jurisdiction *created by statute and confined to its terms.* Its jurisdiction may not be enlarged or extended by act or consent of parties, nor may jurisdiction be conferred by agreement or waiver." *Letterlough v. Akins,* 258 N.C. 166, 128 S.E. 2d 215; *Hart v. Motors,* 244 N.C. 84, 92 S.E. 2d 673.

G.S. 97-88 provides:

> "Expenses of appeals brought by insurers.—If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this article, shall find that such hearing or proceedings were brought by the

> insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of compensation to the injured employee, the Commission or court may further order that the cost to the injured employee on such hearing or proceedings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs."

Although the Commission is authorized to approve fees received by attorneys for services rendered in workmen compensation matters (G.S. 97-90), the only statutory authority to award fees as a part of the costs is contained in the above quoted statute. It is clear that this section of the statute is applicable only when such hearings or proceedings are *brought by the insurer and the court orders the insurer to make or to continue payments of compensation to the injured employee.*

The appellant attempts to invoke the aid of G.S. 6-21.1 which provided:

> "Allowance of counsel fees as part of costs in certain cases. — In any personal injury or property damage suit, instituted in a court of record, where the judgment for recovery of damages is one thousand dollars ($1,000.00) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fees to be taxed as a part of the court costs."

(This statute was rewritten by the General Assembly effective June 27, 1967. However, the change in the statute does not affect the decision in this case.)

A cursory examination of this statute proves it not to be applicable in cases arising under the Workmen's Compensation Act. The statute refers to personal injury or property damage suits. The Workmen's Compensation Act makes no provision for property damage suits, and this Court has clearly distinguished the recoveries allowable in personal injury damage suits and payments received under the Workmen's Compensation Act in the case of *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865, where the Court stated:

> ". . . 'Compensation,' in the connection in which it is used in the Act, means a money relief afforded according to the scale established and for the persons designated in the Act. (Citing cases).

"The statute provides no compensation for physical pain or discomfort. It is limited to the loss of ability to earn. 'The loss of his capacity to earn . . . is the basis upon which his compensation must be based. (Citing cases). It is only intended to furnish compensation for loss of earning capacity."

G.S. 6-21.1 provides that the allowance may be made in the discretion of the presiding judge. There is no provision in the Workmen's Compensation Act for presiding judges. Thus, it is evident that G.S. 2-21.1 refers to personal injury damage suits and property damage suits tried in a court where there is a presiding trial judge. This statute is not applicable.

The case of *Hopkins v. Barnhardt*, 223 N.C. 617, 27 S.E. 2d 644, while not applicable to the Workmen's Compensation Act, is pertinent to this decision. In that case, the Court, in holding that a justice of the peace had no jurisdiction in an action for recovery of a statutory penalty of $50, plus attorney's fees, stated:

"The jurisdiction of a justice of the peace in this State is determined by the Constitution and statutes consistent therewith. Art. IV, sec. 27, N. C. Const. This Court so held in the case of *S. v. Jones*, 100 N.C. 438, 6 S.E. 655, which it is said: 'The jurisdiction thus conferred and that may be conferred is special — not general — and the officer is limited to the exercise of his authority by the regulations and methods of procedure prescribed by statute, subject to the constitutional provision. That is, a justice of the peace can only exercise the powers conferred upon him by the Constitution and statutes in harmony with it; his jurisdictional authority is not enlarged by principles of law applicable only to courts of general jurisdiction; nor can he adopt methods of procedure, or exercise his authority in cases not strictly allowed by law — he may do only what the statute allows him to do, and his official acts will be upheld, however informal, if they embody the substance of the thing or purpose intended.' . . . We know of no statute authorizing justices of the peace to fix and award attorneys' fees in any proceeding. Nor can it be held that a justice of the peace has the inherent or equitable power to fix and award such fees. A justice of the peace has no equitable powers, *Moore v. Wolfe*, 122 N.C. 711, 30 S.E. 120, and the inherent powers of a court do not increase its jurisdiction but are limited to such powers as are essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction. 14 Am. Jur., Courts, sec. 171, p. 370. Neither can it be held in this jurisdic-

tion that the award of attorneys' fees may be taxed as costs. . . ."

Prior to the constitutional amendment of 1961, a justice of the peace was recognized by the North Carolina Constitution (Article IV, section 2) legislative enactment, and case law as a court. *Williams v. Bowling,* 111 N.C. 295, 16 S.E. 176. By its decision in *Hopkins,* this Court held that a then-constitutionally created court could not fix and award attorney's fees. *A fortiori,* such powers would not reside in a statutory administrative board which is not clothed with the inherent or chancery powers of a court.

We hold that, absent specific statutory authority, a hearing Commissioner of the North Carolina Industrial Commission does not have authority to award a plaintiff's attorney a fee to be charged as a part of the costs.

Affirmed.

BETTY R. REAVIS v. HUBERT J. REAVIS.

(Filed 1 November, 1967.)

Divorce and Alimony § 18—

Allowance of subsistence to the wife for the support of herself and the children of the marriage, considered in the light of the husband's earnings and fixed expenses is upheld in this case, notwithstanding the allowance to the wife be insufficient for her needs and the balance remaining to the husband be insufficient for his separate living expenses and expenses in connection with his job, since the order is as reasonable and equitable as the circumstances permit.

APPEAL by defendant from *McLaughlin, J.,* 5 August 1967, in Chambers.

The plaintiff is seeking alimony without divorce under G.S. 50-16.

She alleged that she and the defendant were married on 10 July 1954 and have three children, ages eleven, seven and six years; that for a long period of time the defendant had abused her and the children, drank excessively, had affairs with other women, used vulgar language to the plaintiff in the presence of the children and recently has displayed a dangerous and violent temper; that he has choked her, knocked her down in the yard, torn her clothing off, and threatened to kill her. That on 17 June 1967, without provocation on her part, the defendant went into a violent rage which lasted for two days, during which time he struck her and forced her to take

the children and flee from her home. She alleged that the defendant earned in excess of $150.00 per week and asked an order of support for herself and for the children whose custody she seeks.

The defendant denied all the above allegations, specifically saying that he has never choked the plaintiff or knocked her down, torn her clothing, threatened to kill her, or forced her to leave home. He said his average weekly take-home pay was $60.36 and detailed his necessary expenses as requiring $45.00 per week, in addition to payments due on debts exceeding $500.00. He stated that he wanted the plaintiff to return to their home in the interest of economics and for the welfare of the children. He prayed that the Court would make no allowance to the plaintiff and that he be awarded the custody of the children.

Both parties offered affidavits in support of their respective positions.

After considering the evidence, hearing the arguments of counsel, and privately conversing with the children (with the consent of the parties), Judge McLaughlin awarded the custody of the children to the plaintiff and ordered the defendant to pay $32.50 per week for the support of his wife and children, gave the plaintiff possession of the home and required that defendant continue to pay the installments of $62.00 per month due on the purchase price of the home.

From this order, the defendant appealed.

William E. Hall, Attorney for defendant appellant.

Claude Hicks and Peter W. Hairston, Attorneys for plaintiff appellee.

PER CURIAM. This case presents an unanswerable problem. In these days of high taxes, inflation, and the extremely expensive cost of living, it is almost impossible for the average wage earner to support himself and his family. It can be done only by the most frugal and careful budgeting of the income. In this case, the income of the wage earner has to be allocated in such manner that the wife and three children can subsist while leaving enough for the husband to live elsewhere, travel back and forth from his work, buy his meals, and pay the other necessary expenses of living. It can't be done!

The defendant's claim that his fixed expenses reduce his weekly take-home pay to $60.36 does not appear to be exaggerated or unreasonable. However, if it is accepted it means that that small amount must be so allocated that it will support the wife and three

children living in the home and the defendant in a rented room or apartment with the cost of meals and food at cafe or boardinghouse prices. To leave the defendant with only $28.86 per week for this purpose is obviously unrealistic.

On the contrary, to expect Mrs. Reavis to feed, clothe, and otherwise support herself and three children on $32.50 per week is even more unreasonable. If the husband cannot support himself on $28.86 per week, how much should a wife and three children have?

We don't know the answers and neither does anyone else. Faced with this kind of problem, Judge McLaughlin could not do right — he could only hope to do as little wrong as possible. If any person, be he judge, banker or merchant, can make $60.36 per week do what is required here, he is a genius in economics and finances.

In his judgment, which we are sure Judge McLaughlin would enthusiastically improve, except for the handicap of too little money for too many people, we find

No error.

IN RE CUSTODY OF SHERRY LYNN HUFF AND ALLEN GRAY HUFF
AND
MYRTLE DAVIS HUFF, PLAINTIFF, V. HAROLD GRAY HUFF, DEFENDANT.

(Filed 1 November, 1967.)

Divorce and Alimony §§ 18, 23—

Findings supported by evidence that the husband had abandoned his wife and children without provocation or justification and had not made payments for their support since that date, and that the wife was a fit and suitable person to have the custody of the children and that it was to their best interest that she have their custody, *held* to support the court's order awarding the wife custody of the children and subsistence.

APPEAL by Harold Gray Huff from an order entered by *Johnston, Senior Resident Judge,* in chambers, on May 6, 1967, in causes pending in FORSYTH Superior Court.

Harold Gray Huff and Myrtle Davis Huff were married August 22, 1953. They have lived in a state of separation since January 16, 1967. Two children were born of their marriage, to wit, Sherry Lynn Huff, age eleven, and Allen Gray Huff, age eight. Custody of these children is involved in each of the following causes:

1. A *habeas corpus* proceeding under G.S. 17-39 instituted by Harold Huff.

2. An action for divorce from bed and board under G.S. 50-7 instituted by Myrtle Huff in which she prayed, *inter alia,* in accordance with G.S. 50-13 and G.S. 50-15, that, *pendente lite,* she be awarded custody of the children, an allowance for subsistence for herself and the children, and an allowance for counsel fees.

The respective pleadings of Harold Huff and of Myrtle Huff in these causes contain sharply conflicting allegations as to the causes and circumstances of their separation and as to facts pertinent to the award of custody of the children in a manner that will be for the children's best interests.

By consent, the causes were heard together. Judge Johnston, after consideration of the verified pleadings and other affidavits offered by Harold Huff and by Myrtle Huff, entered an order which, after recitals, provided:

"And it appearing to the court, and the court finds as a fact, . . . that Myrtle Davis Huff is a fit and proper person to have the care and custody of the aforesaid children born of the marriage of Myrtle Davis Huff and Harold Gray Huff; and that it is in the best interests of these children that the mother have custody of them; and that the defendant Harold Gray Huff abandoned his wife, Myrtle Davis Huff, on or about the 16th day of January, 1967, without provocation or justification, and has made no alimony or child support payments since that date; and that the defendant, Harold Gray Huff, is able-bodied and earning at least $100.00 per week.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

"(1) That the plaintiff Myrtle Davis Huff be granted the care, custody and control of the children of the marriage of Harold Gray Huff and Myrtle Davis Huff, to wit: Sherry Lynn Huff and Allen Gray Huff; that such care, custody and control shall begin Saturday, May 6, 1967, at 10:00 A.M. at which time the defendant, Harold Gray Huff, shall release said children to the plaintiff, Myrtle Davis Huff, in the hall outside the big courtroom in the Forsyth County Courthouse in Winston-Salem, North Carolina; that the said Harold Gray Huff shall have visitation rights with said children from 9:00 A.M. till 6:00 P.M. on Saturday of each week hereafter.

"(2) That the defendant Harold Gray Huff shall pay to the plaintiff Myrtle Davis Huff the sum of $35.00 per week as alimony and child support. Said payments shall begin on Friday, May 12, 1967, and shall be made to the Domestic Relations Court of Forsyth County and shall be made on each and every Friday thereafter. That the defendant Harold Gray Huff shall pay to the plaintiff's attorney, William G. Pfefferkorn, the sum of $250.00 less a credit

of $100.00 which has already been paid. Said payment to be made by June 1, 1967."

Harold Huff excepted to the quoted findings of fact and to each of the provisions of the court's order.

White, Crumpler, Powell & Pfefferkorn for plaintiff appellee.

Hayes and Hayes and W. Warren Sparrow for defendant appellant.

PER CURIAM. The evidence offered in behalf of Harold Huff and that offered in behalf of Myrtle Huff was in sharp and irreconcilable conflict. The questions of fact were for determination by the court. There was ample evidence to support the court's findings of fact; and these findings provide ample support for the court's *pendente lite* order. Hence, the order of the court below is affirmed.

Affirmed.

E. JACKSON PARRISH v. PIEDMONT PUBLISHING COMPANY.

(Filed 1 November, 1967.)

Appeal and Error § 46—

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by plaintiff from *Gambill, J.*, 2 January 1967 Session of FORSYTH.

Civil action against the defendant for libel.

From a judgment sustaining a demurrer *ore tenus* filed to the complaint, plaintiff appeals.

Harold R. Wilson for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice by W. P. Sandridge, Irving E. Carlyle and Linwood L. Davis for defendant appellee.

PER CURIAM. The Court being evenly divided in opinion, three members of the Court being of opinion that the demurrer should be sustained and three members of the Court being of opinion that the demurrer should be overruled, Justice I. Beverly Lake taking no part in the consideration or decision of the case, the judgment of the lower court is affirmed after the manner of the usual practice of ap-

pellate courts in such cases and stands as the decision in this case without becoming a precedent. *James v. Rogers,* 231 N.C. 668, 58 S.E. 2d 640; *MacClure v. Accident and Casualty Ins. Co.,* 230 N.C. 661, 55 S.E. 2d 192; *Whitehurst v. Anderson,* 228 N.C. 787, 44 S.E. 2d 358; *Bullard v. Hotel Holding Co.,* 225 N.C. 766, 33 S.E. 2d 480; *Howard v. Queen City Coach Co.,* 216 N.C. 799, 4 S.E. 2d 616; *S. v. Swan,* 209 N.C. 836, 183 S.E. 285; *Nebel v. Nebel,* 201 N.C. 840, 161 S.E. 223; *Tarboro v. Johnson,* 196 N.C. 824, 146 S.E. 803, and numerous cases to the same effect cited in 5 N. C. Digest, Courts, key No. 90(2), and the 1967 Cumulative Annual Pocket Part under the same topic and key number; 21 C.J.S. Courts § 189(c).

Affirmed.

ALLISON JAMES v. PIEDMONT PUBLISHING COMPANY.

(Filed 1 November, 1967.)

Appeal and Error § 46—

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by plaintiff from *Gambill, J.,* 2 January 1967 Session of FORSYTH.

Civil action against the defendant for libel.

From a judgment sustaining a demurrer *ore tenus* filed to the complaint, plaintiff appeals.

Harold R. Wilson for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice by W. P. Sandridge, Irving E. Carlyle and Linwood L. Davis for defendant appellee.

PER CURIAM. The Court being evenly divided in opinion, three members of the Court being of opinion that the demurrer should be sustained and three members of the Court being of opinion that the demurrer should be overruled, Justice I. Beverly Lake taking no part in the consideration or decision of the case, the judgment of the lower court is affirmed after the manner of the usual practice of appellate courts in such cases and stands as the decision in this case without becoming a precedent. *Parrish v. Publishing Co., ante,* 711, 157 S.E. 2d 334, and cases therein cited.

Affirmed.

STATE v. MARION (BUDDY) HOOKS.

(Filed 1 November, 1967.)

APPEAL by defendant from *Gwyn, J.*, March 13, 1967 Mixed Session of DAVIDSON.

Defendant was arrested on a warrant issued October 14, 1966, by the Davidson County Court, charging the felony of assault with intent to commit rape. In said Davidson County Court, probable cause was found; and defendant was bound over to the next session of Davidson Superior Court. At November 14, 1966 Mixed Session of Davidson Superior Court, the grand jury returned as a true bill an indictment charging that defendant on October 14, 1966, "unlawfully, wilfully, and feloniously did assault one Vera Macemore, a female, with intent, her the said Vera Macemore, unlawfully, feloniously, by force and against her will to ravish and carnally know Vera Macemore," etc., being the felony charged in said warrant.

On November 16, 1966, the court, based on defendant's affidavit of indigency, appointed Walter F. Brinkley, Jr., Esq., a member of the Davidson County Bar, to represent defendant. On December 10, 1966, defendant was committed to the Dorothea Dix Hospital at Raleigh for a period of sixty days' observation and examination pursuant to the provisions of G.S. 122-91. On or about February 2, 1967, the Hospital physicians reported that defendant was "Without Psychosis (Not Insane)"; that he was able to plead to the bill of indictment and understood the charges against him; and that he knew the difference between right and wrong.

Upon arraignment on said indictment at March 13, 1967 Mixed Session of Davidson Superior Court, defendant, a male person twenty-eight years of age, through his said counsel, tendered a plea of guilty to an included crime of less degree, namely, assault on a female, a misdemeanor, which plea was accepted by the State.

The court, after hearing the testimony of Mrs. Macemore and of defendant and after consideration of the report of said Hospital physicians, pronounced judgment as follows:

"Let the defendant be confined in the common jail of Davidson County for a term of two (2) years to be assigned to work under the supervision of the State Prison Department. It is requested as a part of this judgment the defendant be given such examination and treatment and care as he is physically nervous *(sic)* and has an emotional condition. *(sic)* This treatment is to be given while he is in prison."

Defendant excepted and appealed.

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

Walser, Brinkley, Walser & McGirt for defendant appellant.

PER CURIAM. Although defendant's court-appointed counsel has perfected his appeal in compliance with defendant's wishes, the record does not show error prejudicial to defendant or of sufficient substance to warrant particular discussion. The impression prevails that the State's acceptance of the misdemeanor plea should be attributed to the efforts of defendant's able and conscientious counsel in bringing to the court all circumstances tending to explain in some measure defendant's anti-social behavior. Hence, the judgment of the court below is affirmed.

Affirmed.

STATE v. WILLIAM D. WITHERSPOON.

(Filed 1 November, 1967.)

APPEAL by defendant from *McLaughlin, J.*, 27 February 1967 Session of FORSYTH.

Defendant, represented by court-appointed counsel, was tried upon a bill of indictment which charged that, on 20 January 1967, he endangered and threatened the lives of Florence B. Bates and Mrs. Raymond B. Martin with the use of a pistol and did unlawfully and feloniously take, steal, and carry away from the place of business known as Hunter's Moon $10.00, the property of Florence B. Bates, the owner of Hunter's Moon.

Evidence for the State tended to show: Mrs. Florence B. Bates operates Hunter's Moon, a used clothing store at 216 North Trade Street in Winston-Salem. About 4:00 p.m. on 20 January 1967, defendant, who had been in the store three or four times prior to that day, came in and shook hands with Mrs. Bates. He then took a pair of pants from the rack, went into the dressing room to try them on, and emerged a few minutes later to report that they did not fit. At that time, Mrs. Bates was standing behind the counter and when she turned toward defendant, she saw that he had a pistol in his hand. He told her to give him "the money," or he would blow her head off. She handed him between ten and twenty one-dollar bills, and he began calling her vile names. He then shot her in the forehead, and she fell behind the counter. Mrs. Raymond Martin, the

assistant manager, ran out of the store and called the police. Three days later, at the hospital, Mrs. Bates picked defendant from a group of photographs submitted to her by the police.

At the trial, both Mrs. Bates and Mrs. Martin positively identified defendant as the man who shot Mrs. Bates and took the money from the store. Defendant did not testify but offered evidence which tended to show that at the time of the alleged robbery he was asleep in his home. The jury returned a verdict of guilty as charged. Judge McLaughlin imposed a sentence of not less than 28 nor more than 30 years, and defendant appealed.

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

Richard C. Erwin, Sr., for defendant appellant.

PER CURIAM. The State's evidence was more than sufficient to establish defendant's guilt of the crime specified in the bill of indictment. The judge, in his charge to the jury, correctly applied the law to the evidence and fairly presented the contentions of both the State and defendant. The jury resolved the only contested issue of fact, the identity of the person who robbed and shot Mrs. Bates, against defendant. The judge imposed a sentence, which was within the statutory maximum. G.S. 14-87. It therefore does not constitute the cruel and unusual punishment forbidden by Article I, § 14 of the Constitution of North Carolina. *State v. LePard,* 270 N.C. 157, 153 S.E. 2d 875.

No error.

DIZE AWNING AND TENT COMPANY v. CITY OF WINSTON-SALEM.

(Filed 8 November, 1967.)

1. Jury § 5; Trial § 18—

Where there is no motion for judgment on the pleadings and the parties stipulate facts in addition to those alleged in the pleadings, the court is without power to make further findings of fact, and when the facts alleged and stipulated, considered in the light most favorable to plaintiff, are insufficient to support nonsuit, the court must submit determinative issues to the jury.

2. Municipal Corporations § 15—

Where a city revises and enlarges an existing culvert for surface waters, including waters from a natural watercourse, it assumes control and management of the drains and is required to use reasonable diligence to

keep the drains in good repair and condition, and may be held liable for damage resulting from its negligent failure to do so.

3. **Same— Allegations and stipulations held to raise issues of negligence and contributory negligence in maintenance of drains for surface waters.**

The allegations and stipulations were to the effect that defendant municipality took over the drainage of a natural watercourse and enlarged the culvert carrying the drainage water without providing covers, grilles or other protective devices to prevent entry into the said culvert of items of debris of large size, that under plaintiff's property the water was carried by two smaller culverts which were too small to carry the large pieces of debris washed into the drains from upstream so that the debris clogged the drains, resulting in the flooding of plaintiff's premises. *Held:* The allegations and stipulations state a cause of action, and the dismissal of the action by the court without the submission of the issues to the jury must be held error, it being for the jury to hear the evidence and determine therefrom the question of the municipality's negligence, and the question of plaintiff's contributory negligence in constructing smaller culverts under its building.

APPEAL by plaintiff from *Gambill, J.,* 17 April 1967, Civil Session, FORSYTH Superior Court.

The plaintiff alleged that it was engaged in the manufacture, sale and storage of tents, canvas products, awnings, blinds, tarpaulins and other related items; that the building in which it operates its business is on the west side of South Main Street in Winston-Salem and approximately 150 feet downstream from where South Creek empties its drainage into a culvert. The original culvert was 30 inches in diameter running to a manhole, and from there the drainage was carried in a 36-inch pipe to a catch basin just south of plaintiff's premises; from this basin, the drainage was carried under plaintiff's building in two pipes, 30 inches and 18 inches in diameter, the 30-inch pipe changing to 36 inches as it traversed the plaintiff's property.

Prior to 28 May 1963, the pipes and culvert "were so constructed and maintained with covers, grilles or other protective devices so as to prevent the entry into said system (the drainage) of any items of debris of a size which could block the said two smaller pipes leading under plaintiff's premises."

In 1960 the "defendant tore up South Main Street and removed the old culvert or drain pipe of 30 inches diameter and replaced it with [a] 42-inch diameter culvert or pipe and in the process of such replacement work connected the new 42-inch pipe into said manhole." It failed to install a grille or other protective device across or about the opening, letting tires, logs, tree stumps, planks and miscellaneous debris of large size into the 42-inch culvert and into

and through the manhole and the 36-inch pipe which blocked and clogged the pipes under plaintiff's building.

On 28 May 1963 a rain caused bulky debris such as tires, planks, wire, stumps, etc., to flow through the 42-inch pipe through the manhole into the 36-inch pipe to a point just before the start of the two smaller drain pipes under the plaintiff's premises. They were too large to pass through either of the pipes, so they jammed, blocked and dammed the openings, causing the rain water to back up and overflow onto plaintiff's property, flooding the basement and work areas to a depth of two feet. Plaintiff further alleges that its basement was used as a manufacturing, finishing and storage area in which stores of raw materials, finished products, machinery, building equipment and supplies were stored; that the drainage water was dirty and muddy and ruined and coated with mud and dirt its materials; and that this muddy, gritty water got into its machinery and tools, causing it a loss of $75,000.00.

Plaintiff alleges some thirteen elements of negligence which may be summarized as follows: That it was negligent in constructing a 42-inch culvert to carry drainage into smaller sets of pipes and drains which would overload the latter; that it failed to use grilles or other devices to prevent bulky items of trash coming into the drainage system; that it failed to inspect the culvert or to clean and remove debris from it; and that it violated several ordinances of the City of Winston-Salem in its action.

In its answer, the defendant said that before the plaintiff's building was erected, South Creek flowed through the property in an open ditch or channel; that the then owners of the property installed a 36-inch culvert upstream from plaintiff's property and continued downstream almost to the plaintiff's present building; that the plaintiff installed two drain pipes under its premises and then constructed its building over this culvert; that in 1960 the 36-inch metal culvert had become rusted and worn out and that the City replaced it with a 42-inch concrete culvert together with two catch basins to carry the natural surface flow of water. It alleged that the plaintiff was negligent in using two parallel pipes 30 and 18 inches in diameter to carry the water under its building when it knew that the upstream pipe was 36 inches and that the smaller pipes could not carry the same quantity of water or debris which might be washed downstream during heavy rains; that following a rain in 1961 the City advised the plaintiff that its pipes were not adequate to handle heavy rains and that the plaintiff should have inspected the open ditch upstream to insure against the accumulation of debris. The defendant further claimed that by the above acts the plaintiff assumed the risk of any damage by flooding.

The case was set for trial at the April 1967 Session which was a two-weeks term for the trial of civil cases. From the "organization of court" in the case on appeal it is said "that the action of *Dize Awning and Tent Company vs. City of Winston-Salem* came on for trial by jury but at said term was heard before Robert M. Gambill, Judge Presiding, in Chambers, and that judgment was entered as appears in this transcript of record."

The transcript of proceedings shows:

> "Proceedings held in Chambers in the Forsyth County Courthouse at Winston-Salem, North Carolina, April 26, 1967, before:
>
> "Hon. ROBERT M. GAMBILL, Judge Presiding.
>
> "APPEARANCES: (naming the attorneys)
>
> "The parties, Plaintiff and Defendant, STIPULATE that the following listed exhibits may be introduced, if otherwise relevant, without the necessity of further identification:"

Here a number of maps, letters, photographs are stipulated.

The parties also made stipulations that the property generally within the watershed of the branch was annexed by the City in 1919; that the watercourse was a natural watercourse; that the 42-inch culvert constructed by the City emptied into a manhole and that the drainage system northwardly from it was privately constructed and owned; that the plaintiff's culverts under its property started at a point approximately 150 feet north (above) of the manhole; that the culvert between it and the plaintiff's culverts is a 36-inch culvert.

The stipulations were made in what was apparently a pre-trial conference called by the Court "to consider the pleadings, settlement of issues, motions to strike and to amend pleadings and possible stipulations; upon consideration of the plaintiff's pleadings and the stipulations of fact agreed upon by the parties, the Court is of the opinion and holds as a matter of law that the plaintiff is not entitled to recover of the defendant in this action."

The Court then in a lengthy written ruling analyzed the pleadings and dismissed the case.

The plaintiff excepted (1) to the attempt of the Court to rule upon issues of law in the absence of any motion or demurrer, written or oral; (2) in the absence of any waiver of trial by jury in attempting to try and determine issues of fact; (3) to the refusal of the Court to accept plaintiff's tender of additional evidence to be placed before a jury; (4) to the denial of the Court to grant a trial by jury and because of errors committed during the progress of the

preliminary conferences; and (5) to certain recitations contained in the judgment in that they are not based upon any evidence before the Court, and to the signing of the judgment, the plaintiff thereupon appealed.

Deal, Hutchins and Minor by William K. Davis and John M. Minor, Attorneys for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice by W. F. Womble and I. E. Carlyle, Attorneys for defendant appellee.

PLESS, J. The plaintiffs complain that in the procedure used by Judge Gambill he gave judgment on the pleadings, considering also the stipulations of the parties. It is true that "[o]n a motion for judgment on the pleadings, the presiding judge should consider the pleadings, and nothing else . . . He should not hear extrinsic evidence, or make findings of fact . . ." *Remsen v. Edwards,* 236 N.C. 427, 72 S.E. 2d 879. However, the record does not show a motion for judgment on the pleadings, and Judge Gambill is careful to say that the Court conducted "a preliminary conference . . . to consider the pleadings, settlement of issues, motions to strike and to amend pleadings and possible stipulations; upon consideration of the plaintiff's pleadings and the stipulations of fact agreed upon by the parties, the Court is of the opinion and holds as a matter of law that the plaintiff is not entitled to recover of the defendant in this action. . . . [U]pon the plaintiff's pleadings and the stipulations of fact, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff shall have and recover nothing . . ."

The record does not show a motion for judgment on the pleadings, nor is it so designated.

We think the procedure used by Judge Gambill comes within the rule tersely stated by Parker, J. (now C.J.) in *Jamison v. Charlotte,* 239 N.C. 682, 80 S.E. 2d 904:

> "It is passing strange that plaintiff's counsel 'objects and excepts to each finding of fact embodied in the judgment,' when each fact found by the Judge was either alleged in the Complaint, which they signed, and was admitted in the defendants' Answer, or copied verbatim from a stipulation and agreement of facts which they and the defendants' counsel signed."

In these days of crowded calendars, over-worked courts and too little time to do so much, we would encourage any efficient and justified method which arrives at the proper result, while giving to all parties a full day in court.

Although the plaintiff was insisting upon a trial by jury and the right to introduce additional evidence, no good purpose could be served by using hours to select a jury and conduct a trial if the judge were correctly of the opinion that the plaintiff could not by the presentation of additional evidence present a jury question. So — the result here must turn upon the decision of the Judge that the pleadings and stipulated facts were such that no evidence could be introduced by the plaintiff that would require a jury determination. In effect, we must determine whether the pleadings and stipulations considered in the light most favorable to the plaintiff would withstand a motion for nonsuit.

We grant that there are allegations upon which a *jury* should be allowed to determine the defendant's plea of contributory negligence in the use by the plaintiff of a smaller pipeline under its building to convey the water contents of the larger one, and also the claim by the defendant that the plaintiff assumed the risk of damage to its property by so doing. We must recall, however, that the Court was without knowledge of the evidence the plaintiff could offer to repel these claims. We cannot deny it the opportunity to do so, and it must be remembered that upon these contentions the burden would be on the defendant — not the plaintiff.

And now, turning to the plaintiff's position, construed most favorably to it, the plaintiff alleges that by the City's action in removing a 36-inch pipe or culvert, which was guarded by the use of covers, grilles, and other protective devices, and replacing it with a larger one, without grilles or other devices to prevent tires and other large debris from entering it, it created a condition that would flood plaintiff's property when they could not be accommodated by plaintiff's smaller culverts. In blocking the plaintiff's culverts they would naturally cause water to pond and flood plaintiff's property, which plaintiff alleged resulted in $75,000 damage.

Here, we think the following excerpt from *Hotels, Inc. v. Raleigh,* 268 N.C. 535, 151 S.E. 2d 35, is applicable:

> "In *Johnson v. City of Winston-Salem,* 239 N.C. 697, at p. 707, 81 S.E. 2d 153, which is cited by the Present Chief Justice Parker, in *Hormel & Company v. Winston-Salem,* 263 N.C. 666, at p. 675, 140 S.E. 2d 362, it is said: 'The general rule is that a municipality becomes responsible for maintenance, and liable for injuries resulting from a want of due care in respect to upkeep, of drains and culverts constructed by third persons when, and only when, they are adopted as a part of its drainage system, or the municipality assumes control and management thereof.' That this is the generally accepted rule is shown by the

> following excerpt: 'The rule as to municipal liability for defects and obstructions in sewers and drains * * * remains the same whether a natural watercourse is adopted for drainage purposes or an artificial channel is built; and, where a municipality has assumed jurisdiction over a stream flowing into the city, it may become liable for injury caused by its negligence in the control of the water. Where a city adopts a natural watercourse for sewerage or drainage purposes, it has the duty to keep it in proper condition and free from obstructions, and it is liable for damage resulting from neglect therein.' 63 C.J.S. 262."

The City claims that the old 36-inch culvert had been installed by others when the area was annexed by it in 1919, that thereafter it maintained it and that in 1960 it replaced it with a 42-inch concrete culvert. To maintain the existing culvert for forty years and then to revise and enlarge the method of controlling the drainage, even from a natural watercourse, would be to assume its control and management and require it to use reasonable diligence to keep the drain in good repair and condition and render it liable to one damaged by its negligence in this respect. 38 Am. Jur., Municipal Corporations, § 637.

> "If sewers, drains, or culverts constructed by third persons, are in some legal manner adopted by the municipality as a part of its sewage or drainage system, *or the municipality assumed control and management* thereof, the municipality becomes liable for injuries resulting therefrom, since in such cases it is immaterial by whom the sewer, drain, or culvert was constructed." McQuillin, Municipal Corporations, 3rd Ed. Rev., Vol. 18, § 53.118.

While most of the cases deal with alleged damage to owners above the point of obstruction, it was held in *Sherrill v. Highway Commission,* 264 N.C. 643, 142 S.E. 2d 653, that a governmental unit is liable also to a lower riparian owner. Whether the plaintiff can substantiate its allegations remains to be seen, but it is entitled to the opportunity to do so. As said by Stacy, C.J. in *Abernethy v. Burns,* 206 N.C. 370, 173 S.E. 899: "He may not get to first base, but he is entitled to come to the bat."

Reversed.

W. H. JAMISON, SUPERINTENDENT OF BUILDING INSPECTION FOR THE CITY OF CHARLOTTE, V. MRS. H. F. KYLES.

(Filed 8 November, 1967.)

1. Administrative Law § 5; Municipal Corporations § 35—

Where the findings of fact of an administrative agency are made in good faith and are supported by competent evidence, its findings are conclusive on appeal, and it is error for the court to substitute its own findings of fact for those of the agency.

2. Appeal and Error § 9—

The Supreme Court will not decide a moot question, and when it appears that the prosecutor of an appeal from an administrative agency has abandoned her appeal and moved to another state, the case will be remanded to the Superior Court with direction to dismiss the appeal from the agency.

APPEAL by respondent from *Patton, E.J.,* 29 May 1967 Schedule C, Civil Non-Jury Session of MECKLENBURG.

This proceeding originated by a letter dated 29 April 1966 from D. W. Long, Building Inspector, to Mrs. H. F. Kyles advising that inspection of her property revealed a violation of the Charlotte Zoning Ordinance, in that the property, zoned R-9, does not permit a beauty salon. Mrs. Kyles was advised to discontinue the business use of the property.

A Certificate of Occupancy to operate a beauty parlor at her residence was denied to Mrs. Kyles by the Inspection Department on 27 May 1966 for the reason that "Beauty parlor not permitted in R-9 zone."

W. H. Jamison, before whom a hearing on the matter was held on 18 May 1966, was of the opinion that the operation was not a customary home occupation in the meaning of sec. 23-32 of the zoning code. Mrs. Kyles appealed to the City of Charlotte Zoning Board of Adjustment. A hearing in the matter before the Board on 28 June 1966 resulted in the following determination:

"Following an investigation of the property in question, and its immediate surroundings, and on the evidence presented, the Board makes the following Findings of Fact:

"(1) When the requirements of Section 23-32 are met a beauty shop is a customary home occupation.

"In view of the above findings, the decision of the Board was expressed by Commissioner Beddingfield who made the motion that this waiver be granted with the following restrictions; that the petitioner is to be the sole operator engaged in home occupation and that she further be restricted to the present

> use and no physical changes; further that no additional equipment for use in these activities except as replacement items of similar construction and uses be purchased. This motion was seconded by Commissioner Asbury and unanimously carried."

On 29 July 1966, W. H. Jamison filed his petition for Writ of *Certiorari* in the Superior Court. The matter came on for hearing before the Honorable George B. Patton. After hearing the matter and considering the record and the decision of the Zoning Board of Adjustment, Judge Patton entered judgment remanding the cause to the Board "for further findings of fact and conclusions of law and a final decision based on such findings of fact and conclusions of law."

The cause was set for rehearing before the Board on 29 November 1966, at which time further evidence was taken.

Thereafter, at its meeting on 20 December 1966, the Board found facts, made its conclusions of law, and entered its decision that Mrs. Kyles' business did not constitute a customary home occupation as set forth in sec. 23-32 Para. D particularly.

Mrs. Kyles petitioned for a Writ of *Certiorari* for review of the findings of fact, conclusions of law, and decision of the Board.

The Superior Court, after considering the entire record and evidence in the cause, made the following pertinent findings of fact:

On 5 April 1965, an existing attached garage was enclosed to be used as a den, including the addition of two half baths, which work was inspected and approved by the City Building Inspection Department. The purpose of this improvement was to prepare additional room at appellant's home for use by a member of her family; however, when it was determined that this use would not be needed, appellant began using this additional room in her home to conduct her business of washing, setting, styling, and coloring hair for her customers.

> ". . . The appellant uses two hair dryers in connection with her hair styling operation, but these hair dryers are of the type customarily and normally used as a part of domestic or household equipment and no chemical, mechanical or electrical equipment that is not normally a part of domestic or household equipment is used by the appellant primarily for commercial purposes in her aforesaid occupation, and the Zoning Board of Adjustment of the City of Charlotte, North Carolina, erred in finding as facts that the equipment being used in the business operation of Mrs. Kyles in her home included two commercial type chairs not normally used in a household and one commercial type sink not normally found in a household, and the Zon-

ing Board of Adjustment of the City of Charlotte, North Carolina, further erred in concluding as a matter of law that Mrs. Kyles' business does not constitute a customary home occupation as set forth in Section 23-32 of the Code of the City of Charlotte, North Carolina, and said findings of Fact and Conclusions of Law are hereby reversed."

Based on evidence in the record, the court further found that: appellant's operation caused no noise or other interference with radio or television reception; no internal or external alterations inconsistent with the residential use of the building have been made; appellant, who resides in the dwelling, is the only person engaged in the home occupation; no display of products is visible from the street; no articles are sold on the premises and no passenger vehicles are used in connection with the conduct of said occupation, and no signs are used in connection with said operation; although appellant conducts her occupation under a North Carolina Beauty Shop License as required by law, the only business conducted by her in the occupation is that of washing, Setting, Styling, and coloring hair, and she does not conduct or perform any other services normally associated with a beauty shop in her home.

Based upon the foregoing findings of fact, the court made the following relevant conclusions of law: that the occupation of washing, setting, styling, and coloring hair as conducted by appellant in her home is a customary home occupation and conformed to the requirements of a customary home occupation as set out in sec. 23-32 of the Code of the City of Charlotte; that the occupation conducted by appellant in her home is a permitted use in a R-9 residential zone under the provisions of sec. 23-32 of the Charlotte City Code and is a customary home occupation within the provisions of that section of the code, and the decision of the Board, holding that this operation is not a customary home occupation, is in error and is reversed and set aside.

The court held that the ruling of the zoning Board that the business operations being conducted by Mrs. Kyles on her property were in violation of the R-9 zoning restriction and did not constitute a customary home operation as permitted by sec. 23-32 of the Charlotte City Code was in error. The court thereupon ordered, adjudged and decreed that the ruling of the Board be reversed and set aside.

Paul L. Whitfield for plaintiff-appellant.
No counsel contra.

BRANCH, J. At the threshold of this appeal we are confronted with the question of whether the judge of superior court exceeded his *certiorari* powers of review in making findings of fact at variance with those found by the Board of Adjustment.

G.S. 143-315 provides:

> "The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: . . . (5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted; . . . If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification."

The findings of fact before the court were as follows:

> "After the presentation of new evidence the Board finds as fact Para. 1-2-3.
>
> (4) That the equipment being used in the operation of the business includes 2 commercial type chairs not normally used in a household and one commercial type sink not normally found in a household.
>
> (5) That the new evidence presented was that the above equipment was being used primarily for commercial purposes.
>
> (6) Paragraph 5.
>
> CONCLUSIONS:
>
> (1) The case was remanded by the Court for additional findings of fact.
>
> (2) At the rehearing on November 29, 1966 with the new evidence presented, the Board finds Mrs. Kyles' business does not constitute a customary home occupation as set forth in Section 23-32 Para. D particularly.
>
> DECISION OF THE BOARD.
>
> In view of the above findings of fact, the decision of the Board was expressed in a motion by Commissioner Phillips, seconded by Commissioner Watt, and unanimously carried."

It is apparent that the court could only speculate as to what Paragraphs 1, 2, 3 and 6 refer to. Thus, only findings of fact 4 and 5 of the Board are to be considered.

In re Appeal of Hasting, 252 N.C. 327, 113 S.E. 2d 433, is a case which grew out of another Charlotte Zoning Board of Adjustment decision. In that case, under the zoning ordinance, petitioner was permitted to continue a nonconforming use when the ordinance was enacted. He later sought to get permission for additional construction upon contention that the construction was to complete facilities under his original plan. The Board affirmed the refusal of the building inspector to issue a permit to increase the use of the property. The decision of the Board was reviewed by the Superior Court, which sustained the Board's findings. In deciding this case on appeal from the Superior Court, this Court said:

> "The City had the authority to prohibit an enlargement of a nonconforming use. *In re O'Neal,* 243 N.C. 714, 92 S.E. 2d 189. Whether what petitioner sought was the right to complete construction of facilities for a nonconforming use to which property had been dedicated when the ordinance took effect or was an enlargement of a subsisting nonconforming use was a question of fact to be determined by the Board of Adjustment. The rule applicable is stated in *In re Pine Hill Cemeteries, Inc.,* 219 N.C. 735, 15 S.E. 2d 1, thus: 'The duties of the building inspector being administrative, appeals from him to the board of adjustment present controverted questions of fact — not issues of fact. Hence it is that the findings of the board, when made in good faith and supported by evidence, are final. *Little v. Raleigh,* 195 N.C. 793. Such findings of fact are not subject to review by the courts."

The case of *Freeman v. Board of Alcoholic Control,* 264 N.C. 320, 141 S.E. 2d 499, again considered the authority of the Superior Court when reviewing proceedings of an administrative board. There the Court stated:

> "The duty to weigh the evidence and find the facts is lodged in the agency that hears the witnesses and observes their demeanor as they testify — in this case the Board of Alcoholic Control. Its findings are conclusive if supported by material and substantial evidence. (Citing cases.) Courts will not undertake to control the exercise of discretion and judgment on the part of members of a commission in performing the functions of a state agency. (Citing cases.) When discretionary authority is vested in such commission, the court has no power

to substitute its discretion for that of the commission; and in the absence of fraud, manifest abuse of discretion or conduct in excess of lawful authority, the court has no power to intervene. (Citing cases.) Hence it is that the findings of the board, when made in good faith and supported by evidence, are final." (Citing cases.)

Our examination of the competent evidence submitted to the Board discloses it to be sufficient to support its findings of fact. The court below erred in reversing these findings of fact. Neither did the trial court comply with the requirements of G.S.143-315 by setting out in writing the reasons for such reversal.

Mrs. Kyles, appellee, has advised her attorneys in writing, copies of which are filed with the Court, that she does not desire to further pursue this appeal since she is moving to another State. Counsel did not appear or file brief in her behalf when the case was called for argument in this Court. Thus, the questions presented by this appeal have become moot.

The judgment entered by the court below is vacated and the cause is remanded to Mecklenburg County Superior Court with direction to enter order dismissing Mrs. Kyles' appeal to the Superior Court of Mecklenburg County, as moot.

Error and remanded.

STATE v. WALLACE ELEE FOSTER.

(Filed 8 November, 1967.)

1. Criminal Law § 138—

Where a judgment of imprisonment in excess of the statutory maximum is vacated on appeal, and, upon remand of the case for proper judgment, the defendant is sentenced to serve the maximum time, he must be allowed credit for the time actually served under the first judgment.

2. Larceny § 10; Constitutional Law § 36—

The statutory maximum of imprisonment for the larceny of goods of a value of $200 or less, a misdemeanor, is two years, and punishment within this maximum is not cruel or unusual in the constitutional sense.

APPEAL by defendant from *Johnston, J.*, 27 March 1967 Session of STANLY.

This is the second time this case has been before this Court. At the 28 March 1966 Session of Stanly County Superior Court the defendant was tried on an indictment containing three counts: The

first count charged defendant on 1 January 1966 with feloniously breaking and entering a building occupied by one Floyd Hinson with intent to steal the merchandise therein, a violation of G.S. 14-54; the second count charged defendant on the same day with the larceny of one electric battery charger, automobile tires and six cartons of cigarettes, of the value of more than $200, of the goods and chattels of Floyd Hinson; and the third count charged defendant on the same day with feloniously receiving stolen goods knowing them to have been previously stolen, taken, and carried away. The defendant pleaded not guilty. The court allowed a motion for judgment of nonsuit on the third count in the indictment of receiving stolen goods, knowing them to have been stolen. Verdict: Guilty as charged in the indictment. From a judgment of imprisonment for not less than 8 nor more than 10 years on the first count in the indictment, and from a judgment of imprisonment for not less than 5 nor more than 10 years on the second count in the indictment, the judgment on the second count to commence at the expiration of the sentence of imprisonment on the first count, defendant, by his court-appointed counsel, appealed. The appeal was heard at the Fall Term 1966 of this Court and is reported in 268 N.C. 480, 151 S.E. 2d 62. The result of the appeal, as stated in the opinion of the Court, was this: "Reversed as to the first count in the indictment. No error in the trial of the second count in the indictment, except as to the judgment, and the judgment imposed upon the verdict of guilty upon that count is vacated, and the case is remanded for a proper judgment on that count in the indictment for the larceny of the electric battery charger, a misdemeanor."

At the March 1967 Session of the Superior Court of Stanly County, Judge Walter E. Johnston, judge presiding, imposed a sentence of two years imprisonment on the count in the indictment charging the larceny of the electric battery charger, a misdemeanor, and from this sentence defendant appealed again to the Supreme Court by his court-appointed counsel.

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

R. L. Brown, Jr., for defendant appellant.

PER CURIAM. Defendant's first assignment of error reads: "The court erred in imposing the maximum statutory sentence of two years upon the misdemeanor charge of larceny, thus depriving the defendant of the benefit of that time in which he was imprisoned in

the State Prison from March 31, 1966 (date of commitment) to August 25, 1966, the date on which he was ordered by the court to be returned to the sheriff of Stanly County." The record shows this: On 31 March 1966 the office of the clerk of the Superior Court of Stanly County issued a commitment ordering the defendant to be committed to the State's prison to serve the sentences imposed at the March 1966 Session of court. Pursuant to this commitment, the defendant remained in the North Carolina prison system from 31 March 1966 through 25 August 1966, at which time Judge McConnell ordered the defendant to be returned to Stanly County and to be released on bond pending the result of his appeal to the Supreme Court.

It is apparent that when Judge Johnston sentenced defendant to serve the maximum two-year sentence for the larceny of the electric battery charger, he did not give him credit for the time served from 31 March 1966 through 25 August 1966. The Attorney General of North Carolina takes the position that the defendant should be given credit for the time served from 31 March 1966 through 25 August 1966. While the facts of this case are not on all-fours with *S. v. Weaver*, 264 N.C. 681, 142 S.E. 2d 633, and *Williams v. State*, 269 N.C. 301, 152 S.E. 2d 111, we think that those cases are highly apposite, and the principles there announced should control in this case. This assignment of error is sustained. The Prison Department is ordered forthwith to give this defendant credit on the two-year sentence imposed for the time that he served from 31 March 1966 through 25 August 1966.

Defendant assigns as error that the prison sentence of two years for larceny of the electric battery charger was cruel and unusual punishment and "within the prohibition of the Eighth Amendment to the Federal Constitution which applies to the States through the due process clause of the Fourteenth Amendment." Defendant in his brief states: "In view of many and recent decisions of the Supreme Court of North Carolina, appellant deems it unnecessary to pursue this assignment of error." This assignment of error is overruled. The statutory maximum of imprisonment for the larceny of the electric battery charger, a misdemeanor, was two years, and we have repeatedly held that such being the case it does not constitute cruel and unusual punishment. *S. v. Bruce*, 268 N.C. 174, 150 S.E. 2d 216; *S. v. Robinson*, 271 N.C. 448, 156 S.E. 2d 854; *S. v. Hopper*, 271 N.C. 464, 156 S.E. 2d 857.

The judgment below is

Modified and affirmed.

STATE v. JIMMY LEVERNE EFIRD.

(Filed 8 November, 1967.)

1. Homicide § 20—

Evidence in this case *held* sufficient for the jury on the question of defendant's guilt of involuntary manslaughter.

2. Homicide § 30—

Punishment for involuntary manslaughter may be by fine or imprisonment not to exceed 10 years, or both, in the discretion of the court. G.S. 14-2, G.S. 14-18.

3. Criminal Law § 140—

Where the court enters separate judgments imposing sentences of imprisonment, and each judgment is complete within itself, the sentences run concurrently as a matter of law, in the absence of a provision to the contrary in the judgment, even though the sentences are for different grades of offenses requiring different places of confinement, G.S. 15-6.2.

APPEAL by defendant from *Johnston, J.*, March 27, 1967 Session of STANLY.

Criminal prosecutions on (1) a bill of indictment charging involuntary manslaughter, to wit, the felonious killing of Elon Deliliah Hall on January 6, 1967, (2) a warrant charging operation of a motor vehicle while under the influence of intoxicating liquor, and (3) a warrant charging the operation of a motor vehicle without a valid operator's license. (In respect of the charges set forth in the two warrants, the trial in the superior court was *de novo* upon defendant's appeal from judgments of the Stanly County Recorder's Court.) The three cases were consolidated for trial. After trial, in which defendant was represented by court-appointed counsel, the jury returned a verdict of guilty as to each of said charges.

In the involuntary manslaughter case, the court pronounced judgment that defendant be confined in the State's Prison for a term of five years. In the case in which defendant was charged with the operation of a motor vehicle while under the influence of intoxicating liquor, judgment imposing a sentence of two years was pronounced. In the case in which defendant was charged with operation of a motor vehicle without an operator's license, judgment imposing a sentence of sixty days was pronounced.

Defendant excepted and appealed. Thereupon, orders were entered providing for the prosecution of defendant's said appeal by his court-appointed counsel and for the payment by Stanly County of the costs of mimeographing the record and defendant's brief incident to his appeal.

Attorney General Bruton, Assistant Attorney General Melvin and Staff Attorney Costen for the State.

R. L. Brown, Jr., for defendant appellant.

PER CURIAM. Defendant assigns as error (1) the denial of his motions for judgment as of nonsuit, and (2) the judgment (in respect of *quantum* of punishment) in the involuntary manslaughter case.

Defendant's motions for judgment as of nonsuit were properly overruled. In brief, the State offered evidence tending to show: On January 6, 1967, about 11:45 p.m., defendant, who had no operator's license, was operating a 1962 Chevrolet on Aquadale Road, a paved public highway in Stanly County. Notwithstanding protests of passengers in the car, he operated said car at a speed of 80 miles per hour in a 55-mile per hour speed zone. While so operating the car, defendant was under the influence of intoxicating liquor. The car operated by defendant failed to make a curve, ran off the road, crashed into a tree, etc., thereby causing Elon Deliliah Hall, one of the passengers, to sustain fatal injuries.

Defendant contends involuntary manslaughter is a "noninfamous" felony for which punishment was limited to two years under G.S. 14-2. This contention was considered and decided adversely to defendant in *State v. Swinney,* 271 N.C. 130, 155 S.E. 2d 545. In *Swinney,* a judgment imposing a sentence of 5-7 years for involuntary manslaughter was pronounced. The Court held: "The defendant's contention that involuntary manslaughter is a misdemeanor for which punishment cannot exceed two years is not sustained." The dissent in *Swinney* did not relate to this holding.

It is noteworthy that G.S. 14-2, as amended by Chapter 1251, Session Laws of 1967, now provides: "Every person who shall be convicted of *any felony* for which no specific punishment is prescribed by statute shall be punishable by fine, by imprisonment for a term not exceeding ten years, or by both, in the discretion of the court." (Our italics.)

Separate judgments, each imposing a prison sentence, were pronounced. Each judgment is complete within itself. Absent an order to the contrary, these sentences run concurrently as a matter of law. *State v. Duncan,* 208 N.C. 316, 180 S.E. 595; *In re Parker,* 225 N.C. 369, 35 S.E. 2d 169; *State v. Stonestreet,* 243 N.C. 28, 89 S.E. 2d 734; *State v. Troutman,* 249 N.C. 398, 106 S.E. 2d 572. It is noted that G.S. 15-6.2, based on Chapter 57, Session Laws of 1955, provides: "When by a judgment of a court or by operation of law a prison sentence runs concurrently with any other sentence a prisoner shall not be required to serve any additional time in prison solely

because the concurrent sentences are for different grades of offenses or that it is required that they be served in different places of confinement."

No error.

STATE OF NORTH CAROLINA v. GEORGE HARRIS.

(Filed 8 November, 1967.)

1. **Criminal Law § 115—**

Where all of the evidence tends to show robbery by firearms, it is not error for the court to fail to submit the question of defendant's guilt of forcible trespass.

2. **Constitutional Law § 31—**

A defendant's right of confrontation cannot be impinged by the failure of the State to have one of the State's witnesses testify, there being no contention by defendant that the testimony of the State's witness could have benefited him in any way.

3. **Criminal Law § 173—**

Defendant may not complain of testimony which he himself elicits from a witness, the testimony being responsive to defendant's questioning.

4. **Criminal Law § 99—**

The court's admonition to defendant on occasions in which defendant is disrespectful in his attitude to the court, is proper.

APPEAL by defendant from *Canaday, J.*, Second June 1967 Regular Criminal Session of WAKE County Superior Court.

The defendant was convicted of the robbery of J. D. Blair on 9 April 1967 and from a judgment of imprisonment of not less than eight (8) nor more than ten (10) years appealed to this Court.

Mr. Blair, the manager of the Raleigh Western Union office, testified that on 9 April 1967 he was robbed of $233.00. He identified the defendant as the robber, as did a Raleigh police officer who saw the defendant walking back and forth in front of the Western Union office about twenty minutes before the robbery, "looking very suspicious." The defendant was arrested by Lt. Bunn of the Raleigh Police Department a few minutes after the robbery, some three blocks from the scene.

The defendant was fully informed of his rights and refused the appointment of counsel.

He was charged in a bill of indictment with robbery with firearms, and some ten weeks after his arrest his case was called for trial. He asked further time to prepare his defense but gave no other reason, and his request was declined.

The Court again informed him he was entitled to counsel which he refused, and the case was then tried, resulting in his conviction of robbery.

Sheldon L. Fogel, Court-appointed attorney for defendant appellant.

Thomas Wade Bruton, Attorney General; Parks H. Icenhour, Assistant Attorney General; William B. Ray, Staff Attorney; and Frank M. Matlock, Staff Attorney, for the State.

PER CURIAM. The State's evidence tended to show that Harris had asked Mr. Blair if he had a Western Union money order for him and left when told that it was not there. About forty-five minutes later, he returned and made the same inquiry. He was again informed that there was no money for him, and the defendant then told Mr. Blair, "he said that he had a gun or weapon in his pocket and that this was a holdup and he wanted all my money. . . . He came through the gate with his left hand in his pocket. He did not take his hand out of his pocket. He came through the gate still saying that this was a holdup, and I let him have the money that was in a metal box in a safe." These facts, if believed, would constitute robbery. *State v. Lunsford,* 229 N.C. 229, 49 S.E. 2d 410. The defendant's exception to the failure of the Court to tell the jury it could return a verdict of forcible trespass is overruled.

The defendant excepted to the absence of Lt. Bunn, demanding the right "to confront his accusers." Lt. Bunn was sick in bed and of course did not testify in the case. The defendant did not subpœna Lt. Bunn, and even if the officer had been present the defendant could not have required the State to use him as a witness. The defendant did not claim that the officer could have benefited him by his testimony but merely demanded that he be allowed "to confront his accusers." The Solicitor said that he would not object to the defendant asking about any information Mr. Bunn had, and the Court also told the defendant that he could ask the State's witnesses anything he wanted to about Mr. Bunn.

The defendant called Robert L. Ennis, a Raleigh Police Officer, as a witness and questioned him about what Lt. Bunn knew. Ennis said that Bunn took the money out of the defendant's pocket because Harris told him that he needed some quick money; that Bunn saw the bulge in Harris' pocket and took a knife off of him and "the money."

Harris testified that he had gotten off the bus about three min-

utes before he was arrested and denied any connection with the robbery.

The record indicates that the defendant was disrespectful in his attitude toward the Court, causing the Judge to admonish him upon two occasions. The defendant excepted to these admonitions, but they were entirely proper and were justified by the defendant's conduct.

The jury in a fair trial and with a proper charge found the defendant guilty.

No error.

STATE v. CLAUDE VANCE COOLEY.

(Filed 8 November, 1967.)

Criminal Law § 114—

Where defendant is charged with speeding and with resisting arrest, and the court reverses its refusal to quash the charge of resisting arrest and instructs the jury that the evidence and arguments in regard to that count should be disregarded, the fact that there was evidence that the officers beat the defendant with their fists after he had been brought to a stop after the speeding incident cannot constitute an expression of opinion by the court, since all of the evidence relative to the charge of resisting arrest is irrelevant to the charge of speeding, and the court correctly instructs the jury not to consider same.

APPEAL by defendant from *Clark, J.*, Special Criminal Assigned Session 1967 of WAKE.

Defendant was tried in the Recorder's Court of Wake Forest under warrants charging him with operating an automobile at a greater rate of speed than allowed by law, to-wit, 90 miles per hour in a 60 mile per hour zone, and with resisting arrest. From verdict of guilty on both charges, he appealed to the Wake County Superior Court.

In the Superior Court, defendant entered a plea of not guilty as to the warrant charging speeding, and made a motion to quash the warrant charging resisting arrest. The motion was denied and defendant entered a plea of not guilty as to that charge.

Trooper K. A. Cook of the State Highway Patrol testified for the State in substance as follows:

On the night of 21 December 1966, Trooper Cook pursued defendant for about eight-tenths of a mile in a 60 mile per hour zone and clocked defendant's speed at 110 miles per hour top speed. De-

fendant stopped when Cook sounded his siren and flashed his light. Defendant, after being placed under arrest, resisted a routine search. Troopers Cook and East then struck defendant with their fists, after which defendant gave no further resistance.

In charging the jury, the judge stated that he had reconsidered the motion to quash and was reversing his ruling thereon. The judge instructed the jurors not to consider the evidence and arguments of counsel as to that charge and to concern themselves only with the charge of speeding.

The jury returned a verdict of speeding 90 miles per hour in a 60 mile per hour zone. Defendant's motions to set aside the verdict as against the greater weight of the evidence, for arrest of judgment, and for a new trial were denied and judgment was entered on the verdict.

Defendant appealed.

Attorney General Bruton and Staff Attorney (Mrs.) Christine Y. Denson, for the State.

Carl C. Churchill, Jr., for defendant.

PER CURIAM. Defendant's principal assignment of error is that the court committed error by charging the jury as follows:

> "Members of the jury, I inform you now that the court has reconsidered the defendant's motion to quash the indictment and reverses its ruling and allows the defendant's motion. So that charge in the separate warrant will not be before you and in that connection, I instruct you that since you have heard some evidence in regard to that charge and the arguments of the solicitor and defense counsel, I instruct you not to let that evidence or argument prejudice you in any respect, either against the State or defendant. Just disregard that and only concern yourself with the one charge of speeding 90 miles per hour in a 60 mile per hour zone."

Appellant contends that this portion of the charge is an expression of opinion as to the credibility of the State's witness, in that his instruction took away from the jury the evidence of assault upon the defendant by the State's witness. We cannot agree. When the court reversed its position and quashed the warrant, it became the court's duty to properly instruct the jury concerning this action.

> "The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring into

view the relation of the particular evidence adduced to the particular issue involved." *State v. Friddle,* 223 N.C. 258, 25 S.E. 2d 751.

It would seem if any opinion were expressed by the court, it was to the defendant's benefit and to the State's detriment.

Defendant had a trial which was without error by an able and fair judge.

No error.

STATE OF NORTH CAROLINA v. ROY ALLEN WHISNANT.

(Filed 8 November, 1967.)

Constitutional Law § 31—

Where defendant changes his plea from guilty to not guilty and requests the court to allow him time to obtain witnesses from other states, it is error for the court to force him to trial on the succeeding day, since under the facts of this particular case defendant was not given time to prepare for trial.

APPEAL by defendant from *Campbell, J.,* May 1967 Session Criminal Court of CALDWELL County Superior Court.

The defendant was charged in a bill of indictment with assault with a deadly weapon with the intent to kill his brother-in-law, James Albert Wheatley. He was brought before the court on 15 May 1967 at which time he was found to be an indigent, and counsel was appointed to represent him. After consultation with his attorney, the defendant was again brought into open court and pleaded guilty to an assault with a deadly weapon, a misdemeanor. The court informed the defendant that by entering this plea he was waiving his constitutional right to attack his alleged unlawful arrest. Upon this statement, the defendant requested that he be allowed to withdraw his plea of guilty and enter a plea of not guilty, which was allowed. The defendant then requested the court to continue his case while he could obtain witnesses from the State of West Virginia and the State of Florida. The record does not show what evidence the witnesses could have given, and the court denied the request. The defendant's attorney then requested the court to continue the case until the following week, which was also denied. The case was then tried, resulting in a verdict of guilty of assault with a deadly weapon, a misdemeanor; and from judgment of imprisonment for two years, the defendant appealed.

The State's evidence was sufficient to support a verdict of guilty

of the felonious charge, but in view of the disposition of the case we find it unnecessary to summarize it.

The defendant testified that he did not cut Wheatley and did not know who had.

Paul L. Beck, Court appointed attorney for defendant appellant.

T. W. Bruton, Attorney General, and James F. Bullock, Deputy Attorney General, for the State.

PER CURIAM. The defendant having plead guilty of assault with a deadly weapon in open court, it is to be presumed that the jurors were present and heard this plea. When it was withdrawn and the defendant placed on trial the next day, we can only assume that the jurors remembered this and that the defendant was thus placed in a prejudiced position in his trial.

While the court could not compel the attendance of witnesses from Florida and West Virginia, it is possible that had the case been continued for the term, or at least continued until the second week as requested by the defendant, that he might have been able to persuade them to come to Lenoir for his trial.

While only vague reasons were given for the motions to continue and to postpone the trial, counsel was entitled to a reasonable time in which to investigate the case against his new client.

In *State v. Whitfield,* 206 N.C. 696, 175 S.E. 93, Chief Justice Stacy said:

> "[T]he right of confrontation carries with it, not only the right to face one's 'accusers and witnesses with other testimony' (sec. 11, Bill of Rights), but also the opportunity fairly to present one's defense. . . . A right observed according to form, but at variance with substance, is a right denied." (showing citations.)
>
> "That a reasonable time for the preparation of a defendant's case should be allowed counsel appointed by the court to defend him commends itself, not only as a rule of reason, but also as a rule of law, and is so established by the decisions. Annotation, 84 A.L.R., 544."

The defendant assigns other alleged errors, but since they will probably not be repeated in a future trial, we find it unnecessary to discuss them.

New trial.

LESSIE MAE HINSON v. CATO'S, INC.

(Filed 8 November, 1967.)

1. Negligence § 37b—

A store owner is not an insurer of his patrons against injury from falling upon the floor of the store, and the doctrine of *res ipsa loquitur* does not apply thereto, but the customer must show that the owner negligently created a condition causing the injury or that he negligently failed to rectify a dangerous condition created by others within a reasonable time after notice, express or implied.

2. Negligence § 37f—

Evidence that plaintiff slipped and fell upon a slick or waxed spot on the floor of a store, without any evidence as to what caused the condition or as to how long the condition had existed, is insufficient to support an issue of negligence on the part of the store proprietor.

APPEAL by defendant from *Brock, S.J.*, 22 May 1967 Session Superior Court, RICHMOND County.

The plaintiff went to the defendant's store and later went to a ladies' room which was provided for the use of the defendant's employees *only*. Upon emerging from it, she stepped on something which caused her to fall and sustain injuries. After her fall she saw a waxy, slick spot on the floor and a skid mark made by her heel through the spot where she fell. Her son testified that upon hearing of his mother's fall, he came to the store and looked. He said that at first you could not see the slick waxy-looking spot where she fell.

Other evidence offered by the plaintiff shed no light upon her cause. Except as stated above, there was no evidence as to the condition of the floor, what caused it, or how long it had been there.

The defendant's evidence was that the floor had not been waxed for two months.

At the conclusion of all the evidence, the defendant moved for judgment as of nonsuit which was denied. The jury answered issues of negligence, contributory negligence, and damages in favor of the plaintiff, and the defendant appealed.

Leath, Bynum, Blount & Hinson, Attorneys for defendant appellant.

Webb, Lee & Davis by Denny Sharpe, Attorneys for plaintiff appellee.

PER CURIAM. A store owner does not insure his patrons against slipping or falling upon the floor. *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 130 S.E. 2d 281. The doctrine of *res ipsa loquitur* does not apply in such cases. *Skipper v. Cheatham*, 249 N.C. 706, 107

S.E. 2d 625. To hold the owner liable, the injured person must show: (1) that the owner negligently created the condition causing the injury, or (2) that it negligently failed to correct the condition after notice, either express or implied, of its existence. The mere fact that one slips and falls on a floor does not constitute evidence of negligence, nor does the fact that a floor is waxed make the owner liable. *Barnes v. Hotel Corp.*, 229 N.C. 730, 51 S.E. 2d 180. Also, the customer has the duty to (1) see that which can be seen in the exercise of ordinary prudence, and (2) use reasonable safeguards to protect himself. *Berger v. Cornwell,* 260 N.C. 198, 132 S.E. 2d 317.

The plaintiff's evidence falls short on all counts. A "waxy, slick spot" could be created in many ways, such as a wad of chewing tobacco, a partially finished child's candy sucker, a bit of banana peel, a tomato, or almost any other vegetable or candy. Its presence cannot be legally ascribed to the merchant without proof. When dozens, even hundreds, of customers throng the aisles of a supermarket, it would impose an impossible burden on the owner to make him responsible for the thoughtless, or even negligent, acts of each customer who might throw an apple peel or even something more slimy or objectionable on the floor. Until the owner has, or should have had, reasonable notice to remedy such condition, he cannot be held responsible.

Even if a negligent situation could be assumed here, had it existed a week, a day, an hour, or one minute? The record is silent; and since the plaintiff must prove her case, we cannot assume, which is just a guess, that the condition had existed long enough to give the defendant notice, either actual or implied.

The plaintiff has failed to meet the requirements which permit the cause to be submitted to the jury.

Reversed.

FELICIA S. SNELL v. CAUDLE SAND & ROCK COMPANY, INC.

(Filed 8 November, 1967.)

Automobiles § 79—

Evidence that plaintiff, traveling east on a dominant highway, did not see defendant's truck which had turned left into the median between the east and westbound lanes, and then started across the eastbound lane, until she was some 138 feet from the truck, and that she collided with the rear wheel of the truck as it was traversing her lane of travel, *held* not to disclose contributory negligence as a matter of law.

APPEAL by defendant from *Braswell, J.*, Second February, Regular Civil Session, 1967, WAKE County Superior Court.

Upon the first trial of this case, the Court below allowed the defendant's motion for nonsuit. Upon appeal, we held this to be error. Chief Justice Parker well summarized the plaintiff's evidence in the opinion of the Court (267 N.C. 613, 148 S.E. 2d 608). No useful purpose would be served in repeating it in detail.

The plaintiff's evidence was to the effect that she was driving her car at a lawful speed eastwardly on U. S. Highway #70 about two and a half miles west of Raleigh. At that place, U. S. Highway #70 consists of two lanes for eastbound traffic and two for westbound traffic, they being separated by a grass median. The accident occurred where Rural Paved Road #1666 crosses U. S. #70 in a north-south direction. At that point there is an unobstructed view to the west for four-tenths of a mile. When the plaintiff was 138 feet from Rural Paved Road #1666, she saw defendant's truck in and crossing U. S. #70, "just dashing across the highway." She applied her brakes but collided with the truck, the right front of her car striking the right rear wheel of the truck. She saw no turn signal.

The plaintiff also offered the adverse examination of George L. Sledge who was driving the defendant's truck. He said he turned left from the westbound lane of U. S. #70 to the median strip, at which time he saw the plaintiff. "The next time was when I was leaving the highway. . . . Between the first and second times I saw her, I was looking straight ahead [south] in the direction I was going. . . . As I approached the cross-over I did not see the automobile driven by Mrs. Snell. I didn't pay any attention because when I was approaching the cross-over I was looking straight ahead and then I turned in and that's when I looked."

The defendant offered testimony as to the scene of the collision and damage to its truck, but no evidence as to the event itself.

Issues of negligence, contributory negligence, and damage were submitted to the jury, and all were answered in favor of the plaintiff. The defendant appealed.

Teague, Johnson, Patterson, Dilthey & Clay by Ronald C. Dilthey, Attorneys for defendant appellant.

Maupin, Taylor & Ellis by William W. Taylor, Jr., Attorneys for plaintiff appellee.

PER CURIAM. Upon the second trial the evidence of the plaintiff was substantially the same as upon the first one. We have al-

ready held that it was sufficient to repel the defendant's motion for nonsuit, and to this we adhere.

In addition to the evidence at the previous trial, the plaintiff offered the adverse examination of defendant's driver, Sledge, which was summarized above.

The defendant's evidence tended to show that Mrs. Snell had an unobstructed view of the crossing for one-third of a mile, and it urged that her failure to see the truck until she was 138 feet from it showed she was not keeping a proper lookout and that the collision itself indicated that she did not have her car under proper control.

This presented a question for the jury upon the defendant's plea of contributory negligence. Upon correct instructions, it has been determined adversely to the defendant.

The defendant brings forth several alleged errors in the charge. If such they be, we are of the opinion, after considering them, that they were not substantial or prejudicial.

No error.

ELEANOR B. O'NEIL, FRASER KNIGHT O'NEIL, AND FIRST UNION NATIONAL BANK OF NORTH CAROLINA, EXECUTOR AND TRUSTEE UNDER THE WILL OF JOHN C. BARRON, DECEASED, v. MICHELLE O'NEIL, MOLLY O'NEIL AND MICHAEL O'NEIL, MINORS; AND THE UNBORN ISSUE OF ELEANOR B. O'NEIL.

(Filed 8 November, 1967.)

1. **Appeal and Error § 68—**

Decision on appeal dismissing the action on the ground that the evidence did not present a *bona fide* controversy between the parties requires by inference that upon the subsequent hearing the cause be tried when the evidence is supplemented to disclose such *bona fide* controversy.

2. **Executors and Administrators § 31—**

In this action disclosing a *bona fide* controversy as to the validity of the paper writing probated, judgment of the court approving a family settlement and modifying the will in accordance therewith in order to preserve the estate and promote family harmony, is affirmed.

3. **Appeal and Error § 8—**

Where subsequent to judgment a corporate party has merged with another corporation and succeeded to the status of the former corporation, the merged corporation will be substituted as a party in the Supreme Court.

APPEAL by P. H. Wilson, guardian *ad litem* for Michelle O'Neil, Molly O'Neil and Michael O'Neil, minors, and guardian *ad litem*

for the unborn issue of Eleanor B. O'Neil, defendant, from a judgment rendered by His Honor, *John D. McConnell, Resident Judge* of the Twentieth Judicial District, in chambers, on August 31, 1967. From MOORE.

E. O. Brogden, Jr., and Hoyle & Hoyle for plaintiff appellees Eleanor B. O'Neil and Fraser Knight O'Neil.

Leath, Bynum, Blount & Hinson for plaintiff appellee First Union National Bank of North Carolina.

William D. Sabiston, Jr., for defendant appellant P. H. Wilson, guardian ad litem.

PER CURIAM. The provisions of the judgment of August 31, 1967, are identical in all material respects with the judgment dated March 8, 1967, considered by this Court in *O'Neil v. O'Neil,* 271 N.C. 106, 155 S.E. 2d 495. The facts pertinent to this appeal are set forth fully in our preliminary statement in connection with said former appeal in this cause.

In vacating the judgment of March 8, 1967, considered on former appeal, this Court said: "We do not hold there is no *bona fide* controversy as to the validity of the 'Will.' We do hold, and all that we hold, is that there is no evidence in the present record sufficient to support the court's finding that such *bona fide* controversy exists. Accordingly, the judgment of the court below is vacated and the cause is remanded for further proceedings not inconsistent with this opinion. If there exists in fact a genuine and *bona fide* controversy as to the validity of the 'Will,' the proposed modifications of its dispositive provisions seem reasonable and not adverse to the best interests of the defendants."

After certification of our decision on former appeal, the cause was again heard by Judge McConnell, at which time evidence was offered, which evidence is set forth in the present record, sufficient in our opinion to sustain the finding in the present judgment that "(t)here is a *bona fide* controversy regarding the validity of the paper writing dated October 7, 1964, purporting to be the last will and testament of John C. Barron." In view of this factual finding, and predicated thereon, we are of opinion, and so decide, that the judgment entered by Judge McConnell on August 31, 1967, approving the "family settlement agreement" dated January 24, 1967, and modifying in accordance therewith the dispositive provisions of the paper writing dated October 7, 1964, probated in common form as the last will and testament of John C. Barron, deceased, should be, and it is hereby, affirmed.

Subsequent to Judge McConnell's order of August 31, 1967, The Citizens Bank and Trust Company of Southern Pines was merged into First Union National Bank of North Carolina which, pursuant to such merger, succeeded to the status of The Citizens Bank and Trust Company of Southern Pines as executor and trustee under the will of John C. Barron, deceased. By consent, and by order of this Court, the said First Union National Bank of North Carolina, in its capacity as executor and trustee under the will of John C. Barron, deceased, has been substituted as a party plaintiff in this cause in lieu of The Citizens Bank and Trust Company of Southern Pines.

Affirmed.

APPENDIX.

SUPPLEMENTARY RULES GOVERNING THE HEARING OF CAUSES IN THE SUPREME COURT WHICH WERE ORIGINALLY DOCKETED IN THE COURT OF APPEALS AND OTHER RULES REQUIRED BY THE ACT ESTABLISHING THE COURT OF APPEALS.

Rule 1. Discretionary Review by the Supreme Court Before Determination by the Court of Appeals.

(a) Causes docketed in the Court of Appeals for appellate review may be certified for appellate review by the Supreme Court, before determination by the Court of Appeals, upon petition for writ of *certiorari* filed in the Supreme Court by any of the parties when:

(1) the subject matter of the appeal has significant public interest, or

(2) the cause involves legal principles of major significance to the jurisprudence of the State, or

(3) delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm.

A petition for writ of *certiorari* filed under subsection (a) of this rule shall be filed within fifteen days after the cause is docketed in the Court of Appeals; in all other respects Rule 34 of the Rules of Practice in the Supreme Court shall apply.

(b) The Supreme Court, upon its own motion and in accordance with a memorandum of procedure issued from time to time by the Supreme Court, may certify for appellate review by the Supreme Court, before determination by the Court of Appeals, causes docketed in the Court of Appeals for appellate review when in the opinion of the Supreme Court:

(1) the subject matter of the appeal has significant public interest, or

(2) the cause involves legal principles of major significance to the jurisprudence of the State, or

(3) delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm, or

(4) the work load of the Courts of the Appellate Division is such that the expeditious administration of justice requires certification.

NOTE: Neither subsection (a) nor (b) of this rule is applicable to appeals docketed in the Court of Appeals from the North Carolina Utilities Commission or the North Carolina Industrial Commission; or to post-conviction proceedings under Article 22, Chapter 15, of the General Statutes of North Carolina.

Rule 2. Discretionary Review by the Supreme Court After Determination by the Court of Appeals.

(a) Causes determined by the Court of Appeals may be certified for further appellate review by the Supreme Court upon petition for writ of *certiorari* filed in the Supreme Court by any of the parties when:

(1) the subject matter of the appeal has significant public interest, or

(2) the cause involves legal principles of major significance to the jurisprudence of the State, or

(3) the decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

Interlocutory determinations by the Court of Appeals, including orders remanding the cause for a new trial or for other proceedings, shall be certified for review by the Supreme Court only upon a determination by the Supreme Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm.

A petition for writ of *certiorari* filed under subsection (a) of this rule shall be filed within fifteen days after the date of the certification to the trial tribunal of the determination of the Court of Appeals; in all other respects Rule 34 of the Rules of Practice in the Supreme Court shall apply.

(b) The Supreme Court, upon its own motion and in accordance with a memorandum of procedure issued from time to time by the Supreme Court, may certify causes determined by the Court of Appeals for further appellate review by the Supreme Court when in the opinion of the Supreme Court:

(1) the subject matter of the appeal has significant public interest, or

(2) the cause involves legal principles of major significance to the jurisprudence of the State, or

(3) the decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

Interlocutory determinations by the Court of Appeals, including orders remanding the cause for a new trial or for other proceedings, shall be certified for review by the Supreme Court only upon a determination by the Supreme Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm.

In causes certified under subsection (a) or (b) of this rule the Supreme Court will review the decision of the Court of Appeals.

NOTE: Neither subsection (a) nor (b) of this rule applies to post-conviction proceedings under Article 22, Chapter 15, of the General Statutes of North Carolina.

Rule 3. Appeals as of Right From the Court of Appeals to the Supreme Court.

When an appeal as a matter of right is taken to the Supreme Court from a decision of the Court of Appeals, the appealing party shall, within fifteen days from the date of the certificate of the clerk of the Court of Appeals to the trial tribunal, give written notice of appeal to the clerk of the Court of Appeals, to the clerk of the Supreme Court, and to the opposing parties.

Rule 4. "Appellant" Defined.

The word "appellant" as used in these Supplementary Rules means: (1) With respect to appeals as of right, the party who appeals from the decision of the Court of Appeals to the Supreme Court; (2) With respect to discretionary review by the Supreme Court after determination by the Court of Appeals, the party who petitioned for *certiorari* or other writ.

Rule 5. Record on Appeal in the Supreme Court—What Constitutes.

When a cause is docketed in the Supreme Court pursuant to the provisions of Rule 1 or Rule 2 of these Supplementary Rules, or pursuant to G.S. 7A-30, the record and exhibits, if any, docketed in the Court of Appeals shall constitute the record on appeal in the Supreme Court; provided such record complies with the Rules of the Court of Appeals.

Rule 6. Records and Briefs.

When a cause is removed to the Supreme Court pursuant to Rule 1 of these Supplementary Rules, twelve copies of the record and twelve copies of the brief of the respective parties, if filed, shall be filed in the office of the clerk of the Supreme Court; provided, however, if the briefs have not been filed at the time of the removal of the cause, twelve copies of the respective briefs must be filed with the clerk of the Supreme Court and the remaining number of said briefs required by Rule 27 of the Rules of the Court of Appeals shall be filed with the clerk of the Court of Appeals.

Rule 7. Records and Briefs — Review of a Determination of the Court of Appeals by Supreme Court.

When a cause is allowed to be docketed in the Supreme Court for review of the determination made by the Court of Appeals, as provided by Rule 2 of these Supplementary Rules, or pursuant to G.S. 7A-30, twelve copies of the record and twelve copies of the brief of the respective parties shall be filed with the clerk of the Supreme Court, subject to the provisions contained in Rule 5 of these Supplementary Rules. Provided, however, in all causes for review of a determination made by the Court of Appeals, the respective parties shall file a new or supplemental brief dealing with the question or questions sought to be reviewed by the Supreme Court.

Rule 8. Briefs in Causes for Review.

When a cause is docketed in the Supreme Court for review of a determination made by the Court of Appeals, the cause shall not be calendared for hearing until after the expiration of twenty-eight days from the date the cause was docketed in the Supreme Court. And the appellant shall have fourteen days after the cause is docketed in the Supreme Court to file twenty-five copies of a new or supplemental brief. The appellee shall file twenty-five copies of a new or supplemental brief within twenty-one days after the cause is docketed in the Supreme Court. (In pauper appeals, briefs may be filed as provided by Rule 22 of the Rules of Practice in the Supreme Court.)

Rule 9. Time of Hearing a Cause for Review.

When a cause has been determined in the Court of Appeals and a petition for *certiorari* or other writ is allowed and the cause ordered docketed in the Supreme Court for review, the Supreme Court may calendar the cause for hearing at any time it may deem appropriate after the expiration of twenty-eight days from the date on which the cause was docketed in the Supreme Court.

Rule 10. Hearing of Causes Not Determined by the Court of Appeals.

When a cause has been docketed in the Supreme Court before a determination thereof has been made by the Court of Appeals, the Supreme Court may calendar the cause for hearing at such time as it may deem appropriate; provided the time has expired in which the cause might have been calendared for hearing in the Court of Appeals.

Rule 11. Removal of Cause Not Determined by the Court of Appeals Does Not Extend Time for Filing Briefs.

The removal of a cause to the Supreme Court from the Court of Appeals before the Court of Appeals has determined the cause shall not extend the time for filing briefs by the respective parties unless otherwise ordered by the Supreme Court.

Rule 12. Notice to Counsel of Record With Respect to Time of Hearing.

The clerk of the Supreme Court shall give twenty days' notice to counsel of record in a cause prior to the time set for hearing the cause in the Supreme Court. Such notice shall apply to all hearings in the Supreme Court in which the cause was originally docketed in the Court of Appeals.

Rule 13. Causes Transferred by Written Order.

Whenever a cause which has been filed with the Court of Appeals is to be heard by the Supreme Court under provisions of G.S. 7A-31, either before or after hearing by the Court of Appeals, the Supreme Court will in writing order the transfer of said cause to the Supreme Court.

Rule 14. Appeals from District Court Pending in Superior Court—How Disposed of.

Civil cases tried in the District Court in which notice of appeal to the Superior Court has been given on or before September 30, 1967, and which have not been finally determined in the Superior Court on that date, shall be disposed of in the Superior Court in accordance with the laws and rules governing such appeals which were applicable immediately prior to the first day of October, 1967. This rule is made pursuant to the provisions of G.S. 7A-35(a).

Rule 15. Appeals from Industrial Commission and Utilities Commission Pending in Superior Court—How Disposed of.

All causes heard by the Industrial Commission, and all causes heard by the Utilities Commission, in which notice of appeal to the Superior Court has been given on or before September 30, 1967, and which have not been finally determined in the Superior Court on that date, shall be disposed of in the Superior Court in accordance with the laws and rules governing such appeals which were applicable immediately prior to the first day of October, 1967. This rule is made pursuant to the provisions of G.S. 7A-35(d).

Rule 16. Rules of Practice and Procedure in Superior Court Applicable to District Court.

The rules of practice and procedure now in effect in the Superior Courts shall, where applicable, be the rules of practice and procedure in the District Courts. This rule is made pursuant to G.S. 7A-34. This rule shall become effective October 1, 1967.

Rule 17. Opinions by Emergency Justices and Judges—How Filed When Period of Service Has Expired.

When an emergency Justice or Judge has been recalled to active service under the provisions of G.S. 7A-39.7, any opinion prepared by him but not filed until after his period of temporary service has expired shall be filed in the same manner and have the same effect as though he were still on active service.

This rule is made pursuant to G.S. 7A-39.8.

* * * * * *

This is to certify that the foregoing Supplementary Rules were approved and adopted in conference by the Supreme Court of North Carolina on September 28, 1967.

BRANCH, J.
For the Court.

APPENDIX.

LIST OF JUDGES 1777 TO 1 JANUARY, 1819.

THE FIRST PERIOD.

Begins in 1777 and ends in 1790, during which the number of the Judges was three.

SAMUEL ASHE, of New Hanover; elected in 1777, was in office in 1790.

SAMUEL SPENCER, of Anson; elected in 1777, was in office in 1799.

JAMES IREDELL, of Chowan; elected in 1777; resigned in 1778.

JOHN WILLIAMS, of Granville; elected in 1778, was in office in 1790.

THE SECOND PERIOD.

From 1790 to 1806, when there were four Judges.

SAMUEL ASHE, elected in 1777, resigned in 1795.

SAMUEL SPENCER, elected in 1777, died in 1794.

JNO. WILLIAMS, elected in 1778, died in 1799.

SPRUCE MCKAY, of Rowan; elected in 1790, was in office in 1806.

JNO. HAYWOOD, of Halifax; elected in 1794; resigned in 1800.

DAVID STONE, of Bertie; elected in 1795, resigned in 1798.

ALFRED MOORE, of Brunswick; elected in 1798, resigned in 1799.

JNO. LOUIS TAYLOR, of Craven; elected in 1798, was in office in 1806.

SAMUEL JOHNSTON, of Chowan; appointed in 1800, resigned in 1803.

JOHN HALL, of Warren; elected in 1800, was in office in 1806.

FRANCIS LOCKE, of Rowan; elected in 1803, was in office in 1806.

THE THIRD PERIOD.

From 1806 to 1 January, 1819, when there were six Judges.

SPRUCE MCKAY, of Rowan; elected 1790, died 1808.

JOHN LOUIS TAYLOR, of Craven; elected 1798, elected to Supreme Court in 1818.

JOHN HALL, of Warren; elected 1800, elected to Supreme Court in 1818.

FRANCIS LOCKE, of Rowan; elected 1803, resigned 1814.

DAVID STONE, of Bertie; elected 1806; resigned 1808.

SAMUEL LOWRIE, of Mecklenburg; elected 1806, died 1817.

BLAKE BAKER, of Warren; appointed 1808, commission expired 1808.

LEONARD HENDERSON, of Granville; elected 1808, resigned 1816.

JOSHUA GRANGER WRIGHT, of New Hanover; elected 1808, died 1811.

HENRY SEAWELL, of Wake; appointed 1811, commission expired 1811.

EDWARD HARRIS, of Craven; elected 1811, died 1813.

HENRY SEAWELL, of Wake; appointed in 1813, resigned 1819.

DUNCAN CAMERON, of Orange; appointed 1814, resigned 1816.

THOMAS RUFFIN, of Orange; elected 1816; resigned 1818.

JOSEPH JOHN DANIEL, of Halifax; appointed 1816, elected to Supreme Court 1832.

ROBERT H. BURTON, of Lincoln; appointed 1818, resigned 1818.

BLAKE BAKER, of Warren; appointed 1818, died 1818.

MEMBERS OF THE SUPREME COURT SINCE 1818.

CHIEF JUSTICES.

John Louis Taylor	1818-1829
Leonard Henderson	1829-1833
Thomas Ruffin	1833-1852
Frederick Nash	1852-1858
Richmond M. Pearson	1858-1878
William N. H. Smith	1878-1889
Augustus S. Merrimon	1889-1893
James E. Shepherd	1893-1895
William T. Faircloth	1895-1901
David M. Furches	1901-1903
Walter Clark	1903-1924
William A. Hoke	1924-1925
Walter P. Stacy	1925-1951
William A. Devin	1951-1954
M. V. Barnhill	1954-1956
J. Wallace Winborne	1956-1962
Emery B. Denny	1962-1966
R. Hunt Parker	1966-

ASSOCIATE JUSTICES.

John Hall	1818-1832
Leonard Henderson	1818-1829
Archibald D. Murphy	*1819-1820
John D. Toomer	1829-1829
Thomas Ruffin	1829-1833
Joseph J. Daniel	1832-1848
William Gaston	1833-1844
Frederick Nash	1844-1852
William H. Battle	1848-1848
Richmond M. Pearson	1848-1858
William H. Battle	1852-1868
Thomas Ruffin	1858-1860
Matthias E. Manly	1860-1865
Edwin G. Reade	1865-1868
Edwin G. Reade	1868-1878
William B. Rodman	1868-1878
Robert P. Dick	1868-1876
Thomas Settle	1868-1876
Nathaniel Boyden	1871-1873
William P. Bynum	1873-1879
William T. Faircloth	1876-1879
Thomas S. Ashe	1879-1887
John H. Dillard	1879-1881
Thomas Ruffin, Jr.	1881-1885
Augustus S. Merrimon	1885-1889
Joseph J. Davis	1889-1893
James E. Shepherd	1889-1893

*Appointed to act in place of Justice Henderson May and November Terms 1819 and June Term 1820, under the Act of 1818.

ALPHONSO C. AVERY 1889-1897
WALTER CLARK....1889-1903
JAMES C. MACRAE....1893-1895
ARMISTEAD BURWELL....1893-1895
DAVID M. FURCHES....1895-1901
WALTER A. MONTGOMERY....1895-1905
ROBERT M. DOUGLAS....1897-1905
CHARLES A. COOK....1901-1903
HENRY G. CONNOR....1903-1909
PLATT D. WALKER....1903-1923
GEORGE H. BROWN....1905-1921
WILLIAM A. HOKE....1905-1924
JAMES S. MANNING....1909-1910
WILLIAM R. ALLEN....1911-1921
WALTER P. STACY....1921-1925
WILLIAM J. ADAMS....1921-1934
HERIOT CLARKSON 1923-1942
GEORGE W. CONNOR....1924-1938
L. R. VARSER....1924-1925
WILLIS J. BROGDEN....1925-1935
MICHAEL SCHENCK....1934-1948
WILLIAM A. DEVIN....1935-1951
M. V. BARNHILL....1937-1954
J. WALLACE WINBORNE....1937-1956
A. A. F. SEAWELL....1938-1950
EMERY B. DENNY....1942-1962
S. J. ERVIN, JR....1948-1954
MURRAY G. JAMES.... 1950
JEFF. D. JOHNSON, JR....1950-1959
I. T. VALENTINE....1951-1952
R. HUNT PARKER....1952-1963
WILLIAM H. BOBBITT....1954-
CARLISLE W. HIGGINS....1954-
WILLIAM B. RODMAN, JR....1956-1965
CLIFTON L. MOORE....1959-1966
SUSIE SHARP....1962-
I. BEVERLY LAKE....1965-
J. WILL PLESS, JR....1966-
JOSEPH BRANCH....1966-

REPORTERS OF CASES DECIDED PRIOR TO JANUARY, 1819.

JUDGE JOHN HAYWOOD (1 and 2 Haywood Reports)....1789-1806
JUDGE F. X. MARTIN (1 and 2 Marin's Reports)....1795-1797
JUDGE JOHN LOUIS TAYLOR (Taylor's Reports)....1799-1802
DUNCAN CAMERON and WILLIAM NORWOOD (Conference Reports)....1802-1805
JUDGE JOHN LOUIS TAYLOR (Carolina Law Repository, 2 Vols.)....1813-1816
JUDGE JOHN LOUIS TAYLOR (Term Reports)....1816-1818
JUDGE A. D. MURPHEY (1 and 2 Murphey)....1804-1813
July Term 1818

REPORTERS SINCE 1819.

ARCHIBALD D. MURPHEY (3 Murphey)....1819
THOMAS RUFFIN (1st part of 1st Hawks) January Term....1820
FRANCIS L. HAWKS....1820-1826
GEO. E. BADGER, with DEVEREUX (1st part of 1st Devereux) January Term 1826

THOMAS P. DEVEREUX....1826-1834
THOS. P. DEVEREUX and WM. H. BATTLE....1834-1840
WM. H. BATTLE (1st part of 1st Iredell) January Term....1840
JAMES IREDELL....1840-1852
PERRIN BUSBEE....1852-1853
QUENTIN BUSBEE (2nd part of Busbee) Fall Term....1853
HAMILTON C. JONES....1853-1863
PATRICK H. WINSTON, SR....1863-1864
SAMUEL F. PHILLIPS....1866-1870
JAMES M. MCCORKLE....1871
WM. M. SHIPP (Attorney-General)....1872
TAZEWELL L. HARGROVE (Attorney-General)....1873-1876
THOS. S. KENAN (Attorney-General)....1877-1884
THEO. F. DAVIDSON (Attorney-General)....1885-1892
ROBERT T. GRAY....1893-1898
RALPH P. BUXTON....1899-1900
ZEB V. WALSER....1891-1904
J. CRAWFORD BIGGS....1905-1906
ROBERT C. STRONG....1907-1939
JOHN M. STRONG....1939-1967

APPELLATE DIVISION REPORTERS.

JOHN M. STRONG....1967-
WILSON B. PARTIN, JR. (Assistant Reporter)....1967-

CLERKS.

WILLIAM ROBARDS....1819-1828
JOHN LAWSON HENDERSON....1828-1843
EDMUND B. FREEMAN....1843-1868
CHARLES B. ROOT....1868-1869
WILLIAM HENRY BAGLEY....1869-1886
THOMAS S. KENAN....1886-1911
JOSEPH L. SEAWELL....1911-1923
EDWARD C. SEAWELL....1923-1931
FRANK NASH....1931-1932
EDWARD MURRAY....1932-1941
ADRIAN J. NEWTON....1941-

MARSHALS OF THE SUPREME COURT.

JOHN TODD COCKE WIATT....1841-1855
JAMES LITCHFORD....1855-1868
DAVID ALEXANDER WICKER....1869-1879
ROBERT HENRY BRADLEY....1879-1918
MARSHALL DELANCEY HAYWOOD....1918-1930
EDWARD MURRAY....1930-1932
DILLARD SCOTT GARDNER....1937-1964
RAYMOND MASON TAYLOR....1964-

LIBRARIANS OF THE SUPREME COURT LIBRARY.

ROBERT HENRY BRADLEY....1883-1918
MARSHALL DELANCEY HAYWOOD....1918-1930
JOHN ALEXANDER LIVINGSTONE....1930-1937
DILLARD SCOTT GARDNER....1937-1964
RAYMOND MASON TAYLOR....1964-

ATTORNEYS-GENERAL OF NORTH CAROLINA.

Name	Years
Waightstill Avery	1777-1779
James Iredell	1779-1782
Alfred Moore	1782-1790
J. John Haywood	1791-1794
Blake Baker	1794-1803
Henry Seawell	1803-1808
Oliver Fitts	1808-1810
William Miller	1810
Hutchins G. Burton	1810-1816
William Drew	1816-1825
James F. Taylor	1825-1828
Robert H. Jones	1828
Romulus M. Saunders	1828-1834
John R. J. Daniel	1834-1840
Hugh McQueen	1840-1842
Spier Whitaker	1842-1846
Edward Stanly	1846-1848
Bartholomew F. Moore	1848-1851
William Eaton	1851-1852
Matt W. Ransom	1852-1855
Joseph B. Batchelor	1855-1856
William H. Bailey	1856
William A. Jenkins	1856-1862
Sion H. Rogers	1862-1868
William M. Coleman	1868-1869
Lewis P. Olds	1869-1870
William M. Shipp	1870-1872
Tazewell L. Hargrove	1872-1876
Thomas S. Kenan	1876-1884
Theodore F. Davidson	1884-1892
Frank I. Osborne	1892-1896
Zeb V. Walser	1896-1900
Robert D. Douglas	1900-1901
Robert D. Gilmer	1901-1908
T. W. Bickett	1909-1916
James S. Manning	1917-1925
Dennis G. Brummitt	1925-1935
A. A. F. Seawell	1935-1938
Harry McMullan	1938-1955
William B. Rodman	1955-1956
George B. Patton	1956-1958
Malcolm B. Seawell	1958-1960
Thomas Wade Bruton	1960-

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"While Acting in Line of Duty"—Within purview of Retirement System, *In re Duckett,* 430.

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Wrongful Death—Action for wrongful death see Death.

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ANALYTICAL INDEX

ACTIONS.

§ 3. Moot Questions.

Before a party can invoke the jurisdiction of a court to redress or protect against a wrongful act done or threatened, he must allege that he is or will be adversely affected thereby in some manner, and is thus the real party in interest. *Oil Co. v. Richardson*, 696.

ADMINISTRATIVE LAW.

§ 3. Duties and Authority of Administrative Boards and Agencies in General.

Administrative board has only that authority conferred on it by statute, expressly or by implication. *Harrill v. Retirement System*, 357.

§ 5. Appeal, Certiorari and Review as to Administrative Orders.

Where the findings of fact of an administrative agency are made in good faith and are supported by competent evidence, its findings are conclusive on appeal, and it is error for the court to substitute its own findings of fact for those of the agency. *Jamison v. Kyles*, 722.

APPEAL AND ERROR.

§ 5. Supervisory Jursidiction of Supreme Court and Matters Cognizable Ex Mero Motu.

The Supreme Court, in the exercise of its supervisory jurisdiction, may determine an appeal on its merits when decision affects the public interest, notwithstanding the appeal might be dismissed on procedural grounds. *Harrelson v. Fayetteville*, 87.

When the case must be remanded for a new trial on one exception, the Supreme Court may discuss another exception relating to meritorious matter even though such other exception is not in the approved form. *Power Co. v. Rogers*, 318.

§ 6. Judgments and Orders Appealable.

The right of appeal in condemnation proceedings is the same as in any other civil action, G.S. 136-119, and appeal lies in such proceedings from a final judgment and also from an interlocutory order which affects a substantial right and which would result in injury if not corrected before final judgment. *Highway Commission v. Nuckles*, 1.

When an interlocutory order in condemnation proceedings adjudicates that respondents own the land involved in the proceeding, the Highway Commission must appeal immediately if it wishes to litigate its contention that it had acquired in prior proceedings practically all the land in question, since trial of the issue of damages would be a futile thing if respondents did not own the land. *Ibid.*

Whether an appeal from the denial of a pretrial examination is subject to dismissal as premature *held* moot when *certiorari* bringing the entire case before the Supreme Court is allowed. *Furr v. Simpson*, 221.

A motion to strike allegations on the ground that they failed to state a cause of action is equivalent to a demurrer, and an order allowing the motion

APPEAL AND ERROR—*Continued.*

has the effect of sustaining a demurrer, and is appealable. G.S. 1-277. *Davis v. Highway Commission*, 405.

A motion to strike which challenges the legal sufficiency of the pleadings will be treated as a demurrer. *Oil Co. v. Richardson*, 696.

§ 8. Death and Substitution of Parties.

Where subsequent to judgment a corporate party has merged with another corporation and succeeded to the status of the former corporation, the merged corporation will be substituted as a party in the Supreme Court. *O'Neil v. O'Neil*, 741.

§ 9. Moot and Academic Questions.

The Utilities Commission denied the motion of a labor union that the reorganized boards of directors of two bus terminals be required to recognize the rights of the union and its employees as set forth in an existent labor contract. Pending appeal, the contract between the union and the bus line expired, and a new contract was negotiated. *Held:* The expiration of the old contract rendered the question moot, requiring dismissal of the appeal. *Utilities Commission v. Southern Council*, 214.

The Supreme Court will not decide a moot question, and when it appears that the prosecutor of an appeal from an administrative agency has abandoned her appeal and moved to another state, the case will be remanded to the Superior Court with direction to dismiss the appeal from the agency. *Jamison v. Kyles*, 722.

§ 10. Demurrers and Motions in the Supreme Court.

A motion in the Supreme Court to be allowed to amend will not be allowed when, under the law of the case, the requested amendment would appellant nothing. *High v. Broadnax*, 313.

Defendant may file a demurrer *ore tenus* in the Supreme Court for failure of the complaint, together with any amendments, to state facts sufficient to constitute a cause of action. *Beam v. Almond*, 509.

Defendant may not demur in the Supreme Court on the ground of improper joinder. *Ibid.*

§ 24. Exceptions and Assignments of Error to the Charge.

Separate exceptions to the charge for failure of the court to charge the law in respect to distinct and separate legal principles arising on the evidence are improperly grouped under a single assignment of error. *Gregory v. Lynch*, 198.

§ 25. Parties Entitled to Object and Take Exception.

Where the owners are afforded direct access from their land to a service road connected with the lanes of travel for one direction on a limited access highway, with crossover points to the lanes of travel in the other direction, the owners are not entitled to compensation for mere inconvenience as distinguished from denial of access, and therefore an instruction leaving it to the jury to say whether, under the circumstances, respondents had reasonable access to the highway, and authorizing the assessment of damages for loss of access if the jury should find that they did not have reasonable access, cannot be prejudicial to them. *Highway Commission v. Nuckles*, 1.

§ 31. Exceptions and Assignments of Error to the Charge.

An assignment of error for failure of the court to charge on an aspect of the law presented by the evidence should set forth appellant's contention as to what the judge should have charged. *Stutts v. Burcham*, 176.

APPEAL AND ERROR—*Continued.*

§ 36. Making Out and Service of Case on Appeal.

A court has an inherent power to correct its records to make them speak the truth, and therefore the clerk of the Superior Court upon findings based on testimony before him that he had signed an order for publication and had made a certificate, that he had addressed and mailed the notice of publication, and placed the certificate in the file, are conclusive, even though the original record failed to so show, and are sufficient to support the clerk's denial of a motion to set aside the judgment in the proceeding for want of proper service. *York v. York*, 416.

§ 46. Presumptions and Burden of Showing Error.

The presumption is in favor of the correctness of the judgment of the lower court, with the burden upon appellant not only to show error but to show that the alleged error was prejudicial. *Gregory v. Lynch*, 198.

The presumption is in favor of the regularity of proceedings in the lower court, and when it does not appear from the record which of two bases constitutes the foundation for the judgment, the order will be referred to that basis which is sufficient to support it. *London v. London*, 568.

Appellant must make the record disclose what the excluded evidence would have been in order for the appellate court to determine whether its exclusion was prejudicial. *Grimes v. Credit Co.*, 608.

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent. *Parrish v. Publishing Co.*, 711; *James v. Publishing Co.*, 712.

§ 48. Harmless and Prejudicial Error in Admission of Evidence.

The admission in evidence of unsigned carbon copies of letters without evidence that they were made at the same time and by the same mechanical operations as the originals, or evidence that the other party received the originals, while erroneous, cannot be held prejudicial when the contents of the letters were collateral and amounted to mere notice which did not directly concern the issues in the case, and it further appears from the record that the subject matter of the letters was later proved by competent evidence. *Paris v. Aggregates*, 471.

§ 50. Harmless and Prejudicial Error in Instructions.

Instructions to the jury, even though technically erroneous, will not warrant a new trial when such instructions could not have adversely affected the verdict. *Highway Commission v. Nuckles*, 1.

A charge will be construed as a composite whole, and an exception thereto will not be sustained if the charge, so construed, is not prejudicial to appellant. *Gregory v. Lynch*, 198.

§ 53. Error Cured by Verdict.

Where the rights of a party are determined by the answer of the jury to one issue, exceptions relating to other issues are rendered moot and need not be considered on appeal. *Welch v. Jenkins*, 138.

§ 55. Review of Orders Relating to Pleadings.

The denial of a motion to strike will not be disturbed on appeal unless the record affirmatively reveals that the matter sought to be stricken is irrelevant or redundant and that its retention in the pleading will cause harm or injustice if not deleted prior to trial. *Paris v. Aggregates, Inc.*, 471.

APPEAL AND ERROR—*Continued.*

§ 57. Findings or Judgments on Findings.

The court's findings of fact are conclusive when supported by competent evidence even though there also be evidence which would support a contrary finding. *Highway Commission v. Nuckles*, 1.

An exception to a finding of fact which is not material to the decision will not be sustained. *Reynolds Co. v. Highway Commission*, 40.

Where the judgment is supported by correct conclusions of law supported by evidence, the correctness of another conclusion of law need not be determined upon appeal. *Ibid.*

Findings of the trial court supported by evidence are conclusive on appeal. *Industrial Center v. Liability Co.*, 158; *Fast v. Gulley*, 208.

The presumption that the court disregarded incompetent evidence in making its findings of fact does not obtain when the record affirmatively discloses that a finding was based, in part at least, on incompetent evidence heard over objection. *Hicks v. Hicks*, 204.

The court's finding supported by competent evidence will not ordinarily be disturbed, even though some incompetent evidence was also heard, since it will be presumed that the court disregarded the incompetent evidence in making its finding. *Highway Commission v. Thornton*, 227.

§ 59. Judgments on Motions to Nonsuit.

An appeal from a judgment of nonsuit presents the question whether the evidence, considered in the light most favorable to plaintiff, is sufficient to be submitted to the jury, giving plaintiffs the benefit of all reasonable inferences which may be properly drawn from the evidence in their favor. *Paul v. Piner*, 123.

§ 61. Determination of Petitions to Rehear.

A petition to rehear is granted in this case to correct an inadvertence in the former opinion, but as modified the former opinion stands. *Milner Hotels v. Raleigh*, 224.

§ 62. New Trial and Partial New Trial.

Where the Supreme Court finds error relating to a single issue, it is discretionary with it whether to order a new trial limited to such issue or a general new trial, and when the assignments of error as to all the issues are so intertwined that the ends of justice will best be met by a new trial on both issues, it will be so ordered. *Paris v. Aggregates, Inc.*, 471; *Brown v. Nesbitt*, 532.

§ 68. Law of the Case and Subsequent Proceedings.

Decision on appeal dismissing the action on the ground that the evidence did not present a *bona fide* controversy between the parties requires by in ference that upon the subsequent hearing the cause be tried when the evidence is supplemented to disclose such *bona fide* controversy. *O'Neil v. O'Neil*, 741.

ASSAULT AND BATTERY.

§ 11. Indictment and Warrant.

Allegations in an indictment that a named defendant, a highway patrolman, and another named defendant, a municipal police officer, did assault and beat a named victim, one by beating the victim with his fists while the other defendant threatened to shoot the victim if the victim resisted the unlawful beating, are sufficient to charge both defendants with criminal assault. *S. v. Lackey*, 171.

ATTORNEY AND CLIENT.

§ 3. Scope and Duration of Attorney's Authority.

Generally speaking, the legal profession is composed of honorable men who are fair and candid in their dealings with the court, and it will be presumed, nothing else appearing, that an attorney in entering pleas of guilty to misdemeanors on charges of felonies was duly authorized to do so by his client, and a defendant will not be allowed to contend for the first time on appeal that his attorney was without authority to enter the pleas of guilty. *S. v. Woody*, 544.

AUTOMOBILES.

§ 2. Grounds and Procedures for Suspension or Revocation of Driver's Licenses.

Conviction of failing to yield the right of way, resulting in injury to persons and property, requires mandatory suspension of the provisional license of a driver under 18 years of age without right of review (prior to the amendment to G.S. 20-13), and therefore the driver's petition for review of the suspension is correctly denied. *Wing v. Godwin*, 426.

§ 3. Driving Without License or After Revocation or Suspension of License.

G.S. 20-7 and G.S. 20-35 must be construed *in pari materia*, and the provision of G.S. 20-7(n) that a person convicted of driving a motor vehicle on the highways of this State without having first been licensed as required by the statute should be guilty of a misdemeanor and punished in the discretion of the court is limited by G.S. 20-35(b) so that punishment for violation of G.S. 20-7 may not exceed a fine of $500 or imprisonment for six months. *S. v. Tolley*, 459.

A person convicted of operating a motor vehicle on the highways in this State without having first been licensed as an operator is guilty of a misdemeanor, G.S. 20-7(n), and is subject to punishment by imprisonment for a term of not more than six months. *S. v. Wall*, 675.

District Court has exclusive original jurisdiction to hear prosecution of operating an automobile without a license. *Ibid.*

§ 16. Passing Parked Vehicles or Vehicles Traveling in Same Direction.

Although G.S. 20-149(b) does not apply to a motorist overtaking and passing another vehicle within a business or residential district, such motorist remains under the common law duty to exercise due care, which may require him to sound his horn in overtaking and passing a bicycle or other vehicle when the rider or driver thereof has not looked back and has given no awareness of the overtaking vehicle. *Lowe v. Futrell*, 550.

§ 19. Right of Way at Intersections.

A municipality has plenary power to regulate traffic at intersections, and a motorist approaching an electrically controlled signal at an intersection of streets or highways may presume, in the absence of notice to the contrary, that it was erected by lawful authority, and he is under duty to maintain a proper lookout and to keep his vehicle under reasonable control in order that he may stop if the green light changes to yellow or red before he actually enters the intersection. *Galloway v. Hartman*, 372.

§ 23. Brakes and Defects in Vehicles.

In an accident caused by brake failure of original defendants' three year old truck, the defendants allege that a garage had repaired the brakes ap-

AUTOMOBILES—*Continued.*

proximately a year before the accident, and that two or three times subsequent thereto (without specifying the dates) the garage had serviced the vehicle and adjusted the brakes, and filed a cross-action against the garage upon the assertion of primary and secondary liability. *Held:* Demurrer to the cross-action was properly sustained, since the facts alleged negate any legitimate inference that defective parts or faulty workmanship on the part of the garage at such remote times was a cause of the brake failure causing the accident in suit. *Nipper v. Branch,* 673.

§ 38. Exemptions from Speed Restrictions.

Plaintiff's evidence tended to show that her intestate was struck as he was crossing a highway at a place other than a crosswalk at nighttime, that he was dressed in dark clothes, and that he could have seen defendant's car for a distance of some one-half mile as it approached on the straight highway with its lights burning. *Held:* The evidence discloses contributory negligence on the part of intestate as a matter of law. *Price v. Miller,* 690.

§ 39. Bicycles and Tricycles.

An instruction to the effect that plaintiff, a 14 year old boy riding a bicycle, was required to maintain a proper lookout and control of the vehicle, and to exercise the degree of care which a person of ordinary prudence would have used under the same or similar circumstances, and that if the jury should find that defendant motorist, approaching from the rear, gave appropriate warning by horn as he was attempting to pass, it was the duty of the plaintiff to give way to the right and allow defendant to pass, *held* without error. *Welch v. Jenkins,* 138.

A bicycle is a vehicle and its rider is a driver within the meaning of the Motor Vehicle Law. *Lowe v. Futrell,* 550.

§ 40. Operation of Motor Vehicles in Regard to Pedestrians.

A pedestrian crossing a highway at a point other than within a marked crosswalk or intersection must yield the right of way to vehicles upon the highway, G.S. 20-174(a), and while his failure to do so is not contributory negligence *per se,* it is sufficient to constitute contributory negligence as a matter of law when the evidence clearly establishes that such failure was one of the proximate causes of his injury. *Price v. Miller,* 690.

§ 54. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Passing Vehicles Traveling in Same Direction.

Evidence tending to show that defendant, driving in a heavy rain, maintained a speed of some 55 miles per hour to within five or six car lengths of an automobile standing on the highway immediately behind a stopped school bus, the brake lights of the car being on and the school bus lights flashing, with another vehicle approaching from the opposite direction, so that defendant crashed into the rear of the stationary car, *held* sufficient to be submitted to the jury on the issue of negligence. *Thompson v. Thomas,* 450.

Evidence failing to show that the *locus* was within a business or residential district and tending to show that defendant attempted to overtake and pass a bicycle traveling in the same direction without giving warning by horn or other device, and that the vehicles collided as the automobile was in the process of passing the bicycle, *held* sufficient to take the issue of negligence to the jury, assuming for the purpose of nonsuit that the *locus* was not within a business or residential district. *Lowe v. Futrell,* 550.

AUTOMOBILES—*Continued.*

§ 56. Sufficiency of Evidence and Nonsuit on Issue of Following Too Closely; Hitting Vehicle Stopped on Highway.

Evidence favorable to plaintiff tending to show that defendant's speed was excessive, the plaintiff's vehicle was disabled but that its lights were burning and visible to approaching traffic, and that plaintiff and his companions were in the process of pushing their disabled vehicle on the straight and unobstructed highway, with its left wheels on the hardsurface only to the extent of some two feet, and that defendant collided with the rear of the disabled vehicle as plaintiff was attempting to get back into the driver's seat, resulting in plaintiff's injury, *held* sufficient to be submitted to the jury on the issue of defendant's negligence. *Rouse v. Snead,* 565.

§ 57. 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 a street intersected a north-south highway from the west, that the highway had two south bound lanes and one north bound lane, that plaintiff entered the intersection from a restaurant driveway opposite the street after plaintiff had observed that the lights for south bound traffic on the highway were red, and that plaintiff, traveling westerly, was hit on the right by defendant's vehicle traveling south in the middle lane of the highway. *Held:* The evidence is sufficient to be submitted to the jury on the issue of defendant's negligence. *Galloway v. Hartman,* 372.

§ 62. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Striking Pedestrians.

Evidence tending to show that defendant was driving 60 miles per hour in a 55 mile per hour zone and that she struck a pedestrian on a level, straight road in good weather, with her headlights burning and without seeing the pedestrian until after she hit him, *held* sufficient to be submitted to the jury on the issue of her negligence both in failing to keep a proper lookout and in violating the speed statute. *Price v. Miller,* 690.

§ 68. Sufficiency of Evidence and Nonsuit on Issue of Defective Vehicles.

Evidence permitting the inference that some three days prior to the accident in suit the driver had knowledge that the brakes of the truck were defective, that on the day of the accident he drove the truck across an intersection into plaintiff's building, and that immediately after the accident the brake pedal could be depressed to the floorboard, *held* sufficient to be submitted to the jury on the issue of the driver's negligence. *Brown v. Nesbitt,* 532.

§ 73. Nonsuit on Ground of Contributory Negligence.

An instruction on the issue of contributory negligence which incorporates the provisions of G.S. 20-140 and charges that if plaintiff was guilty of reckless driving as defined in the statute plaintiff would be guilty of contributory negligence if such violation was a proximate cause of the injury, *held* erroneous, it being required that the court apply the law relating to reckless driving to the particular facts presented by defendant's evidence in regard to plaintiff's contributory negligence. *Ingle v. Transfer Corp.,* 276.

Where plaintiff alleges and offers evidence tending to show that wilful and wanton conduct on the part of defendant proximately caused plaintiff's injury, it is error for the court to refuse to submit plaintiff's tendered issue

AUTOMOBILES—*Continued.*

as to the wilful and wanton negligence of defendant, and such failure must be deemed prejudicial when the action is dismissed on the ground of plaintiff's contributory negligence and the issues submitted do not make certain whether the jury's affirmative finding on the issue of negligence was based upon ordinary negligence or wilful and wanton conduct on the part of defendant. *Pearce v. Barham,* 285.

§ 79. Nonsuit on Ground of Contributory Negligence as to Intersectional Accidents.

Failure of a motorist to yield the right-of-way to traffic on a public highway, G.S. 20-38(23), does not compel a finding of contributory negligence as a matter of law when there is evidence that traffic on the highway was faced with a red traffic light and there is no evidence of anything to give notice that a motorist on the highway would not obey the traffic control signal. *Galloway v. Hartman,* 372.

Evidence that plaintiff, traveling east on a dominant highway, did not see defendant's truck which had turned left into the median between the east and westbound lanes, and then started across the eastbound lane, until she was some 138 feet from the truck, and that she collided with the rear wheel of the truck as it was traversing her lane of travel, *held* not to disclose contributory negligence as a matter of law. *Snell v. Rock Co.,* 739.

§ 81. Nonsuit on Ground of Contributory Negligence as to Dangerous Position in or on Vehicle.

The evidence disclosed that plaintiff voluntarily sat on the fender, astride the radiator, with one foot on the bumper and the other under the elevated hood of an automobile which was being pushed by another vehicle in an attempt to start the automobile, and that after the motor of the automobile ignited he fell therefrom to his injury. *Held:* Nonsuit for contributory negligence was properly entered, even though the evidence may have been sufficient on the issue of the operator's negligence in handling the car after the motor ignited. *Huffman v. Huffman,* 465.

Evidence in this case held not to show contributory negligence as matter of law in pushing disabled vehicle on highway. *Rouse v. Snead,* 565.

§ 85. Nonsuit on Ground of Contributory Negligence as to Persons on Bicycles.

Evidence held to disclose contributory negligence as matter of law on part of cyclist turning left without looking to see if movement could be made in safety. *Lowe v. Futrell,* 550.

§ 87. Actions for Negligent Operation of Motor Vehicles — Concurring Negligence.

Whether negligence of driver in turning left was a proximate cause of collision held for jury. *Stutts v. Burcham,* 176.

§ 88. Sufficiency of Evidence to Require Submission of Issue of Contributory Negligence to Jury.

If plaintiff's own evidence discloses contributory negligence as a sole reasonable conclusion to be drawn from his evidence, nonsuit is proper; if the evidence is such that reasonable minds may differ, the question of contributory negligence must be submitted to the jury. *Rouse v. Snead,* 565.

AUTOMOBILES—*Continued.*

§ 90. Instructions in Automobile Accident Cases.

The instruction in this case upon the duty of a motorist to maintain a proper lookout, the doctrine of sudden emergency, and the respective duties of motorists proceeding in opposite directions in passing each other, *held* free from prejudice to appellant. *Gregory v. Lynch,* 198.

Charge of court on insulating negligence held not prejudicial to defendant in this case. *Ibid.*

An instruction on the issue of contributory negligence which incorporates the provisions of G.S. 20-140 and charges that if plaintiff was guilty of reckless driving as defined in the statute plaintiff would be guilty of contributory negligence if such violation was a proximate cause of the injury, *held* erroneous, it being required that the court apply the law relating to reckless driving to the particular facts presented by defendant's evidence in regard to plaintiff's contributory negligence. *Ingle v. Transfer Corp.,* 276.

§ 93. Right of Guest or Passenger to Sue Jointly or Severally Tortfeasors Causing Injury.

Passenger is entitled to recover of either driver whose negligence was one of proximate causes of injury. *Stutts v. Burcham,* 176.

§ 94. Contributory Negligence of Guest or Passenger.

Neither allegation nor evidence in this action presented the question of plaintiff passenger's contributory negligence. *Stutts v. Burcham,* 176.

§ 105. Sufficiency of Evidence, Nonsuit and Directed Verdict on Issue of Respondeat Superior.

Proof of the registration of a vehicle makes out a *prima facie* case of agency in the registered owner sufficient to support, but not to compel, a verdict against him on the doctrine of *respondeat superior. Brown v. Nesbitt,* 532.

§ 106. Instructions on Issue of Respondeat Superior.

Driver must be operating vehicle in course of his employment in order for owner to be liable. *Brown v. Nesbitt,* 532.

§ 108. Family Purpose Doctrine.

Admission in the answer that the additional defendants were persons in whose names the vehicle in question was registered and that it was being operated at the time in question by their son, living in the household, with the consent, permission and knowledge of the additional defendants, is sufficient to be submitted to the jury on the question of the additional defendants' liability under the family purpose doctrine. *Thompson v. Thomas,* 450.

§ 110. Culpable Negligence.

Culpable or criminal, negligence is something more than actionable negligence in the law of torts; it is such recklessness, proximately resulting in injury or death as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. *S. v. Massey,* 555.

The intentional, wilful or wanton violation of a safety statute which proximately results in injury or death is culpable negligence; but an unintentional violation of a safety statute, unaccompanied by recklessness or probable consequences of a dangerous nature, is not such negligence as imports criminal responsibility. *Ibid.*

The mere fact that a pedestrian is killed when struck by an automobile in a public street, nothing else appearing, does not raise an inference of culpable negligence. *Ibid.*

AUTOMOBILES—*Continued.*

Failure to keep a proper lookout does not constitute negligence unless the failure is accompanied by dangerous speed or perilous operation. *Ibid.*

§ 113. Sufficiency of Evidence and Nonsuit.

Evidence that defendant was driving on the left side of street when he struck child held insufficient, standing alone, to go to jury on involuntary manslaughter. *S. v. Massey*, 555.

§ 117. Prosecutions for Speeding.

The punishment for speeding in violation of G.S. 20-141, where the speed is not in excess of 80 miles per hour, is limited to a fine of $100 or imprisonment for not more than 60 days, or both. *S. v. Tolley*, 459.

§ 118. Elements of the Offense of Reckless Driving.

While the violation of either section of G.S. 20-140 constitutes culpable negligence, the violation must be either intentional or must be accompanied by such recklessness or carelessness as to import a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others, and result in injury or death, but the unintentional violation of a safety statute which is not accompanied by recklessness or probable consequences of a dangerous nature when tested by the rule of reasonable provision, is not culpable negligence. *Ingle v. Transfer Corp.*, 276.

§ 119. Prosecutions for Reckless Driving.

The punishment for reckless driving is limited to a fine not exceeding $500 or imprisonment not to exceed six months, or both, in the discretion of the court. *S. v. Tolley*, 459.

§ 120. Element of the Offense of Driving While Under the Influence of Intoxicating Liquor.

In order to hold the owner liable for injury resulting from the driver's negligence, it is required that plaintiff not only prove agency but also that the damage complained of was the result of the negligent operation by the agent. *Brown v. Nesbitt*, 532.

§ 131. Failing to Stop After Accident; "Hit and Run Driving."

Evidence in this case *held* sufficient to support a charge of failing to stop an automobile after an accident resulting in death of a person. *S. v. Massey*, 555.

§ 134. Driving Without Consent of Owner; Unlawful Taking.

The unlawful taking of an automobile in violation of G.S. 20-105, a misdemeanor, is not an included less degree of the crime of larceny, and a defendant may not be convicted of this offense when tried upon indictment charging the crime of larceny. *S. v. Wall*, 675.

Defendant was arrested and bound over to the Superior Court upon a warrant charging the felonious larceny of an automobile; a bill of indictment was returned charging defendant with the unlawful taking of an automobile in violation of G.S. 20-105, a misdemeanor. *Held:* The Superior Court is without original jurisdiction of the misdemeanor indictment, since, there being no charge of felony in the Superior Court, the exceptions enumerated under G.S. 7A-271 are inapplicable, and the judgment entered thereon is vacated with direction that the action be transferred to the District Court for trial. *Ibid.*

AVIATION.

§ 1. Creation of Airport Authorities.

A municipality has authority to grant a franchise authorizing the carriage of passengers to and from the municipal airport and authorizing such carrier to enter upon the boundaries of the airport property in the performance of such service, since such authority is necessarily implied from the express statutory powers granted municipalities in regard to airports. *Harrelson v. Fayetteville*, 87.

A municipal corporation has the power to stipulate that a franchise for the carriage of passengers to and from an airport, with authority to enter within the boundaries of the airport property in the performance of the service, should be exclusive, notwithstanding the Utilities Commission had theretofore granted a franchise to a common carrier to operate to the boundaries of the airport, there being a provision in the ordinance that if such exclusive operation should require approval or authority of any other governmental agency it should be the duty of the franchise holder to obtain such approval or authority, G.S. 62-260(a). *Ibid.*

BANKS AND BANKING.

§ 13. Loans and Pledges to Secure Loans.

Lender collecting and paying credit life insurance to insurance company is not liable for unearned premiums. *Huski-Bilt, Inc., v. Trust Co.*, 662.

BILL OF DISCOVERY.

§ 2. Examination of Adverse Party to Obtain Information to Draft Pleadings.

Plaintiff may examine officers of defendant corporation prior to the filing of complaint only upon affidavit alleging facts with reasonable particularity disclosing that such examination is necessary to enable plaintiff to prepare properly his complaint and describing with reasonable particularity the information sought to be discovered, G.S. 1-568.1, G.S. 1-568.9, G.S. 1-568.10(b)(2), and the order for examination must be restricted to matters necessary to enable plaintiff to file his pleading. *Kohler v. Construction Co.*, 187.

If the order for examination of officers of the adverse party is too extensive, such order will be modified on appeal so as to restrict it to the examination contemplated by the statute. *Ibid.*

Order for examination of adverse party modified in this case to exclude matter not necessary to enable plaintiff to file complaint. *Ibid.*

§ 3. Examination of Adverse Party to Procure Evidence to be Used at the Trial.

Pretrial examination of the adverse party in proper instances within the purview of G.S. 1-568.11 is available to the applicant as a matter of right. *Furr v. Simpson*, 221.

In this personal injury action plaintiff contended that a breast tumor which she had suffered was aggravated by the accident. Defendant sought by pretrial examination of plaintiff, information as to the name and wereabouts of plaintiff's first husband, a doctor who had treated the tumor. *Held:* The information was pertinent and unavailable to defendant except by pretrial examination, and the court was in error in failing to require plaintiff to answer. *Ibid.*

BILL OF DISCOVERY—*Continued.*

§ 4. Introduction of Evidence Elicited on Examination.

Where plaintiff examines a person at a time when such person is a party to the action, defendant is entitled to introduce such examination at the trial, G.S. 1-568.4, notwithstanding that the person examined is not a party at the time of the trial, subject to the limitation that the deposition may not be used in evidence against a party not notified of the taking thereof, and the rules relating to the deposition of a witness are not pertinent. *Pearce v. Barham,* 285.

BOUNDARIES.

§ 2. Courses and Distances and Calls to Natural and Artificial Monuments.

A call to a fixed monument is controlling over a conflicting call for course and distance, and an established line of an adjacent tract is a fixed monument within the purview of this rule. *Cutts v. Casey,* 165.

§ 8. Questions of Law and of Fact in Proceedings to Establish Boundaries.

What are the boundaries of a tract of land is a question of law for the court, the location of the boundaries on the ground is a factual question for the jury. *Cutts v. Casey,* 165.

BURGLARY AND UNLAWFUL BREAKINGS.

§ 3. Indictment.

An indictment describing stolen property as "merchandise, chattels, money, valuable securities and other personal property" is fatally defective where the proof shows the property to have been eleven rings, since the indictment must describe the property stolen with sufficient particularity to protect defendant from a second prosecution. *S. v. Ingram,* 538.

§ 5. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence in this case *held* sufficient to be submitted to the jury on the charge against defendants of felonious breaking and entering a store with intent to steal property therefrom, and with larceny of described property therefrom as a result of such unlawful breaking and entering. *S. v. Young,* 589.

Evidence in this case *held* sufficient to overrule nonsuit in the prosecution for unlawfully breaking and entering a building with intent to steal merchandise therefrom. *S. v. Cloud,* 591.

Sufficiency of defendant's guilt of breaking and entering a store and with the larceny of property therefrom *held* sufficient in this case to go to the jury. *S. v. Wyatt,* 596.

There is a fatal variance between pleading and proof where the indictment alleges the felonious breaking and entering of a building "occupied by one Friedman's Jewelry, a corporation", and the evidence is that the building is occupied by "Friedman's Lakewood, Incorporated" and that there are three "Friedman's" stores in the city where the offense took place, and it was error to deny defendants' motions of nonsuit at the close of all the evidence. *S. v. Miller,* 646.

§ 8. Sentence and Punishment.

Under G.S. 14-54 the maximum sentence for breaking and entering is 10 years. *S. v. Robinson,* 448.

BURGLARY AND UNLAWFUL BREAKINGS—*Continued.*

A person who breaks and enters a building with intent to commit the crime of larceny is guilty of a felony, regardless of whether he is frustrated before he accomplishes the larceny. *S. v. Cloud,* 591.

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 2. Cancellation for Fraud or Mistake Induced by Fraud.

A wife is not a real party in interest so as to interpose as a defense or counterclaim in an action in ejectment instituted by her husband's grantee that her husband had fraudulently conveyed the lands without her joinder in order to deprive her of the possession thereof, since G.S. 29-14, defining the share of the surviving spouse of an intestate, and G.S. 29-30, providing for a life estate at the election of the surviving spouse, do not give her a present right of possession. *Oil Co. v. Richardson,* 696.

Allegations of defendant that her husband conveyed property to a trustee without her joinder for the purpose of defeating her right to protect the property from a prior deed of trust, which contained her joinder, fail to state facts constituting a defense or counterclaim in an action in ejectment, since the husband's conveyance without her joinder does not prevent her from exercising her right to redemption from the prior deed of trust. *Ibid.*

Defendant's allegations that a deed of trust was a voluntary conveyance executed by her husband and received by the plaintiff for the purpose of defeating her rights to alimony *pendente lite are held* sufficient to constitute a defense or counterclaim entitling her to relief in an action in ejectment. *Ibid.*

§ 3. Cancellation for Mental Incapacity and Undue Influence.

Allegations to the effect that grantor was 70 years old, was ill and under the influence of drugs so that she was incapable of understanding what she was doing, and that defendants fraudulently procured her signature to a deed conveying her property to them, which instrument she understood to be a contract to convey the premises to defendants in return for their promise to support plaintiff for the rest of her life, and that defendants were attempting to sell the property, *held* sufficient to state a cause of action to cancel the deed for undue influence and mental incapacity. *Beam v. Almond,* 509.

§ 11. Instructions in Action to Cancel or Rescind Instruments.

Where the grantor of an instrument seeks to set it aside for fraud, duress and want of mental capacity to execute the instrument, and it appears that the grantees of the instrument had executed a deed of trust thereon in favor of third parties who took without notice and who *bona fide* advanced money on the strength of the grantees' title, cancellation of the deed to the grantees does not affect the validity of the lien of the deed of trust, the duress being in the inducement to execute the deed and not duress in the actual signing of the instrument. *Beam v. Almond,* 509.

CLERKS OF COURT.

§ 3. Probate Jurisdiction.

The jurisdiction of clerks of court with reference to the administration of estates of deceased persons is altogether statutory, G.S. 2-1, and the clerk's special probate jurisdiction is separate and distinct from his general duties and jurisdiction as clerk. *In re Estate of Lowther,* 345.

A proceeding to remove an executor or administrator is neither a civil action nor a special proceeding, and G.S. 1-276 providing that the Superior

CLERKS OF COURT—*Continued.*

Court acquires jurisdiction of any civil action or special proceeding begun before the clerk which is for any ground whatever sent to the Superior Court, does not apply to probate matters. *Ibid.*

COMMON LAW.

The common law of England which is not repugnant to, or inconsistent with, the freedom and independence of this State, and not abrogated or repealed by statute, or become obsolete, is in force in this State. *S. v. Lackey,* 171.

CONSTITUTIONAL LAW.

§ 6. Legislative Powers in General.

Even though existing constitutional provisions do not authorize the General Assembly to enact a particular statute, it may enact such statute in anticipation of a constitutional amendment authorizing it to do so, and provide that the statute should become effective, in the event of the approval of the amendment, on the date of its certification. *Fullam v. Brock,* 145.

One General Assembly cannot restrict or limit by statute the right of a succeeding legislature to exercise its constitutional power to legislate in its own way. *S. v. Wall,* 675.

§ 19. Monopolies and Exclusive Emoluments and Privileges.

Allowances to which a member of the Teachers' and State Employees' Retirement System is entitled upon retirement constitute compensation for public services previously rendered and do not violate Article I, § 7, of the State Constitution. *Harrill v. Retirement System,* 357.

§ 21. Right to Security in Person and Property.

Private property may not be appropriated by the State, even upon the payment of just compensation, except by the exercise of the power of eminent domain in accordance with lawful procedure. *Vance County v. Royster,* 53.

§ 24. Requisites of Due Process.

The provision of G.S. 136-108 that in condemnation proceedings all questions raised by the pleadings as to parties, title, estates condemned, and area taken, should be determined by the court without a jury, reserving only the amount of damages for the determination of the jury, is constitutional, the adjudication by the court of such questions being conclusively solely for the purpose of condemnation. *Highway Commission v. Nuckles,* 1.

§ 25. Impairment of Contracts.

Ordinarily, statutes in this State are presumed to act prospectively only, and a statute which affects a constitutional right may not be construed to have a retrospective effect. *Housing Authority v. Thorpe,* 468.

§ 28. Necessity for and Sufficiency of Indictment.

A valid indictment is a condition precedent to the jurisdiction of the Superior Court in a criminal prosecution, for a capital felony and the return of such indictment by a legally constituted grand jury is necessary to such indictment. *S. v. Yoes,* 616.

§ 30. Due Process in Trial in General.

A Negro defendant has no right to be indicted or tried by a jury composed of persons of his race or to have a person of his race on the jury, but does

CONSTITUTIONAL LAW—*Continued.*

have a constitutional right to be indicted and tried by juries from which persons of his race have not been systematically excluded. *S. v. Brown*, 250.

A defendant asserting discrimination in the selection of the jury has the burden of proving such discrimination, but upon a *prima facie* showing the burden is upon the solicitor to go forward with the evidence to rebut such *prima facie* case. *Ibid.*

The granting of a new trial for discrimination in the selection of jurors has no relevancy to the subsequent trial in which the former errors and practices of the court in the selection of juries had been supplanted by unexceptional procedure. *Ibid.*

The findings of the trial court in regard to racial discrimination in the selection of the grand and petit juries will not be disturbed when such findings are supported by competent evidence and there is nothing in the record to indicate any ill consideration of the evidence or infraction of defendant's constitutional rights. *Ibid.*

While the fact that a disproportionately small number of Negroes had been selected to serve on the grand and petit juries in the county for a considerable period of time may be sufficient to raise a *prima facie* showing of racial discrimination in the selection of the juries, the absence of Negroes from a particular grand or petit jury is insufficient, in and of itself, to raise any presumption of discrimination. *Ibid.*

Even though defendant's showing of a small disparity in the number of Negroes on the jury list for two consecutive panels be considered sufficient to make out a *prima facie* case of discrimination, evidence to the effect that the jury lists included, without indication or regard to race, the names of all persons on the tax books and the voter registration books, without duplication, is sufficient to rebut such *prima facie* showing of discrimination, and the fact that persons whose names appear on the welfare rolls who were not listed on the tax or voter registration books were not included, does not alter this result. *Ibid.*

The contention that the statutory punishment for rape, G.S. 14-21, is unconstitutional because it is enforced in a discriminatory manner against Negro defendants is untenable, since the punishment applies to all persons convicted of the offense without discrimination on account of the race of the convicted defendant or the race of the victim, and discriminating enforcement is not shown by a tabulation of results reached in different cases. *S. v. Yoes*, 616.

The exclusion of bystanders during the testimony of the prosecutrix in a prosecution for rape, representatives of the press and parents of the defendants not being excluded during her testimony, is not a denial of defendants' right to a public trial, the matter being within the discretion of the trial court and no abuse of discretion being shown. *Ibid.*

§ 31. Right of Confrontation and to Access to Evidence.

The fact that the court and the solicitor confer in the absence of defendant's attorney and decide to exclude evidence highly prejudicial to defendant, could not be prejudicial to defendant. *S. v. Spence*, 23.

The fact that the witness' testimony on the *voir dire* is read to the jury upon the ruling by the court that the testimony is competent, *held* not error in depriving defendants of their right to confrontation when it appears from the record that the witness thereafter testified to the same effect in the presence of the jury. *Ibid.*

A list of prospective witnesses furnished by the solicitor to defendants prior to trial is not technically a bill of particulars, and the fact that the solicitor called two witnesses not listed will not be held for prejudicial error

CONSTITUTIONAL LAW—*Continued.*

when it appears that the solicitor listed all of the witnesses of which he had knowledge on the date he filed the list, and that defendant was apprised of the name of one of the witness on the *voir dire* examination of the jurors and could have ascertained the purport of such witness' testimony by inquiry, and that the solicitor did not have the name of the other witness until the day before his testimony was offered. *Ibid.*

It is not error for the court to quash Negro defendants' subpœnas *duces tecum* to clerks of court of other counties and to refuse to hear purported evidence of racial discrimination in prosecutions for rape, since such discrimination cannot be established by a tabulation, even if accurate and complete, of results reached in different cases tried before different juries upon evidence which necessarily varies from case to case. *S. v. Yoes*, 616.

A defendant's right of confrontation cannot be impinged by the failure of the State to have one of the State's witnesses testify, there being no contention by defendant that the testimony of the State's witness could have benefited him in any way. *S. v. Harris*, 732.

Where defendant changes his plea from guilty to not guilty and requests the court to allow him time to obtain witnesses from other states, it is error for the court to force him to trial on the succeeding day since under the facts of this particular case defendant was not given time to prepare for trial. *S. v. Whisnant*, 734.

§ 32. Right to Counsel in Criminal Proceedings.

The guarantee to a defendant of the right to be represented by counsel in a criminal case does not apply to every stage of the proceedings but only to the "critical stages," and what constitutes a critical stage is to be determined both from the nature of the proceedings and from the facts in each case. *Gasque v. State*, 323.

A preliminary hearing is not prerequisite to the finding of an indictment in this State nor a critical stage of the proceeding, and a defendant may waive the hearing and consent to be bound over to the Superior Court to await grand jury action without forfeiting any defense or right available to him; therefore, the denial of defendant's request for counsel at the hearing does not deprive defendant of any constitutional right. *Ibid.*

Defendant's contention that the preliminary hearing afforded the only opportunity to ascertain the evidence of the State before trial, thereby requiring the presence of counsel to obtain this information, is without merit, since the State's witnesses can be examined by defendant before trial by permission of the court or the solicitor, or by resort to the writ of *habeas corpus*. *Ibid.*

The Federal decision that an accused is entitled to be represented by counsel at a pretrial lineup is not to be given retroactive effect, and testimony in this case regarding the identification of defendant at a police station lineup *is held* admissible in evidence, although at the time of the lineup the defendant was not represented by counsel. *S. v. McKissick*, 500.

It is not required that defendant be represented by counsel upon the preliminary hearing. *S. v. Miller*, 611.

§ 36. Cruel and Unusual Punishment.

Punishment within the statutory maximum cannot be cruel or unusual in the constitutional sense. *S. v. Robinson*, 448; *S. v. Lovelace*, 593; *State v. Foster*, 727.

The statute fixing death as the punishment for rape, G.S. 14-21, unless the jury in its discretion recommends life imprisonment, is authorized by the Constitution of North Carolina, Art. XI, § 2, and since such punishment is

CONSTITUTIONAL LAW—*Continued.*

specifically authorized both by the State Constitution and by statute it cannot be cruel or unusual punishment in the constitutional sense. *S. v. Yoes*, 616.

CONTRACTS.

§ 1. Nature and Essentials of Contract in General.

Evidence that the plaintiff bank extended a line of credit to the defendant's husband, who was in the home construction business, in reliance upon a guaranty purporting to bear defendant's signature, and that the defendant and her husband owned some, if not all, of their realty as tenants by the entireties, *held* sufficient to support a finding by the court that the defendant had executed the guaranty, despite her testimony that she did not sign the instrument. *Bank v. Corbett*, 444.

§ 12. Construction and Operation of Contracts in General.

Plaintiff and her father agreed to hold certain shares of stock "as joint tenants with the right of survivorship and not as tenants in common." The law of the state where the agreement was made recognized joint tenancy in personalty with right of survivorship. *Held:* Upon the father's death, plaintiff took title as the survivor. *Fast v. Gulley*, 208.

A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates. *Bank v. Corbett*, 444.

Where the terms of a contract are clear and unambiguous, the construction of the agreement is a matter of law for the court. *Ibid.*

§ 30. Forfeitures and Penalties Under the Terms of the Instrument.

Contract provisions for liquidated damages for failure to complete the work under the contract within the time specified may not be asserted when the party claiming the damages is responsible for the delay. *Reynolds Co. v. Highway Commission*, 40.

CONTROVERSY WITHOUT ACTION.

§ 2. Affidavit, Statement of Facts, Hearings and Judgment.

Where the case is submitted for adjudication upon stipulated facts, the court, in the absence of authorization to make additional findings of fact, is limited to the facts so stipulated. *Board of Health v. Brown*, 401.

CORPORATIONS.

§ 1. Incorporation and Corporate Existence.

The fact that one corporation and its officers own substantially all of the stock of another corporation does not justify a disregard of the separate corporate entities unless there are additional circumstances showing fraud, actual or constructive, or agency. *Huski-Bilt v. Trust Co.*, 662.

COSTS.

§ 4. Items of Costs and Amount of Allowance.

Attorneys' fees are not ordinarily allowable as costs in civil actions or in special proceedings unless expressly authorized by statute. *Bowman v. Chair Co.*, 702.

COURTS.

§ 3. Original Jurisdiction of Superior Court in General.

The Superior Court has original general jurisdiction throughout the State except as otherwise provided by statute. *S. v. Wall,* 675.

Defendant was arrested and bound over to the Superior Court upon a warrant charging the felonious larceny of an automobile; a bill of indictment was returned charging defendant with the unlawful taking of an automobile in violation of G.S. 20-105, a misdemeanor. *Held:* The Superior Court is without original jurisdiction of the misdemeanor indictment, since, there being no charge of felony in the Superior Court, and the exceptions enumerated under G.S. 7A-271 being inapplicable, and the judgment entered thereon is vacated with direction that the action be transferred to the District Court for trial. *Ibid.*

A prosecution initiated by warrant in the District Court is not a charge "initiated by presentment", G.S. 7A-271(b), so as to vest the Superior Court with original jurisdiction, since a presentment is an accusation of crime issuing upon action by a grand jury. *Ibid.*

§ 6. Appeals to Superior Court from Clerk.

A proceeding to remove an executor or administrator is neither a civil action nor a special proceeding, and G.S. 1-276 providing that the Superior Court acquires jurisdiction of any civil action or special proceeding begun before the clerk which is for any ground whatever sent to the Superior Court, does not apply to probate matters. *In re Estate of Lowther,* 345.

§ 7. Appeals from Inferior Courts to Superior Court.

Appeals in civil actions from the general county courts to the Superior Court are governed by G.S. 7-295, and the statute makes no provision for the filing of a case on appeal or the docketing of the record in the Superior Court until settlement of the case, and therefore when appellant timely serves his case on appeal and appellee files exceptions thereto with request that the judge settle the case, appellee is not entitled to dismissal for any delay of the judge of the general court in filing the case as settled by him. *Paris v. Aggregates, Inc.,* 471.

§ 9. Jurisdiction of Superior Court After Orders or Judgments of Another Superior Court Judge.

Order in condemnation proceedings adjudicating respondents' title to virtually all of the land in dispute in the proceedings, and adjudicating that the Highway Commission had not obtained any right thereto in prior condemnation proceedings, *held* a final adjudication as to such title, and in the subsequent proceedings another judge of the Superior Court may not modify, reverse or set aside such order. *Highway Commission v. Nuckles,* 1.

§ 11. Establishment and Abolition of Courts Inferior to the Superior Court.

The General Assembly is empowered to prescribe the jurisdiction and powers of the District Courts. *S. v. Wall,* 675.

§ 14. Jurisdiction of Inferior Courts.

The District Court has original jurisdiction over all criminal actions below the grade of felony, G.S. 7A-270, G.S. 7A-272, and has the exclusive original jurisdiction of all misdemeanors except in those instances specifically enumerated in G.S. 7A-271(a)(b)(c)(d). *S. v. Wall,* 675.

COURTS—*Continued.*

Defendant appeared in the District Court upon warrant charging the operation of an automobile without an operator's license in violation of G.S. 20-7(a), a misdemeanor, and moved for trial by jury. The case was transferred to the Superior Court for trial without adjudication in the District Court. *Held:* The District Court had exclusive original jurisdiction of this prosecution, and its failure to proceed to trial upon the warrant was erroneous. *Ibid.*

§ 20 Conflict of Laws — What Law Governs; As Between Laws of This State and Other States.

The interpretation of a contract is governed by the law of the place where the contract was made, and the place at which the last act was done by either of the parties essential to a meeting of the minds determines the place of the contract. *Fast v. Gulley*, 208.

CRIMINAL LAW.

§ 1. Nature and Elements of Crime in General.

The violation of a municipal ordinance is a misdemeanor. *Bell v. Page*, 396.

In a prosecution for violation of a municipal zoning ordinance, evidence that other violators of the ordinance had not been prosecuted is properly excluded, since it is no defense that others have not been penalized or the law not enforced as to them. *Gastonia v. Parrish*, 527.

§ 5. Mental Capacity in General.

The test of mental responsibility for crime is the capacity to distinguish between right and wrong at the time and in respect of the matter under investigation. *S. v. Spence*, 23.

§ 8. Limitations.

Where a statute provides for the dismissal of charges against a defendant if he is not tried within a specified time, the defendant is not entitled to relief when a trial is held within the statutory time but results in a mistrial upon the failure of the jury to reach a verdict, since, under such circumstances the State is not responsible for the delay. *S. v. George*, 438.

Where trial within period prescribed by Interstate Agreement on Detainers Act results in mistrial, defendant is not entitled to discharge at later trial had with due diligence. *Ibid.*

G.S. 148-89, Art. IV(c), requiring a prisoner to be tried within 120 days after the solicitor requests his return to this State, does not apply when the prisoner is returned at his own request. G.S. 148-89, Art. III. *Ibid.*

§ 10. Accessories Before the Fact.

An indictment charging the defendant with being an accessory before the fact in the slaying of a named person is not rendered invalid in carrying, in addition to the requirements of G.S. 14-5, the words "did incite, move, aid, counsel, hire", since such words do not contradict the essential averments of the indictment. *S. v. Parker*, 414.

§ 15. Venue.

A motion for change of venue on the ground of unfavorable publicity in the county is addressed to the sound discretion of the trial court, and where the courts' interrogation of those selected for jury duty fails to disclose prej-

CRIMINAL LAW—*Continued.*

udice, the denial of the motion for change of venue will not be disturbed. *S. v. Brown*, 250.

§ 16. Status of Offense; Concurrent and Exclusive Jurisdiction.

The statute, G.S. 7-64, divesting certain inferior courts of the exclusive original jurisdiction of criminal actions and providing for concurrent jurisdiction with the Superior Court, is rendered obsolete in those counties in which the District Court is established pursuant to the Judicial Department Act of 1965, G.S. 7A. *S. v. Wall*, 675.

§ 18. Jurisdiction on Appeals to Superior Court.

Upon trial *de novo* in the Superior Court upon appeal from an inferior court, the Superior Court may impose a punishment in excess of that imposed in the inferior court provided the punishment does not exceed the statutory maximum. *S. v. Tolley*, 459.

§ 21. Arraignment and Pleas — Preliminary Proceedings.

A preliminary hearing is not prerequisite to the finding of an indictment in this State nor a critical stage of the proceeding, and a defendant may waive the hearing and consent to be bound over to the Superior Court to await grand jury action without forfeiting any defense or right available to him; therefore, the denial of defendant's request for counsel at the hearing does not deprive defendant of any constitutional right. *Gasque v. State*, 323.

It is not required that defendant be represented by counsel upon the preliminary hearing. *S. v. Miller*, 611.

§ 23. Plea of Guilty.

A plea of guilty can relate only to an offense charged in the indictment, and the sentence may not exceed the sentence prescribed by law for such offense. *S. v. Bennett*, 423.

A defendant, through counsel, may plead guilty to less degrees of the same crimes charged in the indictments against him, and the State may accept such pleas. *S. v. Woody*, 544.

Defendant's counsel entered pleas of guilty upon his trial some three months after he had been bound over, and on the date, as an indigent, he had been appointed counsel by the court, with nothing in the record to show or suggest that defendant's attorney did not have ample time to prepare any defense defendant may have had, and it appeared that neither defendant nor his attorney requested the court to allow him more time to prepare his defense, the pleas of guilty being to mere misdemeanors upon indictments charging felonies. *Held:* The question of defendant's right to continuance not having been raised in the trial court, may not be raised on appeal in the Supreme Court. *Ibid.*

The acceptance of a plea of guilty on the day after the appointment of counsel for the indigent defendant will not be held for error when there is no request for continuance and the interrogation of the court discloses that defendant entered the plea freely, understandingly, and voluntarily, without compulsion or duress or promise of leniency. *S. v. Miller*, 611.

Tender and acceptance of defendant's pleas of guilty upon paritcular charges renders unnecessary proof of defendant's guilt thereof. *Ibid.*

§ 24. Plea of Not Guilty.

Under the general plea of not guilty, a defendant may rely upon more than one defense. *S. v. Price*, 521.

CRIMINAL LAW—*Continued.*

§ 25. Plea of Nolo Contendere.

A plea of *nolo contendere* has the same effect insofar as punishment is concerned as a plea of guilty. *S. v. Swinney*, 130.

If upon the hearing of evidence in determining sentence upon defendant's plea of *nolo contendere* it appears that defendant is not guilty of the offense, the court may advise defendant to withdraw his plea of *nolo contendere*, although the court will not ordinarily do so *ex mero motu*. *Ibid.*

§ 26. Plea of Former Jeopardy.

Prosecution on an indictment charging the felonious breaking and entering of a building "occupied by one Friedman's Jewelry, a corporation" will not bar a subsequent prosecution on an indictment charging the felonious breaking and entering of a building occupied by "Friedman's Lakewood, Incorporated." *S. v. Miller*, 646.

§ 29. Suggestion of Mental Incapacity to Plead.

Defendant's motion that his plea of mental incapacity to plead to the indictment and to conduct a rational defense be determined prior to the trial upon the indictment, is addressed to the discretion of the trial court and is not reviewable in the absence of a showing of abuse. *S. v. Spence*, 23.

§ 34. Evidence of Defendant's Guilt of Other Offenses.

In a prosecution for carnally knowing a female child under the age of twelve years, testimony of the prosecuting witness that the defendant had made improper advances to her approximately four years prior to the offense charged is competent in evidence in corroboration of the offense charged. *Gasque v. State*, 323.

In a prosecution for armed robbery, testimony elicited on cross-examination of defendant that he had been arrested for a similar offense in another state is not prejudicial, when defendant had testified earlier on direct examination as to the prior offense, and when the questioning was for the purpose of impeaching defendant's credibility as a witness. *S. v. George*, 438.

§ 42. Articles and Clothing Connected With the Crime.

Where the evidence discloses that defendant and his accomplice took certain bank bags filled with money from a store, the introduction in evidence of the bank bags, sufficiently identified by the witnesses, is competent, since any object which has a relevant connection with the case is admissible in evidence. The fact that the bank bags were not found in the possession of defendant is favorable to him and does not affect the admissibility of the exhibits. *S. v. Jarrett*, 576.

Testimony of a witness that bank bags introduced in evidence looked similar to the ones which the witness had seen at the time of the commission of the offense and which were used in connection therewith, *held* competent. *Ibid.*

§ 43. Evidence — Maps and Photographs.

A photograph of a defendant in a lineup is competent in evidence for the purpose of illustrating the testimony of witnesses, and, in the absence of a request from the defendant that its admission be restricted, an instruction of the court that the picture was introduced solely for the purpose of "corroborating" a witness, while technically inexact, is not prejudicial, it appearing that the court's remarks effectively limited the jury's consideration of the picture. *S. v. McKissick*, 500.

CRIMINAL LAW—*Continued.*

A witness may use a blackboard sketch to illustrate his testimony as to the *locus* of the crime, and the failure to sufficiently identify the sketch as an accurate portrayal of the scene is not prejudicial when the sketch was drawn in view of the jury without objection and when the court subsequently instructed the jury that the sketch was for illustrative purposes only. *S. v. Cox*, 579.

§ 66. Evidence of Identity by Sight.

The Federal decision that an accused is entitled to be represented by counsel at a pretrial lineup is not to be given retroactive effect, and testimony in this case regarding the identification of defendant at a police station lineup *is held* admissible in evidence, although at the time of the lineup the defendant was not represented by counsel. *S. v. McKissick*, 500.

§ 75. Confessions — Tests of Voluntariness; Admissibility in General.

The constitutional safeguards governing the admissibility of confessions do not apply to free and voluntary statements made by defendants to a cellmate in jail, and such statements volunteered to a person unconnected with law enforcement and not in consequence of any interrogation are competent. *S. v. Spence*, 23.

§ 85. Character Evidence Relating to Defendant.

Evidence purporting to show the reputation of defendant and his mother for truth and veracity was properly excluded, the defendant being entitled to elicit testimony from his character witnesses only as to his general character and not as to particular traits. *S. v. McKissick*, 500.

§ 87. Direct Examination of Witnesses.

The trial court has discretionary authority to allow the solicitor to ask a witness a leading question, and, in the absence of a showing of abuse of discretion, its rulings will not be reviewed on appeal. *S. v. Staten*, 600.

§ 89. Credibility of Witnesses; Corroboration and Impeachment.

In a prosecution for armed robbery, testimony elicited on cross-examination of defendant that he had been arrested for a similar offense in another state is not prejudicial, when defendant had testified earlier on direct examination as to the prior offense, and when the questioning was for the purpose of impeaching defendant's credibility as a witness. *S. v. George*, 438.

It will not be held for error that the court refused to allow defendants' counsel to play, in the presence of the jury, an alleged recording of previous statements by a State's witness then under cross examination, which recording device had not been authenticated or offered in evidence, there being no circumscription of defendants' right to cross-examine any witness for the State as to whether such witness had theretofore made contradictory statements and the court having specifically stated that the defendants at the proper stage of the trial might recall as their witness any person whose voice was purportedly recorded to identify his voice and the statement so recorded. *S. v. Yoes*, 616.

§ 92. Consolidation and Severance of Counts.

Indictment charging defendants as accessories before the fact in the slaying of the same person, the defendants being present together at the time of the offense, *held* to authorize the consolidation of the indictments for trial. *S. v. Parker*, 414.

CRIMINAL LAW—*Continued.*

A motion by the State to consolidate indictments against four defendants for successively raping the same female during a single episode, and the motion of defendants for separate trials are addressed to the discretion of the trial court, G.S. 15-152, and his ruling allowing the motion for consolidation will not be disturbed in the absence of a showing of abuse. *S. v. Yoes*, 616.

§ 98. Custody of Defendant or Witnesses.

Motion to sequester witnesses is addressed to the discretion of the trial court, and denial of the motion is not reviewable in the absence of a showing of abuse. *S. v. Spence*, 23; *S. v. Yoes*, 616.

§ 99. Conduct of the Court, and its Expression of Opinion on the Evidence During Progress of the Trial.

The fact that the court and the solicitor confer in the absence of defendant's attorney as to whether evidence relating to a particular matter would be competent upon the trial, could not be prejudicial to defendant. *S. v. Spence*, 23.

There could have been no prejudice to defendants in the court's direction to their counsel that a recording device be removed from the courtroom when the record discloses that the recording device in question was not connected or in operation. *S. v. Yoes*, 616.

The court's admonition to defendant on occasions in which defendant is disrespectful in his attitude to the court, is proper. *S. v. Harris*, 732.

§ 101. Custody and Conduct of Jury and Misconduct Affecting Jury.

A juror who was not a member of the jury impaneled to try defendant through error entered the jury room with eleven members of the jury impaneled to try the case on the morning following a recess. The trial judge found that the juror in question was in the room only for a short time and that the twelfth juror impaneled to try defendant replaced him within a matter of moments, prior to any deliberations of the jury. *Held:* The court properly denied defendant's motion to set aside the verdict on the ground of any such nonprejudicial incident. *S. v. Battle*, 594.

§ 102. Argument and Conduct of Counsel or Solicitor.

The court properly stops counsel for defendant from arguing the facts of other cases to the jury. *S. v. Spence*, 23.

While counsel have wide latitude in their argument to the jury, counsel are not entitled to travel outside the record and argue facts not included in the evidence, and what constitutes improper argument must ordinarily be left to the sound discretion of the trial court. *Ibid.*

In a capital prosecution, the solicitor is entitled to argue to the jury that the jury should return a verdict that carries mandatory sentence of death. *Ibid.*

The solicitor's improper argument to the jury to the effect that if they did not render a verdict without recommendation of life imprisonment the police department's hands would be tied and that the police would not afford protection to the citizenry, *held* cured by the action of the court in stopping the argument and instructing the jury not to consider it. *Ibid.*

Wide latitude is allowed counsel in their arguments to the jury, and, except in capital cases, an exception to improper remarks of counsel during the argument must ordinarily be taken before verdict. *S. v. Miller*, 646.

Argument of Solicitor to the jury held grossly prejudicial in this case. *Ibid.*

CRIMINAL LAW—*Continued.*

§ 104. Consideration of Evidence on Motion to Nonsuit.

Upon motion for nonsuit, all the evidence admitted, whether competent or incompetent, must be considered in the light most favorable to the State, giving it the benefit of every reasonable inference to be drawn therefrom, and so much of the defendant's evidence as is favorable to the State must also be considered. *S. v. Cutler,* 379.

Contradictions and discrepancies are for the jury to resolve and do not warrant nonsuit. *S. v. Young,* 589.

On motion to nonsuit, defendant's evidence will not be considered when it is in conflict with that of the State. *Ibid.*

When the State has introduced no exculpatory evidence, defendant's evidence tending to exculpate him of the offense charged is to be disregarded on motion of nonsuit. *S. v. Miller,* 646.

§ 106. Sufficiency of Evidence to Overrule Nonsuit.

Motion for nonsuit is properly allowed when the evidence is insufficient to raise more than a suspicion or conjecture that the crime charged in the indictment or warrant has been committed or that the defendant committed it. *S. v. Cutler,* 379.

The test of the sufficiency of circumstantial evidence to withstand nonsuit is whether a reasonable inference of defendant's guilt may be drawn from the evidence; if so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is guilty. *Ibid; S. v. Young,* 589.

§ 111. Form and Sufficiency of Instructions in General.

It is not required that the court in its charge inform the jury as to who had made or brought the charges against defendant, it being sufficient that the indictment against defendant had been duly returned by the grand jury. *S. v. Withers,* 364.

The failure of the court, in instructing the jury upon the lesser offenses of robbery, to repeat an instruction previously given relating to the defense of alibi, is not error, since the jury could reasonably conclude that if defendant should be acquitted of armed robbery on the ground that he was not present at the time of the offense, he should likewise be acquitted of common law robbery. *S. v. Banks,* 583.

The charge of the court in this case *held* to contain a full and fair summary of the evidence and the contentions of the parties, together with an accurate statement and explanation of the principles of law applicable thereto, with no expression or intimation of an opinion by the court as to whether any fact was or was not sufficiently proved, and defendants' assignments of error thereto are overruled. *S. v. Yoes,* 616.

§ 112. Instructions on Burden of Proof and Presumptions.

The charge to the effect that reasonable doubt was not an imaginary or fanciful doubt but was a sane, rational doubt arising out of the evidence or lack of it, so that the evidence fails to satisfy or convince the jurors of defendant's guilt, *held* not prejudicial, it not being required that the court use any set formula in defining reasonable doubt. *S. v. Withers,* 364.

§ 114. Expression of Opinion by Court on the Evidence in the Charge.

Where defendant is charged with speeding and with resisting arrest, and the court reverses its refusal to quash the charge of resisting arrest and instructs the jury that the evidence and arguments in regard to that count

CRIMINAL LAW—*Continued.*

should be disregarded, the fact that there was evidence that the officers beat the defendant with their fists after he had been brought to a stop after the speeding incident cannot constitute an expression of opinion by the court, since all of the evidence relative to the charge of resisting arrest is irrelevant to the charge of speeding, and the court correctly instructs the jury not to consider same. *S. v. Cooley*, 734.

§ 115. Instructions on Lesser Degrees of Crime and Possible Verdicts.

Where all the evidence tends to show robbery by firearms, it is not error for the court to fail to submit the question of defendant's guilt of forcible trespass. *S. v. Harris*, 732.

§ 120. Instructions on Right of Jury to Recommend Life Imprisonment.

The charge of the court in the present case *held* not to contain any statement tending to influence the jury in regard to whether it should return a verdict of guilty without recommendation of life imprisonment, and in any event the verdict of guilty with such recommendation discloses that there could not have been any prejudice. *S. v. Yoes*, 616.

§ 124. Sufficiency and Effect of Verdict in General.

In a prosecution under an indictment charging felonious breaking and entering, a verdict of guilty of larceny of goods of a value of more than $200.00 without reference to the indictment is not sufficient to support judgment, and the Supreme Court *ex mero motu* will vacate the judgment and order a new trial. *S. v. Ingram*, 538.

§ 126. Unanimity of Verdict, Polling the Jury, and Acceptance of the Verdict.

Upon the polling of the jury in regard to its verdict of guilty of rape returned against one defendant, one juror stated that his verdict as to such defendant was guilty but that he recommended mercy, whereupon the court sent the jury back for further deliberation after instructing them that the verdict must be unanimous. *Held:* The contention that the instruction required that the same verdict be returned as to all defendants is untenable, the court having expressly charged the jury to the contrary, saying as to each defendant by name that the jury might return one of three verdicts, guilty as charged in the bill of indictment, guilty as charged in the bill of indictment with recommendation for life imprisonment, or not guilty. *S. v. Yoes*, 616.

§ 127. Arrest of Judgment.

A motion in arrest of judgment may be directed to patent defects in the pleadings, verdict, or other parts of the record proper. *S. v. Ingram*, 538.

§ 134. Form and Requisites of Judgment or Sentence in General.

On defendant's pleas of guilty to non-felonious breaking and entering and non-felonious larceny, judgment that the defendant be imprisoned for a term not less than two years, with recommendation that he be assigned under the work-release program, is not ambiguous, it being apparent that the court consolidated the two pleas for a single judgment, and that the judgment on the consolidated pleas was definite and certain. *S. v. Woody*, 544.

§ 138. Severity of Sentence and Determination Thereof.

A sentence within the statutory limit will be presumed regular and valid, but such presumption is not conclusive, and if the record discloses that the court considered irrelevant and improper matter in determining the severity

CRIMINAL LAW—*Continued.*

of sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights. *S. v. Swinney*, 130.

Record held to show that court increased punishment for lawful conduct of defendant unrelated to crime charged. *Ibid.*

The fact that defendant was given increased punishment upon his second conviction after a new trial obtained by him, *held* not ground for objection. *S. v. Brown*, 250.

The imposition of a sentence of imprisonment of seven to nine years upon plea of *nolo contendere* to the offenses of breaking and entering and larceny is not cruel or unusual punishment in a constitutional sense. *S. v. Robinson*, 448.

Where the punishment imposed is within the statutory maximum, it cannot be held cruel and unusual and will not be disturbed on appeal, although it would seem that the maximum punishment allowed by statute should be imposed only in instances of aggravation or circumstances tending to justify the more severe punishment. *S. v. Hilton*, 456.

Upon trial *de novo* in the Superior Court upon appeal from an inferior court, the Superior Court may impose a punishment in excess of that imposed in the inferior court provided the punishment does not exceed the statutory maximum. *S. v. Tolley*, 459.

Where convictions on several warrants or indictments are consolidated for judgment, the judgment cannot exceed that prescribed by the most severe statutory penalty for any one of the offenses. *Ibid.*

Where the sentence imposed by the lower court is in excess of the statutory maximum and the prisoner has already served more than such maximum, the opinion of the Supreme Court will be certified immediately to the end that the prisoner be discharged from custody forthwith. *Ibid.*

Punishments within the statutory maximums cannot constitute cruel and unusual punishment. *S. v. Hopper*, 464.

In sentencing a defendant upon his plea of guilty, it is not required that any evidence heard before the court before entering judgment be transcribed, since an appeal from the judgment will bring up for review only whether the facts charged, which defendant has himself admitted, constitute an offense punishable under the laws and the Constitution, and whether the sentence is within the punishment allowed for the offense. *S. v. Woody*, 544.

Where a judgment of imprisonment in excess of the statutory maximum is vacated on appeal, and, upon remand of the case for proper judgment, the defendant is sentenced to serve the maximum time, he must be allowed credit for the time actually served under the first judgment. *S. v. Foster*, 727.

§ 140. Sentence to Maximum and Minimum Terms.

Under the provisions of G.S. 15-6.2, concurrent sentences may be imposed for separate offenses, even though one is for a misdemeanor and the other a felony, so that one must be served in the State's prison and one in the county jail. *S. v. Brooks*, 462.

Where the court enters separate judgments imposing sentences of imprisonment, and each judgment is complete within itself, the sentences run concurrently as a matter of law, in the absence of a provision to the contrary in the judgment, even though the sentences are for different grades of offenses requiring different places of confinement, G.S. 15-6.2. *S. v. Efird*, 730.

§ 146. Nature and Grounds of Appellate Jurisdiction of Supreme Court in Criminal Cases in General.

The record proper recited as to each indictment against defendant a verdict of not guilty by the court, a plea of guilty entered by defendant, and a

CRIMINAL LAW—*Continued.*

verdict of guilty returned by the jury. *Held:* The Supreme Court, in the exercise of its supervisory power, will remand the cause to the Superior Court with direction that upon a hearing after notice to counsel and parties it certify any corrections necessary to make the record conform to the facts. *S. v. Old,* 341.

The Supreme Court may consider an assignment of error, although it is defective in compelling the Court to search the record to discover the purported error. *S. v. Staten,* 600.

Upon appeal from a sentence of life imprisonment, the Supreme Court must be careful to ascertain that the established procedures have been observed, and if there has been a substantial and prejudicial departure therefrom the Supreme Court must set aside conviction and resulting judgment, irrespective of the court's opinion of the innocence or guilt of the accused. *S. v. Yoes,* 616.

The Supreme Court, in the exercise of its supervisory jurisdiction, may order a new trial for the failure of the trial court to restrain a grossly prejudicial argument by the solicitor, even though counsel for defendant failed to object to the remarks at the time they were made. *S. v. Miller,* 646.

§ 158. Conclusiveness and Effect of Record and Presumptions as to Matters Omitted.

The rule that the case on appeal as certified imports verity and must be presumed complete and correct cannot apply when the record recites inconsistent and contradictory statements in regard to a material matter. *S. v. Old,* 341.

The record imports verity and the Supreme Court can judicially know only what appears therein, and therefore defendant may not base a contention on appeal on matters which do not appear of record. *S. v. Hilton,* 456.

Where the charge of the court is not included in the record, it will be presumed that the court properly instructed the jury as to the law arising upon the evidence. *S. v. Staten,* 600.

§ 160. Correction of Record.

The trial court has the inherent power to correct error, mistake or omissions in its records so as to make its records speak the truth, and no lapse of time will bar the court from discharging this duty. *S. v. Old,* 341.

§ 161. Necessity for and Form and Requisites of Exceptions and Assignments of Error in General.

An exception and an assignment of error should show within itself the question sought to be presented, and a mere reference in the assignment of error to the page of the record where the asserted error may be discovered is not sufficient. *S. v. Brown,* 250; *S. v. Staten,* 600.

The Supreme Court may consider an assignment of error in a capital case, although the assignment is defective in compelling the Court to search through the record to find the precise question involved. *Gasque v. State,* 323.

The admissibility of evidence challenged only by an exception is considered by the Supreme Court in this capital case, although the jurisdiction of the Court on appeal is ordinarily limited to questions of law presented both by objections duly entered and exceptions duly taken to the rulings of the lower court. *Ibid.*

It is reprehensible for appellant in an assignment of error to quote widely separated portions of the record in such a manner as to give the impression that there is no omission when in fact the statements so placed in the assign-

CRIMINAL LAW—*Continued.*

ment of error are wholly unrelated and occurred in connection with the examinations of different prospective jurors. *S. v. Yoes*, 616.

§ 162. Objections, Exceptions, and Assignments of Error to Evidence, and Motions to Strike.

A sole exception to the judgment presents only the face of the record proper for review. *S. v. Hilton*, 456.

§ 166. The Brief.

Exceptions not set out in appellant's brief or in support of which no argument is stated or authority cited will be taken as abandoned. *S. v. Spence*, 23; *S. v. Withers*, 364; *S. v. Battle*, 594; *S. v. Wyatt*, 596.

§ 167. Presumptions and Burden of Showing Error, and Harmless and Prejudicial Error in General.

The burden is upon appellant not only to show error but to show that such error was prejudicial to him. *S. v. Brown*, 250; *S. v. Jarrett*, 576.

§ 168. Harmless and Prejudicial Error in Instructions.

A *lapsus linguæ* in the charge, immediately corrected by the court so that the jury could not have been misled, will not be held for prejudicial error. *S. v. Withers*, 364.

§ 169. Harmless and Prejudicial Error in Exclusion of Evidence.

Where the record does not show what the answer of the witness would have been had he been permitted to testify, appellant has failed to carry the burden of showing prejudicial error. *S. v. Brown*, 250; *S. v. Price*, 521; *S. v. Staten*, 600.

In a prosecution for carnally knowing a female child under the age of twelve years, the admission of testimony of prosecutrix' aunt that prosecutrix had stated that the defendant had had intercourse with her many times prior to the date of the offense charged, even though technically incompetent as corroborative evidence in that it exceeded the scope of prosecutrix' testimony, *held* not prejudicial under the facts of this case, there being plenary evidence of defendant's guilt of the crime charged and the question of prosecutrix' consent not being material to the offense. *Gasque v. State*, 323.

Even conceding that the introduction in evidence of the photograph of defendant's accomplice was erroneous, its admission *held* cured by testimony theretofore and thereafter admitted without objection describing the accomplice in detail. *S. v. Jarrett*, 576.

§ 170. Harmless and Prejudicial Error in Remarks of the Court.

A remark of the court, in excluding defendant's testimony which explained a prior offense, that "we can be here 60 days trying all this stuff," *held* cured by a prompt instruction to the jury not to consider the remark. *S. v. White*, 391.

§ 171. Error Relating to One Count or to One Degree of the Crime Charged.

Where defendant validly pleads guilty to one count and the sentence therefor is within the statutory maximum and is made to run concurrently with the sentence on the other counts, any error relating to the other counts cannot be prejudicial. *S. v. Miller*, 611.

CRIMINAL LAW—*Continued.*

§ 173. Invited Error.

Defendant may not complain of testimony which he himself elicits from a witness, the testimony being responsive to defendant's questioning. *S. v. Harris,* 732.

§ 181. Post Conviction Hearing.

In a hearing under the Post Conviction Hearing Act, a finding by the court that an indigent defendant had been denied right of appeal to the Supreme Court fully supports an order appointing counsel to perfect an appeal and directing the county to furnish a transcript of the trial. *S. v. Staten,* 600.

DAMAGES.

§ 3. Compensatory Damages for Injury to Person.

As a general rule, damages for mere fright or emotional disturbance are not recoverable unless there is a contemporaneous physical injury resulting from defendant's conduct, which injury defendant could have reasonably foreseen under the circumstances. *Crews v. Finance Co.,* 684.

Evidence held sufficient to overrule nonsuit on question of damages for physical injury resulting from emotional disturbance. *Ibid.*

§ 4. Damages for Injury to or Conversion of Property.

Where plaintiff's allegations and evidence are to the effect that damages to his dwelling resulted from a particular dynamite blast at defendant's quarry, the proper measure of damages is the difference in the market value of the property immediately before and immediately after the explosion complained of, and the court properly instructs the jury that it should consider the evidence offered by plaintiff in regard to the value of the property before the alleged damage by blasting and evidence of such value immediately after the blasting. *Paris v. Aggregates, Inc.,* 471.

§ 15. Instructions on Measure of Damages.

The failure of the court to place the burden of proof upon plaintiff to prove the amount of his damages must be held for prejudicial error. *Paris v. Aggregates, Inc.,* 471.

DEATH.

§ 4. Time Within Which Action for Wrongful Death Must be Instituted.

In this action for wrongful death, plaintiff instituted action in a Federal District Court of another state within a year, which action was dismissed "without prejudice." Plaintiff instituted the present action in this State within a year of the dismissal. *Held:* The action was barred by the statute of limitations, G.S. 1-53(4), since G.S. 1-25 has no application. *High v. Broadnax,* 313.

DEDICATION.

§ 1. Acts Constituting Dedication.

In order to constitute a dedication, a landowner must intend to dedicate property to the public, or commit acts fairly and reasonably leading a reasonably prudent man to infer an intent to dedicate, followed by acceptance of such offer by the public. *Highway Commission v. Thornton,* 227.

The fact that occupants of houses upon the owner's land and persons having business of social relations with such occupants use a roadway across the

DEDICATION—*Continued.*

land as means of ingress and egress from a public road, is alone insufficient to establish a dedication by the owner of such road to the public. *Ibid.*

The fact that the owner records a map showing a street or road across his land does not alone constitute an offer of dedication to the public, but it is required further that such owner sell a lot with reference to such map, and even then the offer of dedication must be accepted by the public. *Ibid.*

DEEDS.

§ 19. Construction and Operation of Restrictive Covenants.

While restrictive covenants must be strictly construed, restrictions must be interpreted to preclude any uses contrary to the intent of the parties as expressed in the instrument or instruments creating the restrictions considered in the light of the circumstances existing at the time of the creation of the restrictions. *Long v. Branham,* 264.

Nothing else appearing, restrictions imposed upon a particular subdivision are for the benefit of that particular development and no other. *Ibid.*

A modification of a restrictive covenant by the parties to permit a semiprivate driveway between two lots discloses that, without such modification, the restrictions precluded the use of any part of the lots for the purpose of an additional street. *Ibid.*

The owner of a lot in a subdivision is bound by any restrictions which an examination of the instruments in his chain of title would have disclosed. *Ibid.*

Under facts of this case, residential restrictions precluded construction of road connecting subdivision with adjacent development. *Ibid.*

DIVORCE AND ALIMONY.

§ 16. Alimony Without Divorce.

In an action for alimony without divorce, a judgment, entered by consent of the parties, which orders defendant to make alimony payments to his wife, is valid and is enforceable against the husband by attachment for contempt, notwithstanding the absence of allegations or findings that the separation was caused by the misconduct of the husband. *Whitesides v. Whitesides,* 560.

§ 18. Alimony and Subsistence Pendente Lite.

Allowance of subsistence to the wife for the support of herself and the children of the marriage, considered in the light of the husband's earnings and fixed expenses is upheld in this case, notwithstanding the allowance to the wife be insufficient for her needs and the balance remaining to the husband be insufficient for his separate living expenses and expenses in connection with his job, since the order is as reasonable and equitable as the circumstances permit. *Reavis v. Reavis,* 707.

Findings supported by evidence that the husband had abandoned his wife and children without provocation or justification and had not made payments for their support since that date, and that the wife was a fit and suitable person to have the custody of the children and that it was to their best interest that she have their custody, *held* to support the court's order awarding the wife custody of the children and subsistence. *In re Huff,* 709.

§ 21. Enforcing Payment of Alimony.

Allegations in the amended answer admitting that plaintiff and defendant signed a separation agreement but denying that defendant promised to pay plaintiff for her support monthly periodic payments as stipulated in the

DIVORCE AND ALIMONY—*Continued.*

agreement, and denying plaintiff's allegations that defendant had defaulted in making such payments, raises an issue of fact for the determination of the jury in plaintiff's action to recover the amounts alleged to be in default, irrespective of whether defendant's further answer and defense sufficiently alleged that the signing of the agreement was induced by coercion, threats and intimidations. *Powell v. Powell,* 420.

§ 23. Support and Custody of Children.

Findings supported by evidence that the husband had abandoned his wife and children without provocation or justification and had not made payments for their support since that date, and that the wife was a fit and suitable person to have the custody of the children and that it was to their best interest that she have their custody, *held* to support the court's order awarding the wife custody of the children and subsistence. *In re Huff,* 709.

EJECTMENT.

§ 6. Nature and Essentials of Ejectment to Try Title.

Action in ejectment is properly brought by the owner of the legal title having the right to immediate possession. *Oil Co. v. Richardson,* 696.

A wife is not a real party in interest so as to interpose as a defense or counterclaim in an action in ejectment instituted by her husband's grantee that her husband had fraudulently conveyed the lands without her joinder in order to deprive her of the possession thereof, since G.S. 29-14, defining the share of the surviving spouse of an intestate, and G.S. 29-30, providing for a life estate at the election of the surviving spouse, do not give her a present right of possession. *Ibid.*

Allegations of defendant that her husband conveyed property to a trustee without her joinder for the purpose of defeating her right to protect the property from a prior deed of trust, which contained her joinder, fail to state facts constituting a defense or counterclaim in an action in ejectment, since the husband's conveyance without her joinder does not prevent her from exercising her right to redemption from the prior deed of trust. *Ibid.*

Defendant's allegations that a deed of trust was a voluntary conveyance executed by her husband and received by the plaintiff for the purpose of defeating her rights to alimony *pendente lite are held* sufficient to constitute a counterclaim entitling her to relief in defendant's action in ejectment. *Ibid.*

EMINENT DOMAIN.

§ 1. Nature and Extent of Power.

Private property may not be taken by eminent domain even for a public purpose when such purpose, under the circumstances of the particular case, as a matter of law cannot be accomplished. *Vance County v. Royster,* 53.

The exercise of the power of eminent domain is always subject to the limitation that there must be definite and adequate provision for reasonable compensation to the owner. *Raleigh v. Mercer,* 114.

Where a municipality condemns a portion of a tract of land for a sewer outfall line and later assesses the owner for the public improvement, and in the condemnation proceeding the court, upon the city's objection, excludes the owner's evidence that he would receive no benefit from the proposed sewer line but nevertheless would be charged with the assessment for the improvement, *held,* upon appeal from the assessment thereafter levied, the case must be re-

EMINENT DOMAIN—*Continued.*

manded for the hearing of evidence in order to insure that respondent receives reasonable compensation for the taking of the easement for the sewer outfall line. *Ibid.*

Landowners are not entitled to the issuance of an order restraining the Highway Commission from constructing a road across their lands when the construction of the road had been completed at the time of the hearing and no request for a temporary restraining order having been made, since if an act has been accomplished it cannot be restrained. *Highway Commission v. Thornton,* 227.

The doctrine that the silence of a landowner in the face of a long and continued use of an easement across his land by an agency having the power of eminent domain may constitute the basis for an implied grant has no application where the contention is that such power does not extend to the taking in question. *Ibid.*

§ 2. Acts Constituting a "Taking".

Where the owners are afforded direct access from their land to a service road connected with the lanes of travel for one direction on a limited access highway, with crossover points to the lanes of travel in the other direction, the owners are not entitled to compensation for mere inconvenience as distinguished from denial of access, and therefore an instruction leaving it to the jury to say whether, under the circumstances, respondents had reasonable access to the highway, and authorizing the assessment of damages for loss of access if the jury should find that they did not have reasonable access, cannot be prejudicial to them. *Highway Commission v. Nuckles,* 1.

§ 3. What is "Public Purpose" Within Power of Eminent Domain.

Private property may be taken by the exercise of the power of eminent domain only when the taking is for a public use; what is a public use is a judicial question, but if the use be public the courts will not interfere with the legislative or administrative determination that the taking of particular property is necessary for the successful operation of the proposed project, or prevent the taking on the ground that another site would be preferable. *Vance County v. Royster,* 53.

Acquisition of land for, and the construction and operation of, an airport for use by the public is a purpose for which a city or a county, or both, may acquire land by condemnation, and the fact that at the time of the taking there are no commitments from commercial air lines and the immediate prospect is for use only by a small number of private planes, is irrelevant, there being no suggestion that the airport would not be available and eventually used as a public facility. *Ibid.*

Private property may not be condemned for a private purpose notwithstanding the payment of full compensation. *Highway Commission v. Thornton,* 227.

What constitutes a public purpose is a judicial question to be determined in the light of the circumstances of the particular case and the then current opinion as to the proper function of government. *Ibid.*

Economic benefits to the community, anticipated from the attraction to it of a large and wealthy prospective employer, are not determinative of whether property taken in order to accomplish that purpose is taken for a "public use." *Ibid.*

The fact that a road ends in a *cul de sac* does not prevent it from being a public road so as to support condemnation proceedings. *Ibid.*

EMINENT DOMAIN—*Continued.*

A road does not cease to be a public road so as to support condemnation proceedings merely by reason of the fact that one individual or corporation may derive more benefit from it than the public generally, or because a substantial part of the anticipated cost of the construction of the road is paid by a private corporation organized for the promotion of the industrial development of the community, and a road is a public road if it is used as a matter of right by the public on an equal, common basis, irrespective of how many people actually use it. *Ibid.*

Findings held to support conclusion that road to terminal of truck carrier was for use of public and therefore for public purpose. *Ibid.*

§ 5. Amount of Compensation.

Respondents sold a part of their tract of land to third persons prior to the time the Highway Commission acquired title of the remaining tract. Respondents alleged that the price obtained by them for the tract sold prior to the taking was greatly decreased because of public knowledge that the Commission had decided upon the location for the limited access highway and the taking of property therefor. *Held:* G.S. 136-104 provides compensation on the basis of the date title vests in the Commission, and respondents are not entitled to compensation in regard to land conveyed by them to third persons prior to such date. *Highway Commission v. Hettiger*, 152.

Respondents may not by agreement made in anticipation of the condemnation of a portion of their property change the statutory provision relating to the time of and the basis for compensation to be paid upon the condemnation of the property. *Ibid.*

Allegations of unwarranted delay and *mala fides* on the part of employees of the Highway Commission in effecting a condemnation of respondents' land are irrelevant to the determination of what constitutes just compensation for the property condemned for highway purposes. *Ibid.*

Where an electric power company condemns an easement for its transmission lines together with the right to enter upon the land to maintain the lines, with the landowners retaining such rights in the land not inconsistent with the rights acquired by easement, the measure of compensation is the difference in the market value of the land free of the easement and the market value of the land subject to the easement, and an instruction to the effect that the landowners are entitled to recover the market value of the land taken, and the difference between the market value of the remaining tracts before and after the taking, is error. *Power Co. v. Rogers*, 318.

The nature and extent of the easement acquired determines whether there is any substantial difference in the easement condemned and a fee simple estate in the land, and each case must stand on its exact facts. *Ibid.*

Plaintiffs alleged that they vacated their home on the date the Highway Commission advised them it would require the property, but that the Commission did not take actual possession until some two years later. The Commission admitted the date of taking to be the day plaintiffs vacated the property. *Held:* The proper measure of damages is the fair market value of the property as of the date of the taking, plus interest for delayed payment of compensation, and plaintiffs are not entitled to damages for the loss of use of their property between the day it was vacated and the date the defendant deposited its estimate of compensation. *Davis v. Highway Commission*, 405.

§ 6. Evidence of Value.

Testimony as to the price paid by respondents for the tract of land some four years prior to the condemnation of a part of the tract is properly

EMINENT DOMAIN—*Continued.*

admitted upon the question of the amount of damages when there is no suggestion of any physical change in the tract or any substantial change in the vicinity of the property which might have affected its value from the time of the purchase by plaintiffs to the time of condemnation. *Highway Commission v. Nuckles,* 1.

§ 7d. Proceedings to Take Land and Assess Compensation for Highways.

The provision of G.S. 136-108 that in condemnation proceedings all questions raised by the pleadings as to parties, title, estates condemned, and area taken, should be determined by the court without a jury, reserving only the amount of damages for the determination of the jury, is constitutional, the adjudication by the court of such questions being conclusively solely for the purpose of condemnation. *Highway Commission v. Nuckles,* 1.

The right of appeal in condemnation proceedings is the same as in any other civil action, G.S. 136-119, and appeal lies in such proceedings from a final judgment and also from an interlocutory order which affects a substantial right and which would result in injury if not corrected before final judgment. *Ibid.*

When an interlocutory order in condemnation proceedings adjudicates that respondents own the land involved in the proceeding, the Highway Commission must appeal immediately if it wishes to litigate its contention that it had acquired in prior proceedings practically all the land in question, since trial of the issue of damages would be a futile thing if respondents did not own the land. *Ibid.*

Order in condemnation proceedings adjudicating respondents' title to virtually all of the land in dispute in the proceedings, and adjudicating that the Highway Commission had not obtained any right thereto in prior condemnation proceedings, *held* a final adjudication as to such title, and in the subsequent proceedings another judge of the Superior Court may not modify, reverse or set aside such order. *Ibid.*

G.S. 136-19 is a statute of limitations and not a condition precedent, and the trial court's discretionary action in refusing to permit the Highway Commission to amend to plead the statutory limitation a year and a half after the original pleadings had been filed is not reviewable in the absence of a showing of abuse. *Ibid.*

Where, in condemnation proceedings, the court has adjudicated that the Highway Commission did not obtain a right of way over the land in question by prior condemnation proceedings, it is prejudicial error for the court, in the subsequent trial of the issue of damages, to permit, over respondents' objection, the introduction of testimony in support of the Highway Commission's contention that it had acquired the land in the prior condemnation proceedings and to submit such contention to the jury in the court's charge. *Ibid.*

If the Highway Commission institutes condemnation proceedings and, pursuant thereto, enters upon and constructs a road across private lands for a private purpose, the landowners are not entitled to injunctive relief but only to a dismissal of the condemnation proceedings since, in such instance, neither a judgment of condemnation nor an award for damages for trespass could be entered in the condemnation proceedings. *Highway Commission v. Thornton,* 227.

Injunction will not lie to restrain the Highway Commission from maintaining condemnation proceedings on the ground that the Commission was without authority to condemn the land, since the ground of objection is one which

EMINENT DOMAIN—*Continued.*

the landowner may assert as a defense in the condemnation proceeding itself, and therefore the landowner has an adequate remedy at law. *Ibid.*

Respondents' allegations and contentions to the effect that the Highway Commission was without authority to maintain the condemnation proceeding because the proceeding was to condemn respondents' land for a private and not a public purpose raise an issue to be determined by the Superior Court under the provisions of G.S. 136-108, and therefore if respondents' premise is correct, the proceeding should be dismissed. *Ibid.*

Where respondents within twelve months of the declaration of taking file answer setting up the defense that the condemnation was for a private and not a public purpose and therefore the Commission had no authority to maintain the condemnation proceeding, such defense is asserted within the time stipulated by the statute, G.S. 136-107, and the Commission may not assert that the respondents are barred from asserting such defense because the Commission had entered upon the land immediately after the filing of the declaration of taking and had practically completed construction of the road at the time respondents filed answer. *Ibid.*

§ 9. Trial Upon Exceptions.

Where an electric power company condemns an easement for its transmission lines together with the right to enter upon the land to maintain the lines, with the landowners retaining such rights in the land not inconsistent with the rights acquired by easement, the measure of compensation is the difference in the market value of the land free of the easement and the market value of the land subject to the easement, and an instruction to the effect that the landowners are entitled to recover the market value of the land taken, and the difference between the market value of the tracts before and after the taking, is error. *Power Co. v. Rogers*, 318.

The nature and extent of the easement acquired determines whether there is any substantial difference in the easement condemned and a fee simple estate in the land, and each case must stand on its exact facts. *Ibid.*

§ 11. Action to Recover Compensation or Damages.

The State Highway Commission, as an agency of the State, may be sued in tort only as authorized in the Tort Claims Act, G.S. 143-29.1, and in no forum is the Commission liable for fraudulent misrepresentations. *Davis v. Highway Commission*, 405.

The Tort Claims Act authorizes claims against the State Highway Commission which arise out of a negligent act of an employee in the scope of his employment, G.S. 143-291, and allegations to the effect that the Commission by false representations fraudulently and unnecessarily induced the plaintiffs to vacate their home two years before it was required for highway purposes, *held* properly stricken, since an intentional misrepresentation is not a negligent act. *Ibid.*

§ 13. Time of Passage of Title.

Title to property condemned for highway purposes passes at the time of the filing of the complaint and declaration of taking by the Highway Commission and the deposit by it into court of the amount estimated by it as just compensation. *Highway Commission v. Hettiger*, 152.

§ 14. Persons Entitled to Compensation Paid.

The right to compensation for property taken for highway purposes vests in the persons owning the property at the time title passes to the Commission,

EMINENT DOMAIN—*Continued.*

and their right to compensation is limited to such interest as they own at the time of the taking. *Highway Commission v. Hettiger*, 152.

Respondents sold a part of their tract of land to third persons prior to the time the Highway Commission acquired title. Respondents alleged that the price obtained by them for the tract sold prior to the taking was greatly decreased because of public knowledge that the Commission had decided upon the location for the limited access highway and the taking of property therefor. *Held:* G.S. 136-104 provides compensation on the basis of the date title vests in the Commission, and respondents are not entitled to compensation in regard to land conveyed by them to third persons prior to such date. *Ibid.*

Respondents may not by agreement made in anticipation of the condemnation of a portion of their property change the statutory provision relating to the time of and the basis for compensation to be paid upon the condemnation of the property. *Ibid.*

Allegations of unwarranted delay and *mala fides* on the part of employees of the Highway Commission in effecting a condemnation of respondents' land are irrelevant to the determination of what constitutes just compensation for the property condemned for highway purposes. *Ibid.*

ESCAPE.

§ 1. **Elements of and Prosecutions for the Offense.**

In order for an indictment for an escape to support punishment for the felony of a third escape, it is required that the indictment allege facts showing with particularity the prior escapes, and an indictment having the words "Indictment Third Escape" on the back of the indictment, without any allegations as to the prior escapes, is insufficient to support a felony sentence. *S. v. Bennett*, 423.

ESTATES.

§ 9. **Joint Estates and Survivorship in Personalty.**

Plaintiff and her father agreed to hold certain shares of stock "as joint tenants with the right of survivorship and not as tenants in common." The law of the state where the agreement was made recognized joint tenancy in personalty with right of survivorship. *Held:* Upon the father's death, plaintiff took title as the survivor. *Fast v. Gulley*, 208.

ESTOPPEL.

§ 4. **Equitable Estoppel.**

Respondents are not estopped from maintaining that the Highway Commission was seeking to condemn their land for a private and not a public purpose and therefore was without authority to maintain the condemnation proceeding when there is nothing in the record to show that respondents by act or statement or silence led anyone to suppose that they would not resist to their utmost the construction of the road, since it is esesntial to an estoppel that the person asserting the estoppel must have changed his position to his detriment in reliance upon statements or acts of the parties sought to be estopped. *Highway Commission v. Thornton*, 227.

The doctrine that the silence of a landowner in the face of a long and continued use of an easement across his land by an agency having the power of eminent domain may constitute the basis for an implied grant has no appli-

ESTOPPEL—*Continued.*

cation where the contention is that such power does not extend to the taking in question. *Ibid.*

§ 5. Parties Estopped.

A municipal corporation is not estopped from pleading *ultra vires* to a void contract, even though it has accepted benefits from the contract and has made partial payments thereon, and even though the other party has substantially performed his part of the agreement. *Moody v. Transylvania County,* 384.

EVIDENCE.

§ 1. Judicial Notice of Legislative, Executive, Judicial Acts and Geographic Facts of This State.

The courts will take judicial notice of the amendment of a statute. *Wing v. Godwin,* 426.

§ 4. Presumptions in General.

Where a person under duty to mail a letter entrusts it to a person having an interest in the mailing of the letter, who testifies that he duly mailed it and that the letter was properly addressed, there is a presumption that the letter was delivered to the addressee. *York v. York,* 416.

§ 12. Communications Between Husband and Wife.

A husband or wife shall not be compellable to disclose any confidential communication made by the one to the other during their marriage. *Hicks v. Hicks,* 204.

A tape recording, made without the wife's knowledge by the husband, of a conversation between them while alone except for the presence of their eight year old child, who was singing and playing at the time, *held* incompetent in evidence over the wife's objection. *Ibid.*

§ 22. Photographs, X-rays and Maps.

An engineer who has made an actual survey of the area may use a map of the property to illustrate his testimony. *Gastonia v. Parrish,* 527.

§ 22.1. Relevancy and Competency of Tape Recordings.

A tape recording of a conversation is ordinarily admissible in evidence if it is properly authenticated and if it is not excluded by some positive rule of law. *Hicks v. Hicks,* 204.

§ 26. Best and Secondary Evidence Relating to Writings.

Where it is shown that a municipal zoning ordinance map has been lost and cannot, after due and diligent search, be found, it is competent to permit the introduction in evidence of a map made by a tracing process (Kronaflex), established by oral testimony as an accurate copy of the lost original. *Gastonia v. Parrish,* 527.

§ 27. Parol or Extrinsic Evidence Affecting Writings.

The rule that a written instrument may not be contradicted or varied by parol applies to the nature and quality of an estate conveyed by deed and in the absence of anything to prevent the application of this rule, a deed to husband and wife, nothing else appearing, vests title in them as tenants in the entirety, and a different estate may not be established by parol. *Terrell v. Terrell,* 95.

EVIDENCE—*Continued.*

§ 31. Admissions or Declarations of Agents or Representatives.

Immediately after plaintiff had slipped and fallen on the floor of defendant's store, defendant's employee stated that she had almost slipped down herself and that the janitor had waxed the floor the night before. *Held:* The testimony of what the girl said was properly excluded as a narrative of past events. *Grimes v. Credit Co.*, 608.

§ 43. Competency and Qualification of Experts.

Where a witness is shown to be a building inspector with many years experience relating to damage from dynamite blasts, it will be presumed, in the absence of objection by the opposing party, that the court, in admitting his testimony as to his opinion that the damage to plaintiff's dwelling was caused by dynamite blasting, found that the witness was an expert in the field, even though there is no specific finding by the court that the witness was an expert. *Paris v. Aggregates, Inc.*, 471.

§ 55. Evidence Competent for Purpose of Corroboration.

Where a witness has testified to a certain fact, his testimony that another had made a statement to like effect is competent for the purpose of corroboration. *Paris v. Aggregates, Inc.*, 471.

§ 56. Evidence Competent to Impeach or Discredit Witness.

Cross-examination of a witness for the purpose of impeachment is not limited to inquiry as to the witness' prior convictions of offenses involving moral turpitude, but the witness may be asked on cross-examination as to any prior convictions of crime. *Ingle v. Transfer Corp.*, 276.

EXECUTORS AND ADMINISTRATORS.

§ 5. Attack of Appointment, Revocation of Letters, and Appointment of Successors.

The clerk of Superior Court has authority to revoke letters of administration issued by him under mistake of fact and to remove any administrator who has been guilty of default or misconduct in the execution of his office. *In re Estate of Lowther*, 345.

In absence of exception thereto, clerk's finding in probate proceedings is conclusive if supported by evidence. *Ibid.*

An adjudication by the clerk that the administratrix theretofore appointed by him was not the widow of decedent is not *res judicata* in any other proceeding between the parties which respondent may be entitled to pursue. *Ibid.*

§ 31. Distribution of Estates Under Family Agreements.

The dispositive provisions of a will may not be modified by a family settlement merely because the beneficiaries may be dissatisfied with its provisions, and the courts will not substitute their judgment in contravention of the wishes of testator, but a will may be modified by a family settlement only when there exists some exigency or emergency not contemplated by testator and modification of the will in accordance with the family settlement would tend to preserve the estate and promote and encourage family accord. *O'Neil v. O'Neil*, 106.

The mere fact that a beneficiary under a will has filed a caveat does not warrant the court in approving a family agreement modifying the dispositive provisions of the will unless there is evidence before the court disclosing a *bona fide* controversy as to the validity of the will. *Ibid.*

EXECUTORS AND ADMINISTRATORS—*Continued.*

Mere allegation that caveat had been filed attacking the validity of the will on the ground of mental incapacity of grantor and allegation that the primary beneficiary had testified in a different case in regard to the mental incapacity of testator generally, without evidence before the court disclosing that there would be evidence adduced at the caveat proceeding raising a serious question as to the validity of the will, is insufficient to invoke the equity jurisdiction of the court, and judgment approving the settlement is vacated and the cause remanded for a determination of whether there exists a *bona fide* controversy as to the will's validity. *Ibid.*

In this action disclosing a *bona fide* controversy as to the validity of the paper writing probated, judgment of the court approving a family settlement and modifying the will in accordance therewith in order to preserve the estate and promote family harmony, is affirmed. *O'Neil v. O'Neil,* 741.

FRAUD.

§ 12. Instructions and Damages.

Punitive, exemplary, or vindictive damages are ordinarily not recoverable for simple fraud. *Davis v. Highway Commission,* 405.

GRAND JURY.

§ 1. Selection and Qualification.

A Negro defendant has no right to be indicted or tried by a jury composed of persons of his race or to have a person of his race on the jury, but does have a constitutional right to be indicted and tried by a jury from which persons of his race have not been systematically excluded. *S. v. Brown,* 250.

A defendant asserting discrimination in the selection of the jury has the burden of proving such discrimination, but upon a *prima facie* showing the burden is upon the solicitor to go forward with the evidence to rebut such *prima facie* case. *Ibid.*

The granting of a new trial for discrimination in the selection of jurors has no relevancy to the subsequent trial in which the former errors and practices of the court in the selection of juries had been supplanted by unexceptional procedure. *Ibid.*

The findings of the trial court in regard to racial discrimination in the selection of the grand and petit juries will not be disturbed when such findings are supported by competent evidence and there is nothing in the record to indicate any ill consideration of the evidence or infraction of defendant's constitutional rights. *Ibid.*

While the fact that a disproportionately small number of Negroes had been selected to serve on the grand and petit juries in the county for a considerable period of time may be sufficient to raise a *prima facie* showing of racial discrimination in the selection of the juries. the absence of Negroes from a particular grand or petit jury is insufficient, in and of itself, to raise any presumption of discrimination. *Ibid.*

Even though defendant's showing of a small disparity in the number of Negroes on the jury list for two consecutive panels be considered sufficient to make out a *prima facie* case of discrimination, evidence to the effect that the jury lists included, without indication or regard to race, the names of all persons on the tax books and the voter registration books, without duplication, is sufficient to rebut such *prima facie* showing of discrimination, and the fact that persons whose names appear on the welfare rolls who were not listed on

GRAND JURY—*Continued.*

the tax or voter registration books were not included, does not alter this result. *Ibid.*

A grand jury is not unlawful merely because it is drawn from the tax list of the county. *S. v. Yoes*, 616.

It is not required that the Negro race be represented on the grand jury panel in the same ratio as the total Negro population of the county bears to the total population. *Ibid.*

It is not the right of any party to be indicted by a jury of his own race or to have a representative of any particular race on the jury, but it is his right to be tried by a competent jury from which members of his race have not been unlawfully excluded. *Ibid.*

Evidence held to support finding that there was no racial discrimination in selection of grand jury. *Ibid.*

GUARANTY.

Plaintiff bank sued upon a guaranty executed by defendant in consideration of a line of credit extended to her husband. The instrument contained this provision: "The amount of principal at any one time outstanding for which the undersigned shall be liable as herein set forth shall not exceed the sum of $................" No insertion was made in the blank space. *Held:* The guarantor's failure to limit her liability, upon being provided an opportunity to do so, does not render the guaranty void. *Bank v. Corbett*, 444.

HIGHWAYS.

§ 8.1. Contracts for Construction of Highways.

Limitation on filing of claim on highway contract does not begin to run until Commission tenders unconditional payment. *Reynolds Co. v. Highway Commission*, 40.

Where delays in completing contracts are due to mutual defaults, courts will not ordinarily apportion damages. *Ibid.*

Where the contract for highway construction provides that the Commission should pay interest at the rate of 5 per cent on the amount still due on the contract 90 days after the project is completed and accepted, the contractor is authorized to collect interest on such amount beginning 90 days after the Commission accepts the work. *Ibid.*

HOMICIDE.

§ 6. Manslaughter.

The common-law definition of involuntary manslaughter includes unintentional homicide resulting from the performance of an unlawful act, from the performance of a lawful act in a culpably negligent manner, and from the culpably negligent failure to perform a legal duty. *S. v. Massey*, 555.

§ 12. Pleas.

Under the general plea of not guilty, a defendant may rely upon more than one defense. *S. v. Price*, 521.

§ 13. Presumptions and Burden of Proof.

Where the evidence establishes that the defendant intentionally assaulted another with a deadly weapon and thereby caused the death of the person as-

HOMICIDE—*Continued.*

saulted, the presumption arises that the killing was unlawful and with malice. *S. v. Price,* 521.

§ 14. Relevancy and Competency of Evidence in General.

Where the solicitor asked a witness if he had seen the defendant strike the deceased with his hands or fists, and the witness replied, "I seen motions, swinging motions", a motion to strike on the ground that the answer was not responsive to the question was properly denied, since the witness testified positively as to what he saw taking place between the defendant and the deceased. *S. v. Staten,* 600.

§ 15. Dying Declarations.

Testimony of decedent's dying declarations *held* properly admitted in evidence upon a showing that at the time of making the declarations deceased was in actual danger of impending death and had full apprehension thereof, and that death ensued some 24 hours after the assault. *S. v. Brown,* 250.

§ 16. Evidence of Threats, Motive and Malice.

Testimony that on the day before the homicide the defendant stated that he dreamed he had shot the deceased, while too uncertain and conjectural to show ill will and malice towards deceased, does not justify a new trial, it appearing that the evidence had no probative force upon the jury. *S. v. White,* 391.

§ 17. Evidence of Premeditation and Deliberation.

Testimony of statements by defendants to the effect that their unarmed victim begged for his life prior to the fatal shooting is competent upon the question of premeditation and deliberation in showing want of provocation. *S. v. Spence,* 23.

§ 20. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence held insufficient to be submitted to the jury in this homicide prosecution. *S. v. Cutler,* 379.

Evidence tending to show that the deceased and several persons were scuffling in a poolroom, and that the defendant, attempting to aid a friend, shoved the deceased and stated that "there was nobody going to run over" his friend, and that the defendant then shot the unarmed deceased with a pistol, *is held* sufficient to be submitted to the jury on defendant's guilt of murder in the second degree. *S. v. White,* 391.

Evidence tending to show that defendant and his companions had been drinking and playing poker, and that one or two nonfelonious assaults had broken out between them during the course of the evening, that defendant and his companions left the building and another altercation broke out, and that defendant intentionally shot deceased with a pistol, inflicting mortal injury, without any evidence that deceased at that time was advancing upon defendant or threatening him in any way, *held* amply sufficient to overrule defendant's motion to nonsuit and to sustain his conviction of manslaughter. *S. v. Godwin,* 571.

The State's evidence tended to show that the defendant and two other persons were seen attacking the deceased on the street in the nighttime, that defendant's hands were making "swinging motions" over deceased's body, that a coat worn by defendant at the time of the attack and a knife were taken from defendant following his arrest, that tests performed on the coat revealed splotches of human blood, and that the deceased died from a stab

HOMICIDE—*Continued.*

wound in the chest. *Held:* The evidence was sufficient to go to the jury on the issue of defendant's guilt of murder in the second degree. *S. v. Staten,* 600.

Evidence in this case *held* sufficient for the jury on the question of defendant's guilt of involuntary manslaughter. *S. v. Efird,* 730.

§ 22. Instructions in General.

The court's definition of murder in the first degree, second degree, and manslaughter *held* without error in this case. *S. v. Withers,* 364.

§ 23. Instructions on Presumptions and Burden of Proof.

Instructions as to the presumptions arising from the intentional use of a deadly weapon *held* without error in this case. *S. v. Price,* 521.

§ 26. Instructions on Manslaughter.

In this homicide prosecution the failure to charge the jury with reference to involuntary manslaughter was not error, since there was no evidence to support such instruction. *S. v. Price,* 521.

§ 27. Instructions on Defenses.

The court's definition of homicide by misadventure *held* not prejudicial to defendant in this case. *S. v. Withers,* 364.

The court's charge relating to self-defense and defense of home and family held free of prejudicial error in this case. *S. v. Price,* 521.

Defendant's testimony was to the effect that he intentionally fired three shots in the immediate area where the deceased was standing in order to warn him away from defendant's premises, and that the deceased was killed by the third shot. *Held:* Defendant's evidence does not present the defense of death by accident, since it discloses that he intentionally assaulted the deceased with a deadly weapon, and it was not error for the court to fail to charge the jury upon the defense of death by accident. *Ibid.*

§ 30. Verdict and Sentence.

Punishment for involuntary manslaughter may be by fine or imprisonment not to exceed 10 years, or both, in the discretion of the court. *S. v. Swinney,* 130; *S. v. Efird,* 730.

HUSBAND AND WIFE.

§ 14. Creation and Existence of Estates by Entireties.

Evidence held to support finding that realty was held by parties as tenants by the entirety and not as tenants in partnership. *Terrell v. Terrell,* 95.

The rule that a written instrument may not be contradicted or varied by parol applies to the nature and quality of an estate conveyed by deed and in the absence of anything to prevent the application of this rule, a deed to husband and wife, nothing else appearing, vests title in them as tenants in the entirety, and a different estate may not be established by parol. *Ibid.*

§ 15. Nature and Incidents of Estates by the Entireties.

In the wife's action for dissolution of a partnership existing between herself and husband and for an accounting of the partnership assets, the wife is not entitled to one-half of the rental value of real estate used in the operation of the partnership when such real estate is held by the parties as tenants by the entirety, since the husband alone is entitled to the rents and profits to the exclusion of the wife. *Terrell v. Terrell,* 95.

Land owned by husband and wife as tenants by the entirety may not be charged with the individual debts of either spouse. *Bank v. Corbett,* 444.

INDICTMENT AND WARRANT.

§ 1. Return of Indictment — Preliminary Proceedings.

An indictment will not be quashed because of absence of preliminary hearing. *S. v. Spence*, 23.

§ 2. Return by a Duly Constituted Grand Jury.

A valid indictment is a condition precedent to the jurisdiction of the Superior Court in a criminal prosecution for a capital felony and the return of such indictment by a legally constituted grand jury is necessary to such indictment. *S. v. Yoes*, 616.

By constitutional provision in this State, Art. I, § 17, which antedates like holding by the Supreme Court of the United States under the Fourteenth Amendment to the Federal Constitution, the indictment of a Negro defendant by a grand jury from which members of defendant's race have been intentionally excluded on account of race is not a valid indictment and confers upon the court no jurisdiction of the prosecution. *Ibid.*

§ 7. Nature, Requisites and Sufficiency of Indictment and Warrant in General.

A prosecution initiated by warrant in the District Court is not a charge "initiated by presentment", so as to vest the Superior Court with original jurisdiction, since a presentment is an accusation of crime issuing upon action by a grand jury. *S. v. Wall*, 675.

§ 9. Charge of Crime.

An indictment charging a common law offense must set forth all essential factual elements necessary to identify and to constitute such offense. *S. v. Lackey*, 171.

Where defendant waives preliminary hearing in the general county court on the warrant upon which defendant was arrested, and is bound over to the Superior Court, the trial in the Superior Court is upon the indictment there found and not the warrant. *S. v. Bennett*, 423.

Neither the caption nor extraneous words on the front or back of an indictment is a part of the indictment, and the words on the back of an indictment "Indictment Third Escape" cannot enlarge nor diminish the offense charged in the body of the instrument. *Ibid.*

§ 13. Bill of Particulars.

Motion for a bill of particulars is addressed to the discretion of the trial court and is not reviewable in the absence of a showing of abuse. *S. v. Spence*, 23.

A list of prospective witnesses furnished by the solicitor to defendants prior to trial is not technically a bill of particulars, and the fact that the solicitor called two witnesses not listed will not be held for prejudicial error when it appears that the solicitor listed all of the witnesses of which he had knowledge on the date he filed the list, and that defendant was apprised of the name of one of the witness on the *voir dire* examination of the jurors and could have ascertained the purport of such witness' testimony by inquiry, and that the solicitor did not have the name of the other witness until the day before his testimony was offered. *Ibid.*

The office of a bill of particulars is to furnish defendant further information not required to be set out in the indictment, G.S. 15-143, and a bill of particulars cannot cure a fatal defect in an indictment. *S. v. Ingram*, 538.

INDICTMENT AND WARRANT—*Continued.*

§ 15. *Grounds for Motion to Quash.*

A motion to quash addressed to the indictment in its entirety is properly overruled if the entire indictment, disregarding irrelevant or defective matter, sufficiently charges a criminal offense. *S. v. Lackey,* 171.

The motion to quash is directed only to patent defects in the pleadings, while a motion in arrest of judgment may be directed to patent defects in the pleadings, verdict, or other parts of the record proper. *S. v. Ingram,* 538.

§ 16. Effect of Quashal.

The quashal of an indictment for failing properly to charge an offense will not bar further prosecution *S. v. Ingram,* 538.

§ 17. Variance Between Averment and Proof.

Where the indictment for robbery alleges the use of a "pistol," and the proof is that the robbery was committed with a "gun", there is no fatal variance, the word "gun" being a generic term for a variety of firearms and embracing within its meaning in everyday speech the term "pistol". *S. v. Banks,* 583.

There is fatal variance where indictment alleges felonious breaking and entering of "Friedman's Jewelry" and the evidence is that the building is occupied by "Friedman's Lakewood, Incorporated." *S. v. Miller,* 646.

INJUNCTIONS.

§ 1. Nature and Elements.

Landowners are not entitled to the issuance of an order restraining the Highway Commission from constructing a road across their lands when the construction of the road had been completed at the time of the hearing and no request for a temporary restraining order having been made, since if an act has been accomplished it cannot be restrained. *Highway Commission v. Thornton,* 227.

§ 3. Inadequacy of Legal Remedy and Irreparable Injury in General.

Injunction will not lie to restrain the Highway Commission from maintaining condemnation proceedings on the ground that the Commission was without authority to condemn the land, since the ground of objection is one which the landowner may assert as a defense in the condemnation proceeding itself, and therefore the landowner has an adequate remedy at law. *Highway Commission v. Thornton,* 227.

§ 14. Hearing on the Merits and Judgment.

Injunction may not issue against persons or corporations who are not parties to the suit. *Highway Commission v. Thornton,* 227.

INSANE PERSONS.

§ 4. *Control and Management of Estate by Guardian.*

The guardian of an incompetent widower is authorized to file a dissent by him from his wife's will. *Fullam v. Brock,* 145.

INSURANCE.

§ 3. Construction and Operation of Policies in General.

An ambiguous provision of an insurance contract will be given that meaning most favorable to insured, and exception to coverage is not favored; never-

INSURANCE—*Continued.*

theless the policy must be construed as written. *Industrial Center v. Liability Co.*, 158.

Where insurer receives an additional premium for amending the policy by substituting another word for a word used in the original policy, the parties must necessarily intend that the word used in substitution should cover a larger field of liability. *Ibid.*

Where a word used in an insurance policy is defined therein, it must be given the meaning as defined in the policy, regardless of whether a broader or narrower meaning is customarily given to such word, since the parties are free to contract and give words embodied in their agreement the meaning they see fit. *Ibid.*

§ 9.1. Credit Life Insurance.

Lender collecting and paying credit life insurance to insurance company is not liable for unearned premiums. *Huski-Bilt, Inc., v. Trust Co.*, 662.

§ 26. Actions on Life Policies.

Plaintiff beneficiary has the burden of showing that the death of the insured resulted from accident or accidental means within the language of the policy sued on. *Barnes v. Insurance* Co., 217.

When the evidence of the beneficiary tends to show that the insured died by unexplained and external violence not wholly inconsistent with an accident, the presumption arises that death was accidental, since the law will not presume that the injuries were inflicted intentionally by the deceased or some other person. *Ibid.*

Evidence of plaintiff beneficiary to the effect that the insured was found, still alive, between the rails and under the cars of a train, with his right leg severed, his left leg broken, and cuts and bruises about the body, and that his death occurred some thirty minutes after the discovery, *held* sufficient to be submitted to the jury on the issue of whether insured's death was the result of accident or accidental means. *Ibid.*

§ 34. Death or Injury by Accident or Accidental Means.

Plaintiff beneficiary has the burden of showing that the death of the insured resulted from accident or accidental means within the language of the policy sued on. *Barnes v. Insurance Co.*, 217.

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Evidence held not to show insured provoked felonious assault as matter of law and therefore was sufficient to be submitted to jury on accident policy. *Sawyer v. Insurance Co.*, 410.

§ 48c. Actions on Automobile Collision and Upset Policies.

In this action upon a policy of garage liability insurance, plaintiff's evidence disclosed that the insured, a used-car dealer, gave a named person a

INSURANCE—*Continued.*

written 96-hour permit for the use of a car, as provided by G.S. 20-79(b), and that the accident in question occurred within the 96-hour period. The defendant insurer offered evidence that the driver had permission to use the car only until a Monday morning and that the accident occurred on a Tuesday afternoon. *Held:* The conflicting evidence as to whether the driver was operating the automobile with the permission of the owner-insured at the time of the accident was properly submitted to the jury. *Brinkley v. Insurance Co.*, 301.

§ 95. Construction of Property Damage Policies.

Where a proviso in a policy of property damage insurance excepts from coverage injury or destruction of property intended by the insured, such exclusionary clause will be construed to except from the coverage only those acts of the insured in wilfully and knowingly damaging property. *Industrial Center v. Liability Co.*, 158.

The policy in suit provided coverage for liability incurred by insured for injury to or destruction of property caused by an unexpected event or happening. The findings were to the effect that insured's surveyor made a mistake in locating a corner between insured's land and the contiguous land of another, and that due to this mistake insured damaged trees along a 20 foot strip of the contiguous land for which the owner recovered damages. *Held:* Insured is entitled to recover from insurer under the policy. *Ibid.*

INTEREST.

§ 1. Items Drawing Interest in General.

The State is not liable for interest unless payment of interest is authorized by statute or lawful contract. *Reynolds Co. v. Highway Commission*, 40.

Where the contract for highway construction provides that the Commission should pay interest at the rate of 5 per cent on the amount still due on the contract 90 days after the project is completed and accepted, the contractor is authorized to collect interest on such amount beginning 90 days after the Commission accepts the work. *Ibid.*

JUDGMENTS.

§ 1. Nature and Requisites of Judgments in General.

A judgment rendered by a court against a citizen affecting his rights in an action or proceeding to which he is not a party is absolutely void as to him and may be treated as a nullity by him whenever it is brought to the attention of the court. *Board of Health v. Brown*, 401.

In this proceeding brought by a county board of health against individual householders to compel the construction of a new sewer line, the court concluded upon facts stipulated by the county board and a householder that the local sanitary district was responsible for the installation of the sewer and entered an order directing the district to install the sewer; the sanitary district was not a party to the proceeding, nor was it represented by counsel. *Held:* The order is void as to the district, and is vacated by the Supreme Court *ex mero motu. Ibid.*

§ 3. Conformity of Judgment to Verdict and Pleadings.

An exception to the judgment limits review to the questions whether the findings of fact are sufficient to support the judgment and whether error of law appears on the face of the record. *London v. London*, 568.

JUDGMENTS—*Continued.*

Plaintiff instituted separately two actions for alimony without divorce. Motion for alimony *pendente lite* was scheduled to be heard in the second action but was continued, and on the day of the hearing the second action was nonsuited and the court found facts and awarded alimony *pendente lite. Held:* It will be presumed that the order awarding alimony *pendente lite* was entered in the prior action which was still pending rather than the second action which had been nonsuited, and the order being supported by facts found in the duly constituted action for alimony without divorce, it will not be disturbed. *Ibid.*

§ 5. Interlocutory and Final Judgments.

A judgment based on matters of practice or procedure is not a judgment on the merits. *Beam v. Almond,* 509.

§ 9. Jurisdiction to Enter Consent Judgments.

A judgment entered by consent of all the parties is valid and enforceable, although its provisions are outside the issues raised by the pleadings, if the court has jurisdiction of the parties and the matters adjudicated. *Whitesides v. Whitesides,* 560.

§ 19. Void Judgments.

A judgment rendered by a court against a citizen affecting his rights in an action or proceeding to which he is not a party is absolutely void as to him and may be treated as a nullity by him whenever it is brought to the attention of the court. *Board of Health v. Brown,* 401.

In this proceeding brought by a county board of health against individual householders to compel the construction of a new sewer line, the court concluded upon facts stipulated by the county board and a householder that the local sanitary district was responsible for the installation of the sewer and entered an order directing the district to install the sewer; the sanitary district was not a party to the proceeding, nor was it represented by counsel. *Held:* The order is void as to the district, and is vacated by the Supreme Court *ex mero motu. Ibid.*

§ 28. Conclusiveness of Judgments and Bar in General.

Order in condemnation proceedings adjudicating respondents' title to virtually all of the land in dispute in the proceedings, and adjudicating that the Highway Commission had not obtained any right thereto in prior condemnation proceedings, *held* a final adjudication as to such title, and in the subsequent proceedings another judge of the Superior Court may not modify, reverse or set aside such order. *Highway Commission v. Nuckles,* 1.

A judgment dismissing an action upon demurrer for want of necessary parties is not a judgment on the merits and cannot constitute *res judicata* barring a second action thereafter instituted upon substantially identical allegations but joining the parties necessary to a determination of the cause, even though plaintiff fails to amend the original complaint as permitted by the court within the time limited in the order sustaining the demurrer. *Beam v. Almond,* 509.

§ 30. Matters Concluded by Judgment in General.

An adjudication by the clerk that the administratrix theretofore appointed by him was not the widow of decedent is not *res judicata* in any other proceeding between the parties which respondent may be entitled to pursue. *In re Estate of Lowther,* 345.

JURY.

§ 2. Special Venires.

There is no error in ordering a special venire to be summoned from the body of the county after the exhaustion of three such venires drawn from the jury box. *S. v. Yoes*, 616.

Record held to show absence of discrimination in summoning special venire from body of county's residents. *Ibid.*

Motion of defendant that a venire be summoned from another county is addressed to the sound discretion of the presiding judge and will not be disturbed in the absence of a showing of abuse. *Ibid.*

§ 3. Selection, Examination and Personal Disqualifications and Exemptions.

In a criminal prosecution it is not error for the court to permit the solicitor to challenge prospective jurors for cause on the ground of conscientious scruples against the infliction of the death penalty. *S. v. Spence*, 23.

A juror passed by the State and the defendant, but not impanelled, may be excused by the court in the exercise of its discretion upon suggestion to the court that the juror might be guilty of a crime of moral turpitude disqualifying him. *Ibid.*

Objection to the manner in which the jury was selected, *held* without merit, when defendant offered no objection to the jury at the trial and consented, through his counsel, to the manner of selection. *S. v. Parker*, 414.

The provisions of G.S. 9-1 and G.S. 9-2 are directory, and while the statutes contemplate that the county commissioners shall examine the lists and eliminate therefrom those lacking good moral character or sufficient intelligence, the fact that this is done by the sheriff and his deputies or any other person does not vitiate the indictment when there is nothing in the record to raise even the suspicion that the name of any person possessing good moral character and sufficient intelligence was stricken from the list, or that there was any discrimination in the purging of the lists, or any deviation from the material procedures prescribed by the statutes. *S. v. Yoes*, 616.

The county commissioners themselves cannot reject a name drawn from the box for service upon a grand jury panel upon the ground of bad character or lack of mental capacity, this power being vested in them only while the jury list is being prepared for the insertion of names into the box. *Ibid.*

Objection to the fact that members of the regular panel were present in the courtroom during the taking of evidence in support of motion to quash the bills of indictment on the ground of racial discrimination is without merit when the record discloses that nothing was said in those proceedings relating to the merits of the case. *Ibid.*

Defendant's question to a prospective juror *held* not framed so as to elicit information as to whether such juror might feel justified in returning a verdict of guilty with recommendation of life imprisonment and did not state any hypothesis upon which such recommendation might or might not be justified, and therefore the sustaining by the court of objection to the question was not error. *Ibid.*

§ 4. Challenges.

Challenge to the array of the jury on the ground of racial discrimination is properly denied when the record affirmatively discloses no such discrimination in the selection of the names for the jury box or in the selection of a special venire from the residents of the county, and it further appears that those called were actually interrogated in open court, and that the presiding judge had this visual evidence before him in passing upon each challenge on

JURY—*Continued.*

the ground of racial discrimination, found no racial discrimination and the record and defendants' brief are silent upon this demonstration concerning the composition of the jury. *S. v. Yoes*, 616.

There is no error in permitting the solicitor to ask each prospective juror if he had conscientious scruples against returning a verdict carrying the death penalty if the evidence convinced him to a moral certainty of defendant's guilt of the capital crime charged. *Ibid.*

§ 5. Right to Trial by Jury.

Where there is no motion for judgment on the pleadings and the parties stipulate facts in addition to those alleged in the pleadings, the court is without power to make further findings of fact, and when the facts alleged and stipulated, considered in the light most favorable to plaintiff, are insufficient to support nonsuit, the court must submit determinative issues to the jury. *Tent Co. v. Winston-Salem*, 715.

LANDLORD AND TENANT.

§ 10. Duration and Termination of Estate — Expiration of Term, Notice, Renewals and Extensions.

A directive of the Department of Housing and Urban Development relative to the termination of leases in an urban development built with the assistance of Federal funds can have no relevancy to the termination of a lease some 17 months prior to the issuance of the directive, since such directive insofar as it affects contractual constitutional rights cannot be given retrospective effect. *Housing Authority v. Thorpe*, 468.

Where a tenant testifies that she was given notice to vacate the day after she was elected president of an organization for tenants living in the project and contends that termination of her lease was because of such activity, but in a hearing there is testimony of the manager to the effect that the lease was terminated at the expiration of the term in accordance with its provisions and that the tenant's activities in the club played no part in the decision of lessor not to renew the lease, the evidence discloses mere coincidence but no showing of causal relation between the termination of the lease and the tenant's activities, and the court's findings to this effect support its order that the tenant surrender the premises. *Ibid.*

LARCENY.

§ 4. Warrant and Indictment.

An indictment describing stolen property as "merchandise, chattels, money, valuable securities and other personal property" is fatally defective where the proof shows the property to have been eleven rings, since the indictment must describe the property stolen with sufficient particularity to protect defendant from a second prosecution. *S. v. Ingram*, 538.

§ 7. Sufficiency of Evidence and Nonsuit.

There is no fatal variance where the indictment charges the felonious larceny of rings, the property of "Friedman's Jewelry, a corporation", and the undisputed evidence is that the rings were the property of "Friedman's Jewelry, Incorporated", it appearing that, in respect to the ownership of the rings stolen, the witnesses were referring to one and the same corporation. *S. v. Miller*, 646.

LARCENY—*Continued.*

Evidence held sufficient to raise presumption of defendant's guilt of larceny in this case. *Ibid.*

§ 9. Verdict.

In a prosecution under an indictment charging felonious breaking and entering, a verdict of guilty of larceny of goods of a value of more than $200.00 without reference to the indictment is not sufficient to support judgment, and the Supreme Court *ex mero motu* will vacate the judgment and order a new trial. *S. v. Ingram,* 538.

§ 10. Judgment and Sentence.

Under G.S. 14-72 the maximum sentence for larceny of property by breaking and entering a storehouse is 10 years. *S. v. Robinson,* 448.

The statutory maximum of imprisonment for the larceny of goods of a value of $200 or less, a misdemeanor, is two years, and punishment within this maximum is not cruel or unusual in the constitutional sense. *S. v. Foster,* 727.

LIMITATION OF ACTIONS.

§ 12. Computation of Period of Limitation — Institution of Action, Discontinuance and Amendment.

Our statute permitting a suit to be reinstituted within a specified time after dismissal of the original action by nonsuit does not apply when the original suit is brought in another jurisdiction. *High v. Broadnax,* 313.

In this action for wrongful death, plaintiff instituted action in a Federal District Court of another state within a year, which action was mismissed "without prejudice." Plaintiff instituted the present action in this State within a year of the dismissal. *Held:* The action was barred by the statute of limitations, G.S. 1-53(4), since G.S. 1-25 has no application. *Ibid.*

§ 16. Procedure to Set Up the Defense of the Statute of Limitations.

G.S. 136-19 is a statute of limitations and not a condition precedent, and the trial court's discretionary action in refusing to permit the Highway Commission to amend to plead the statutory limitation a year and a half after the original pleadings had been filed is not reviewable in the absence of a showing of abuse. *Highway Commission v. Nuckles,* 1.

Ordinarily, the statute of limitations may not be taken advantage of by demurrer. *Homes Co. v. Homes Co.,* 181.

Where the allegations of the complaint disclose that, *prima facie,* the action is barred by the statute of limitations, defendant's plea in bar is properly allowed in the absence of a reply by plaintiff alleging facts which would avoid the plea. *High v. Broadnax,* 313.

MANDAMUS.

§ 1. Nature and Grounds of the Writ in General.

A party seeking a writ of *mandamus* must have a clear legal right to demand it, and the party to be coerced must be under a positive legal obligation to perform the act sought to be done, and *mandamus* can not be invoked to compel the officers of a municipal corporation to perform the terms of a void contract. *Moody v. Transylvania County,* 384.

MASTER AND SERVANT.

§ 53. Injuries Compensable Under Workmen's Compensation Act in General.

Mere fact of injury sustained by an employee in the course of his employment does not entitle him to compensation unless the injury arises by accident, and therefore stipulations to the effect that plaintiff employee became disabled while at work is insufficient alone to support an award of compensation, and this case was properly remanded to the Industrial Commission for specific findings from the evidence and stipulations as to whether claimant was injured by accident. *Hargus v. Foods, Inc.*, 369.

§ 63. Injuries Compensable Under Workmen's Compensation Act — Hernia and Back Injuries.

Evidence tending to show that an employee, while engaged in moving cases of soup in the ordinary manner and free from confining or otherwise exceptional conditions and surroundings, suffered a back injury which was accentuated by a congenital condition, *held* insufficient to support a finding that the injury resulted from an accident within the purview of the Workmen's Compensation Act, and the finding to the contrary by the Industrial Commission must be reversed. *Rhinehart v. Market*, 586.

§ 67. Workmen's Compensation Act — Amount of Compensation for Injury in General.

Disability as used in the Workmen's Compensation Act refers not to physical infirmity but to a diminished capacity to earn money, and while the employee's return to work after the injury and the fact that the same wages are paid him after the injury as before create a presumption of termination of disability, such presumption is a presumption of fact and rebuttable. *Ashley v. Rent-A-Car Co.*, 76.

§ 73. Medical and Hospital Expenses Recoverable Under Workmen's Compensation Act.

Medical and hospital expenses and the cost of nursing services are not a part of, and are not included in, compensation recoverable under the Workmen's Compensation Act. *Ashley v. Rent-A-Car Co.*, 76.

The provision of G.S. 97-25 that the employer should be liable for medical and nursing services for such time as such services will tend to lessen the period of disability, *held* not to preclude such payments when the disability is permanent, provided such service will tend to lessen the degree of disability. *Ibid.*

Claimant was severely burned in a compensable accident. The employer continued to pay full wages after the accident and claimant gradually resumed his managerial duties as his total disability lessened. There was expert testimony that although claimant's disability was permanent, further operations would lessen the degree of disability by enabling claimant to grasp objects with his left hand, and to raise and lower his head, etc. *Held:* The employer and his insurance carrier may be held liable for such operations. *Ibid.*

Evidence tending to show that after compensable injury, claimant was totally incapacitated even after his release from the hospital, that he received nursing care at his home subsequent to his release from the hospital, and that his condition improved during the period of such nursing care, *held* to support award of compensation for such care as tending to lessen the degree of claimant's disability. *Ibid.*

MASTER AND SERVANT—*Continued.*

§ 82. Nature and Extent of Jurisdiction of the Industrial Commission in General.

The Industrial Commission is a creature of the General Assembly and has only those powers and jurisdictions delegated to it by statute. *Bowman v. Chair Co.*, 702.

§ 93. Review of Findings and Award of Industrial Commission.

Except in matters determinative of jurisdiction, the Industrial Commission has exclusive authority to find facts. *Hargus v. Foods, Inc.*, 369.

Evidence tending to show that an employee, while engaged in moving cases of soup in the ordinary manner and free from confining or otherwise exceptional conditions and surroundings, suffered a back injury which was accentuated by a congenital condition, *held* insufficient to support a finding that the injury resulted from an accident within the purview of the Workmen's Compensation Act, and the finding to the contrary by the Industrial Commission must be reversed. *Rhinehart v. Market*, 586.

§ 96. Appeal and Review of Award — Costs and Attorneys' Fees.

The Industrial Commission is without authority to award attorney's fees to a plaintiff's attorney as part of the costs, except in the instance, expressly authorized by G.S. 97-88, where the Commission finds that the hearing or proceeding on appeal is brought by the insurer and orders the insurer to make or continue payments of compensation to the injured employee. *Bowman v. Chair Co.*, 702.

The Statute, G.S. 6-21.1, authorizing a presiding judge to award attorney's fees as part of the costs in any personal injury or property damage suit where the judgment is $1000 or less, is inapplicable in cases arising under the Workmen's Compensation Act. *Ibid.*

MUNICIPAL CORPORATIONS.

§ 4. Legislative Control and Supervision and Powers of Municipalities in General.

A municipal corporation is a creature of the Legislature, and it has only those powers granted in express terms and powers necessarily or fairly implied or incident to the powers expressly granted which are essential and indispensable to, and not merely convenient for, the accomplishment of the declared objects of the corporation. *Moody v. Transylvania County*, 384.

The providing of a county-wide ambulance service is not a necessary expense for which a municipality may incur debt without a vote of the people, and, in the absence of a vote or of authority expressly granted by the Legislature, a county may not legally contract with a funeral home for such services, and its attempt to do so prior to the enactment of G.S. 153-95(58) was *ultra vires. Ibid.*

§ 15. Injuries from Water and Sewer Systems.

Complaint held to state cause of action against city for negligence in maintaining drains. *Milner Hotels v. Raleigh*, 224.

Where a city revises and enlarges an existing culvert for surface waters, including waters from a natural watercourse, it assumes control and management of the drains and is required to use reasonable diligence to keep the drains in good repair and condition, and may be held liable for damage resulting from its negligent failure to do so. *Tent Co. v. Winston-Salem*, 715.

MUNICIPAL CORPORATIONS—*Continued.*

Allegations and stipulations held to raise issues of negligence and contributory negligence in maintenance of drains for surface waters. *Ibid.*

§ 17. Municipal Contracts, Purchase, Use and Sale of Property.

A municipal corporation is not estopped from pleading *ultra vires* to a void contract, even though it has accepted benefits from the contract and has made partial payments thereon, and even though the other party has substantially performed his part of the agreement. *Moody v. Transylvania County,* 384.

§ 19. Power to Make Public Improvements and Levy Assessments Therefor.

Municipalities have been given authority to make public improvements and to levy assessments against abutting private property, G.S. 160-239, G.S. 160-241, and the municipal authorities have sole power to determine the necessity for the improvements and the authority to apportion the costs by any recognized and established rules, and the courts may interfere only when there has been palpable and gross abuse of discretion on the part of the municipal authorities. *Raleigh v. Mercer,* 114.

Where a municipality has constructed a sewer outfall line across a portion of respondent's land and levied assessments against such land, the respondent may not attack the assessments on the ground that his property was already served by adequate sewer facilities, that it was not suitable for subdivision, and that therefore he would not be benefited by the construction of the sewer line, since the necessity for such improvement is solely for the determination of the municipal authorities and the respondent's grounds of objections do not amount to a charge of arbitrariness, abuse of discretion, or *mala fides* on the part of the authorities. *Ibid.*

Where a respondent asserts that assessments against his land for public improvements is discriminatory and not uniform, just and equitable, respondent is entitled to offer evidence in respect thereto, and it is error for the court to sustain the municipality's motion that respondent's appeal from the assessments be dismissed on the ground that such averments do not entitle respondent to relief. *Ibid.*

Where a municipality condemns a portion of a tract of land for a sewer outfall line and later assesses the owner for the public improvement, and in the condemnation proceeding the court, upon the city's objection, excludes the owner's evidence that he would receive no benefit from the proposed sewer line but nevertheless would be charged with the assessment for the improvement, *held,* upon appeal from the assessment thereafter levied, the case must be remanded for the hearing of evidence in order to insure that respondent receives reasonable compensation for the taking of the easement for the sewer outfall line. *Ibid.*

§ 20. Validity and Attack of Assessments.

Municipalities have been given authority to make public improvements and to levy assessments against abutting private property, G.S. 160-239, G.S. 160-241, and the municipal authorities have sole power to determine the necessity for the improvements and the authority to apportion the costs by any recognized and established rules, and the courts may interfere only when there has been palpable and gross abuse of discretion on the part of the municipal authorities. *Raleigh v. Mercer,* 114.

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MUNICIPAL CORPORATIONS—*Continued.*

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§ 24. Nature and Extent of Municipal Police Power in General.

Ordinances of municipal corporations may be enacted in the exercise of the police power and thus be penal in nature, or in the exercise of proprietary powers and be in the nature of a franchise or contract. *Harrelson v. Fayetteville,* 87.

§ 25. Zoning Ordinances and Building Permits.

A civil engineer may testify from a survey made by him that the property in question lay within one mile of the city limits of the municipality in question. *Gastonia v. Parrish,* 527.

A property owner with personal knowledge of the property lines of nearby property and of the boundary lines of the city limits may testify that such other property was within a mile of the city limits. *Ibid.*

§ 31.1. Police Power — Operation of Airports.

A municipality has authority to grant a franchise authorizing the carriage of passengers to and from the municipal airport and authorizing such carrier to enter upon the boundaries of the airport property in the performance of such service, since such authority is necessarily implied from the express statutory powers granted municipalities in regard to airports. *Harrelson v. Fayetteville,* 87.

A municipal corporation has the power to stipulate that a franchise for the carriage of passengers to and from an airport, with authority to enter within the boundaries of the airport property in the performance of the service, should be exclusive, notwithstanding the Utilities Commission had theretofore granted a franchise to a common carrier to operate to the boundaries of the airport, there being a provision in the ordinance that if such exclusive operation should require approval or authority of any other governmental agency it should be the duty of the franchise holder to obtain such approval or authority, G.S. 62-260(a). *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

§ 34. Enforcement, Validity and Attack of Ordinances.

Where a municipality introduces evidence that its council unanimously adopted a zoning ordinance and that it was later printed in book form and certified by the city clerk, there is a presumption in favor of the validity of the ordinance and the burden is upon the complaining property owner to show its invalidity or inapplicability. *Gastonia v. Parrish*, 527.

A municipality may restrain the use of property in violation of its valid zoning ordinance. *Ibid.*

Evidence held sufficient in this case to go to jury on question of defendant's violation of zoning ordinance. *Ibid.*

§ 35. Municipal Charges and Expenses.

Where the findings of fact of an administrative agency are made in good faith and are supported by competent evidence, its findings are conclusive on appeal, and it is error for the court to substitute its own findings of fact for those of the agency. *Jamison v. Kyles*, 722.

§ 41. Actions Against a Municipality Ex Contractu.

Allegations that the plaintiff contracted with the county commissioners to operate an ambulance service and that he was to be paid by the county in monthly installments, and that, in so contracting, the commissioners were acting within the scope of their authority as the governing body of the county, squarely present the issue of the authority of the county to enter into such a contract, and the right of the plaintiff to maintain an action to recover for such services may be challenged by demurrer. *Moody v. Transylvania County*, 384.

§ 42. Mandamus Against Municipal Corporations.

A party seeking a writ of *mandamus* must have a clear legal right to demand it, and the party to be coerced must be under a positive legal obligation to perform the act sought to be done, and *mandamus* can not be invoked to compel the officers of a municipal corporation to perform the terms of a void contract. *Moody v. Transylvania County*, 384.

NEGLIGENCE.

§ 1. Acts and Omissions Constituting Negligence in General.

Where a municipal ordinance imposes a public duty and is designed for the protection of life and limb, a violation thereof is negligence *per se*, but in order for liability to arise for actionable negligence, it must be established that such violation was a proximate cause of the alleged injury. *Bell v. Page*, 396.

§ 2. Distinctions Between Negligence and Other Torts.

The Tort Claims Act authorizes claims against the State Highway Commission which arise out of a negligent act of an employee in the scope of his employment, G.S. 143-291, and allegations to the effect that the Commission by false representations fraudulently and unnecessarily induced the plaintiffs to vacate their home two years before it was required for highway purposes, *held* properly stricken, since an intentional misrepresentation is not a negligent act. *Davis v. Highway Commission*, 405.

§ 4. Dangerous Substances, Machinery and Instrumentalities.

It is not an act of negligence for a person to maintain an unenclosed pond or pool on his premises. *Bell v. Page*, 396.

NEGLIGENCE—*Continued.*

Allegations sufficient to allege that plaintiff's dwelling was damaged by concussion and vibrations proximately caused by defendant's use of explosives in blasting operations at defendant's quarry are sufficient to state a cause of action, and the fact that plaintiff alleges in other portions of the complaint that defendant was negligent in certain respects does not constitute an election to proceed upon the theory of negligence rather than absolute liability. *Paris v. Aggregates, Inc.*, 471.

§ 7. Proximate Causes and Foreseeability of Injury.

Where a municipal ordinance imposes a public duty and is designed for the protection of life and limb, a violation thereof is negligence *per se*, but in order for liability to arise for actionable negligence, it must be established that such violation was a proximate cause of the alleged injury. *Bell v. Page*, 396.

§ 11. Contributory Negligence in General.

Where plaintiff's injury is the result of wilful and wanton conduct on the part of defendant, plaintiff's contributory negligence will not bar recovery. *Pearce v. Barham*, 285.

§ 16. Contributory Negligence of Minors.

A 14 year old boy is presumed capable of contributory negligence to the same extent as an adult, and this presumption obtains as a matter of law in the absence of evidence that the boy did not have the capacity, discretion and experience which would ordinarily be possessed by a boy of his age; therefore, in the absence of such evidence, the court is not required to charge the jury that a different rule should be applied in considering the question of his contributory negligence than the rule which should be applied in the case of an adult. *Welch v. Jenkins*, 138.

Since a child between the ages of seven and fourteen is rebuttably presumed incapable of contributory negligence, nonsuit may not be entered on such grounds. *Bell v. Page*, 396.

§ 24a. Sufficiency of Evidence and Nonsuit on Issue of Negligence in General.

On motion for nonsuit on the issue of negligence, the evidence is to be considered in the light most favorable to the plaintiff, and the motion is properly denied when there is sufficient evidence to support the essential elements of actionable negligence. *Galloway v. Hartman*, 372; *Bell v. Page*, 396.

Nonsuit on the issue of negligence should not be allowed unless the evidence is free of material conflict, and the only reasonable inference that can be drawn therefrom is that there was no negligence on the part of the defendant, or that his negligence was not a proximate cause of the injury. *Price v. Miller*, 690.

§ 26. Nonsuit for Contributory Negligence.

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 the defense that no other reasonable inference or conclusion can be drawn therefrom. *Galloway v. Hartman*, 372; *Lowe v. Futrell*, 550.

Nonsuit for contributory negligence is proper when there is no conflicting inference permissible from plaintiff's proof and it appears therefrom that he was contributorily negligent which constituted a proximate cause of the injury. *Price v. Miller*, 690.

NEGLIGENCE—*Continued.*

§ 28. Instructions in Negligence Actions.

A 14 year old boy is presumed capable of contributory negligence to the same extent as an adult, and this presumption obtains as a matter of law in the absence of evidence that the boy did not have the capacity, discretion and experience which would ordinarily be possessed by a boy of his age; therefore, in the absence of such evidence, the court is not required to charge the jury that a different rule should be applied in considering the question of his contributory negligence than the rule which should be applied in the case of an adult. *Welch v. Jenkins*, 138.

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. *Gregory v. Lynch*, 198.

§ 36. Attractive Nuisances and Injury to Children.

Evidence tending to show that the defendant maintained an unfenced swimming pool on his motel property in violation of a municipal ordinance requiring such pool to be fenced or an employee kept on duty at all times, and that the body of plaintiff's intestate, a nine-year old boy, was found in ten feet of water, and that the cause of death was drowning, *held* sufficient to permit a finding by the jury that the violation of the ordinance was a proximate cause of intestate's death, and therefore was sufficient to be submitted to the jury, notwithstanding intestate was a trespasser. *Bell v. Page*, 396.

§ 37b. Duties to Invitees in General.

A store owner is not an insurer of his patrons against injury from falling upon the floor of the store, and the doctrine of *res ipsa loquitur* does not apply thereto, but the customer must show that the owner negligently created a condition causing the injury or that he negligently failed to rectify a dangerous condition created by others within a reasonable time after notice, express or implied. *Hinson v. Cato's, Inc.*, 738.

§ 37f. Duties and Liabilities to Invitees — Sufficiency of Evidence and Nonsuit in Actions by Invitees.

Evidence that plaintiff fell to her injury on the waxed floor of defendant's place of business, without evidence that the wax had been applied other than in the usual and customary manner or that an excessive quantity of wax had been used or that any unusual patches of wax were left on the floor, is insufficient to resist nonsuit. *Grimes v. Credit Co.*, 608; *Hinson v. Cato's, Inc.*, 738.

PARTNERSHIP.

§ 3. Rights, Duties and Liabilities of Partners Among Themselves.

Evidence held to support finding that realty was held by parties as tenants by the entirety and not as tenants in partnership. *Terrell v. Terrell*, 95.

§ 9. Dissolution and Accounting.

In the wife's action for dissolution of a partnership existing between herself and husband and for an accounting of the partnership assets, the wife is not entitled to one-half of the rental value of real estate used in the operation of the partnership when such real estate is held by the parties as tenants by the entirety, since the husband alone is entitled to the rents and profits to the exclusion of the wife. *Terrell v. Terrell*, 95.

PLEADINGS.

§ 2. Statement of Cause of Action in General.

Where a pleading is sufficient to state a cause of action upon one theory of liability, the fact that it contains other averments pertinent to a different theory of liability is not fatal, and such other allegations may be treated merely as surplusage not requiring proof. *Paris v. Aggregates, Inc.*, 471.

In this action to recover damages resulting from the use of a chemical weed killer, plaintiff incorporated into a single cause of action allegations constituting an action for negligence as well as allegations constituting action for breach of warranty. *Held:* While demurrer was properly sustained on the ground of improper joinder of causes of action, G.S. 1-123, G.S. 1-127, the plaintiff should have been given leave to plead separately the two causes of action. *Corprew v. Chemical Corp.*, 485.

§ 3. Joinder of Causes of Action.

In an action to set aside a deed for fraud and duress, lien holders in a deed of trust executed by the grantees are necessary parties, since their rights may be affected by adjudication of title, and therefore it is proper to join them in an action to rescind the deed to the grantees. *Beam v. Almond*, 509.

§ 4. Prayer for Relief.

Prayer for relief does not determine the relief to which the pleader is entitled. *Highway Commission v. Thornton*, 227.

§ 8. Counterclaims and Cross-Actions.

In an accident caused by brake failure of original defendants' three year old truck, the defendants allege that a garage had repaired the brakes approximately a year before the accident, and that two or three times subsequent thereto (without specifying the dates) the garage had serviced the vehicle and adjusted the brakes, and filed a cross-action against the garage upon the assertion of primary and secondary liability. *Held:* Demurrer to the cross-action was properly sustained, since the facts alleged negate any legitimate inference that defective parts or faulty workmanship on the part of the garage at such remote times was a cause of the brake failure causing the accident in suit. *Nipper v. Branch*, 673.

§ 11. Form and Contents of Reply.

A reply is a defensive pleading, and where the reply states a cause of action, it is properly stricken on motion. *Davis v. Highway Commission*, 405.

§ 12. Office and Effect of Demurrer.

A motion to dismiss a proceeding because the complaint does not state facts sufficient to constitute a cause of action is in effect a demurrer, presenting the question of the sufficiency of the pleading, admitting for the purpose the truth of the factual averments well stated, and all relevant inferences of fact reasonably deducible therefrom, but not conclusions of law. *Raleigh v. Mercer*, 114.

If a demurrer is overruled, the admission for the purpose of the demurrer of the truth of the facts well pleaded ends forthwith. *Ibid.*

Allegations that the plaintiff contracted with the county commissioners to operate an ambulance service and that he was to be paid by the county in monthly installments, and that, in so contracting, the commissioners were acting within the scope of their authority as the governing body of the county, squarely present the issue of the authority of the county to enter into such a contract, and the right of the plaintiff to maintain an action to recover for

PLEADINGS—*Continued.*

such services may be challenged by demurrer. *Moody v. Transylvania County,* 384.

Upon demurrer, the allegations of a complaint shall be liberally construed with a view to substantial justice between the parties, G.S. 1-151, and the demurrer will not be sustained unless the complaint is fatally and wholly defective. *Corprew v. Chemical Corp.,* 485.

A demurrer admits the truth of factual averments well stated, but not conclusions of law. *Ibid.*

A demurrer tests the sufficiency of a pleading, admitting for its purpose the truth of factual averments well stated and relevant inferences of fact deducible therefrom, but does not admit legal inferences or conclusions, and the complaint will be liberally construed with a view to substantial justice between the parties. *Beam v. Almond,* 509.

§ 18. Demurrer for Defect of Parties or for Misjoinder of Parties and Causes of Action.

Where the complaint is insufficient to state a cause of action as to one of the two purported causes of action asserted, there can be no misjoinder of parties and causes. *Homes Co. v. Homes Co.,* 181.

In this action to recover damages resulting from the use of a chemical weed killer, plaintiff incorporated into a single cause of action allegations constituting an action for negligence as well as allegations constituting action for breach of warranty. *Held:* While demurrer was properly sustained on the ground of improper joinder of causes of action, G.S. 1-123, G.S. 1-127, the plaintiff should have been given leave to plead separately the two causes of action. *Corprew v. Chemical Corp.,* 485.

§ 19. Demurrer for Failure of the Pleading to State a Cause of Action.

Where the complaint alleges that under written contract plaintiff furnished plans, plates and plan books to defendant partnership without cost, plaintiff being a partner, it will be assumed that plaintiff's remuneration was to be from the profits of the partnership, and the complaint fails to state a cause of action to recover under the agreement a percentage of the amount received by the partnership from its resale of such plans, notwithstanding allegations that under the "agreement, custom and usage, and the said written contract" plaintiff was to be paid such percentage, since conflicting allegations neutralize each other. *Homes Co. v. Homes Co.,* 181.

§ 24. Motions to Be Allowed to Amend.

G.S. 136-19 is a statute of limitations and not a condition precedent, and the trial court's discretionary action in refusing to permit the Highway Commission to amend to plead the statutory limitation a year and a half after the original pleadings had been filed is not reviewable in the absence of a showing of abuse. *Highway Commission v. Nuckles,* 1.

§ 30. Motions for Judgment on the Pleadings.

Judgment on the pleadings is proper only when the pleadings fail to present any issue of fact for the determination of a jury. *Powell v. Powell,* 420.

§ 34. Right to Have Allegations Stricken on Motion.

The test of a right to have allegations stricken from the pleadings is whether the pleader has the right to introduce evidence to support such allegations. *Paris v. Aggregates, Inc.,* 471.

In an action to recover damages to plaintiff's house from a particular blasting operation, allegations that defendant, in the course of its business in

PLEADINGS—*Continued.*

operating its quarry, blasted with dynamite and that such blasting on each occasion seriously shook plaintiff's house, and that a particular explosion was "tremendous," *held* not to warrant defendant's motion to strike. *Ibid.*

A motion to strike which challenges the legal sufficiency of the pleadings will be treated as a demurrer. *Oil Co. v. Richardson*, 696.

PUBLIC OFFICERS.

§ 11. Criminal Liability of Public Officers.

Indictment held insufficient to charge offense of official oppression. *S. v. Lackey*, 171.

RAPE.

§ 4. Relevancy and Competency of Evidence.

Testimony that the prosecutrix exclaimed that the defendant "was trying to rape me", such remark being made to officers immediately upon their arrival at the scene of the offense, *held* competent as part of the *res gestæ*, it appearing that the statement was spontaneous and practically contemporaneous with the offense. *S. v. Cox*, 579.

§ 5. Sufficiency of Evidence and Nonsuit.

The State's evidence tending to show that defendants accosted prosecutrix and her escort as they were parked in their automobile, ordered her escort out of the car and struck him unconscious when he attempted to fight, and that defendants disrobed prosecutrix and has successive intercourse with her one after the other despite her resistance, a rifle being pointed to her side throughout the occurrences, *held* amply sufficient to overrule each defendant's motion for nonsuit and not to require the submission to the jury of any less degree of the offense. *S. v. Yoes*, 616.

§ 7. Verdict and Judgment.

The statute fixing death as the punishment for rape, G.S. 14-21, unless the jury in its discretion recommends life imprisonment, is authorized by the Constitution of North Carolina, Art. XI, § 2, and since such punishment is specifically authorized both by the State Constitution and by statute it cannot be cruel or unusual punishment in the constitutional sense. *S. v. Yoes*, 616.

§ 9. Indictment Charging Carnal Knowledge of Female Under Twelve Years of Age.

An indictment under G.S. 14-26, charging defendant with ravishing and carnally knowing a female child under the age of twelve years, need not allege that the child was abused. *Gasque v. State*, 323.

§ 10. Competency and Relevancy of Evidence in Prosecution for Carnal Knowledge of Female Under Twelve Years of Age.

In a prosecution for carnally knowing a female child under the age of twelve years, testimony of the prosecuting witness that the defendant had made improper advances to her approximately four years prior to the offense charged is competent in evidence in corroboration of the offense charged. *Gasque v. State*, 323.

Testimony by prosecutrix' grandmother as to statements of the prosecutrix that the defendant had intercourse with her on the date of the offense and had made improper advances approximately four years prior to the offense is

RAPE—*Continued.*

competent for the purpose of corroborating the testimony of prosecutrix to like effect. *Ibid.*

In a prosecution for carnally knowing a female child under the age of twelve years, the admission of testimony of prosecutrix' aunt that prosecutrix had stated that the defendant had had intercourse with her many times prior to the date of the offense charged, even though technically incompetent as corroborative evidence in that it exceeded the scope of prosecutrix' testimony, *held* not prejudicial under the facts of this case, there being plenary evidence of defendant's guilt of the crime charged and the question of prosecutrix' consent not being material to the offense. *Ibid.*

REFERENCE.

§ 10. Appeal from Judgment of the Court Upon Exceptions to Referee's Report.

The Superior Court upon review of exceptions to the referee's findings of fact must review the evidence, determine the credibility of the witnesses and form its own judgment as to the facts and the law, and therefore where the evidence in regard to a particular finding is conflicting and sufficient to support contrary findings, the court may set aside the referee's finding and substitute a contrary finding of its own supported by the evidence. *Terrell v. Terrell,* 95.

RELIGIOUS SOCIETIES.

§ 2. Government, Management and Property.

Where the congregation of a church is divided into two factions, title and the right to use the church property belong to that faction, whether a minority or majority, which remains faithful to the doctrines, policy and fundamental customs and rules of the denomination which were accepted and followed by the congregation prior to disagreement. *Paul v. Piner,* 123.

§ 3. Actions.

Civil courts have no jurisdiction of purely ecclesiastical questions and controversies, and will inquire into ecclesiastical questions only to the extent necessary to determine the property rights of the contending parties. *Paul v. Piner,* 123.

The evidence disclosed that one faction of a congregation adhered to the national association of the denomination, while another faction adhered to the conference and the state convention of the denomination which had withdrawn from the national association, but there was no evidence of any specific acts of defendant faction which were contrary to the characteristic usages, customs, doctrines and practices of the denomination accepted by both factions before dissension. *Held:* The evidence discloses a purely ecclesiastical dispute which is not justiciable by the courts, and nonsuit was properly entered. *Ibid.*

RETIREMENT SYSTEMS.

§ 1. Validity of Retirement and Pension Acts.

Allowances to which a member of the Teachers' and State Employees' Retirement System is entitled upon retirement constitute compensation for public services previously rendered and do not violate Article I, § 7, of the State Constitution. *Harrill v. Retirement System,* 357.

RETIREMENT SYSTEMS—*Continued.*

§ 5. Claims of Members.

Retirement benefits may not be suspended on the basis of remuneration received in part-time employment. *Harrill v. Retirement System,* 357.

The right to a pension depends upon the provisions of the statute providing the benefits and must be determined primarily from the terms of the statute. *In re Duckett,* 430.

A statute providing benefits if a member of a retirement system should become disabled "while acting in line of his duty" or if he should die as a result of such disability, *held* not to require a causal relation between disability of a member and his work, but only that the disability occur while the member is in the discharge of his duties. *Ibid.*

The evidence tending to show that a fireman, after helping extinguish a brush fire with a pine branch during the course of some 15 minutes, complained of pain in his chest, and that minutes after returning to the fire station died of a myocardial infarction, *held* to disclose death from a disability occurring in line of duty, entitling his widow to the benefits provided by the act. Chapter 320, Session Laws of 1955. *Ibid.*

The determination by a pension board that a member's death or disability was not received in line of duty is a legal conclusion and reviewable, notwithstanding it is denominated a finding of fact. *Ibid.*

ROBBERY.

§ 4. Sufficiency of Evidence and Nonsuit.

Where the indictment for robbery alleges the use of a "pistol," and the proof is that the robbery was committed with a "gun", there is no fatal variance, the word "gun" being a generic term for a variety of firearms and embracing within its meaning in everyday speech the term "pistol". *S. v. Banks,* 583.

§ 5. Instructions and Submission of the Question of Guilt of Less Degrees of the Crime.

The failure of the court, in instructing the jury upon the lesser offenses of robbery, to repeat an instruction previously given relating to the defense of alibi, is not error, since the jury could reasonably conclude that if defendant should be acquitted of armed robbery on the ground that he was not present at the time of the offense, he should likewise be acquitted of common law robbery. *S. v. Banks,* 583.

SALES.

§ 6. Implied Warranties.

Complaint held to state causes of action for negligence and breach of implied warranty, despite the lack of priority between consumer and manufacturer. *Corprew v. Chemical Corp.,* 485.

The manufacturer of a chattel is under a duty to the ultimate purchaser, irrespective of contract, to use reasonable care in its manufacture, and when reasonable care so requires, to give adequate directions for its use, and he is liable to the purchaser for injury resulting to persons or property from a failure to perform this duty. *Ibid.*

§ 8. Parties Liable on Warranties.

Complaint held to state causes of action for negligence and breach of implied warranty, despite lack of priority between consumer and manufacturer. *Corprew v. Chemical Corp.,* 485.

SEARCHES AND SEIZURES.

§ 1. Necessity for Search Warrant and Waiver.

Where defendant consents to a search of his car, he waives his constitutional rights in regard to a search without a warrant, and such consent will render competent incriminating evidence obtained by such search. *S. v. Brown*, 250.

SIGNATURES.

Evidence that the plaintiff bank extended a line of credit to the defendant's husband, who was in the home construction business, in reliance upon a guaranty purporting to bear defendant's signature, and that the defendant and her husband owned some, if not all, of their realty as tenants by the entireties, *held* sufficient to support a finding by the court that the defendant had executed the guaranty, despite her testimony that she did not sign the instrument. *Bank v. Corbett*, 444.

STATE.

§ 4. Actions Against the State.

The State Highway Commission, as an agency of the State, may be sued in tort only as authorized in the Tort Claims Act, G.S. 143-291, and in no forum is the Commission liable for fraudulent misrepresentations. *Davis v. Highway Commission*, 405.

§ 5a. Nature and Construction of the Tort Claims Act.

The Tort Claims Act authorizes claims against the State Highway Commission which arise out of a negligent act of an employee in the scope of his employment, G.S. 143-291, and allegations to the effect that the Commission by false representations fraudulently and unnecessarily induced the plaintiffs to vacate their home two years before it was required for highway purposes, *held* properly stricken, since an intentional misrepresentation is not a negligent act. *Davis v. Highway Commission*, 405.

§ 6. Actions by the State.

The State is not liable for interest unless payment of interest is authorized by statute or lawful contract. *Reynolds Co. v. Highway Commission*, 40.

Where the contract for highway construction provides that the Commission should pay interest at the rate of 5 per cent on the amount still due on the contract 90 days after the project is completed and accepted, the contractor is authorized to collect interest on such amount beginning 90 days after the Commission accepts the work. *Ibid.*

STATUTES.

§ 5. General Rules of Construction.

The words of a statute must be given their natural and ordinary meaning, and when the meaning of a statute is plain and unambiguous, the courts must construe the act as written and do not have the power to insert provisions not contained therein or to delete provisions there appearing. *In re Duckett*, 430.

Where a statute provides benefits upon conditions joined by the disjunctive "or", one alternative may not be made a part of the other, and a person is entitled to its benefits if he comes within either condition. *Ibid.*

STATUTES—*Continued.*

§ 8. Prospective and Retroactive Effect.

Ordinarily, statutes in this State are presumed to act prospectively only, and a statute which affects a constitutional right may not be construed to have a retrospective effect. *Housing Authority v. Thorpe*, 468.

TAXATION.

§ 6. Necessary Expenses and Necessity for Vote.

The operation and maintenance of a county-municipal airport is not a necessary expense of the city or county. *Vance County v. Royster*, 53.

The constitutional provision prohibiting a county or city from contracting a debt or levying a tax for a purpose other than a necessary purpose without a vote of the people is not an impediment to economic progress but merely relegates to the people and not to their elected representatives the power to determine whether a particular project should be undertaken. *Ibid.*

Even though an agreement between a city and a county and the Federal Government be construed to obligate the city and county to spend only non-tax revenue for the maintenance and operation of an airport, the county and city are without authority to incur such debt without the approval of the voters, since the constitutional prohibition against the incurrence of a debt for other than a necessary expense without a vote applies regardless of whether the future obligation constitutes a charge on funds derived from taxation or otherwise. *Ibid.*

The providing of a county-wide ambulance service is not a necessary expense for which a municipality may incur debt without a vote of the people, and, in the absence of a vote or of authority expressly granted by the Legislature, a county may not legally contract with a funeral home for such services, and its attempt to do so prior to the enactment of G.S. 153-95(58) was *ultra vires*. *Moody v. Transylvania County*, 384.

TRESPASS.

§ 1. Civil Trespass to Realty in General.

While trespass requires an intentional entry upon the land of another, it does not require that such entry be with wrongful motive, and therefore there is a trespass even though the entry is made under a *bona fide* belief by the trespasser that he owned the land or was entitled to enter thereon as a matter of right. *Industrial Center v. Liability Co.*, 158.

Allegations sufficient to allege that plaintiff's dwelling was damaged by concussion and vibrations proximately caused by defendant's use of explosives in blasting operations at defendant's quarry are sufficient to state a cause of action, and the fact that plaintiff alleges in other portions of the complaint that defendant was negligent in certain respects does not constitute an election to proceed upon the theory of negligence rather than absolute liability. *Paris v. Aggregates, Inc.*, 471.

TRESPASS TO TRY TITLE.

§ 2. Presumptions, Pleadings and Burden of Proof.

In an action for the recovery of land and damages for trespass thereon, denial by defendant of plaintiff's title places upon plaintiff the burden of showing title in himself and that the descriptions in his chain of title fitted

TRESPASS TO TRY TITLE—*Continued.*

the land claimed by him, and of showing trespass by defendant. *Cutts v. Casey,* 165.

§ 4. Sufficiency of Evidence and Nonsuit.

In this action in trespass to try title, the descriptions in plaintiff's chain of title called for a tract fronting the ocean and for the lines of the tracts lying respectively on each side of plaintiff's tract, and plaintiff's evidence tended to support the location of these lines on the ground in accordance with his contentions. *Held:* Nonsuit was improperly entered, notwithstanding that the location of the lines of the contiguous tracts resulted in a distance between such adjacent boundaries greatly in excess of that called for in the descriptions in plaintiff's chain of title. *Cutts v. Casey,* 165.

TRIAL.

§ 6. Stipulations.

Stipulations are in the nature of judicial admissions and, unless limited as to time or application, continue in force for the duration of the controversy. *Hargus v. Foods, Inc.,* 369.

§ 10. Expression of Opinion on Evidence by Court During Progress of the Trial.

In admitting expert testimony, a statement of the court to the effect that the witness was experienced and to let him testify amounts to nothing more than a holding that the witness was qualified to give opinion evidence and cannot be held prejudicial as an expression of opinion by the court on the credibility of the witness. *Paris v. Aggregates, Inc.,* 471.

§ 13. Allowing the Jury to Visit Exhibits or Scenes.

Whether the court will allow a jury view of the premises in question rests in the court's sound discretion, and the court's refusal to allow such jury view will not ordinarily be disturbed. *Paris v. Aggregates, Inc.,* 471.

§ 18. Province of the Court and Jury in General.

The functions of the judge and the jury are separate and distinct; the weight and credibility of the evidence is within the sole province of the jury and they may believe any part or none of it. *Brinkley v. Insurance Co.,* 301.

Where there is no motion for judgment on the pleadings and the parties stipulate facts in addition to those alleged in the pleadings, the court is without power to make further findings of fact, and when the facts alleged and stipulated, considered in the light most favorable to plaintiff, are insufficient to support nonsuit, the court must submit determinative issues to the jury. *Tent Co. v. Winston-Salem,* 715.

§ 19. Office and Effect of Motion to Nonsuit.

Motion to nonsuit presents the question whether the evidence, considered in the light most favorable to plaintiff, is sufficient to be submitted to the jury. *Cutts v. Casey,* 165.

§ 21. Consideration of Evidence on Motion to Nonsuit.

On motion to nonsuit, plaintiff is entitled to every reasonable inference to be drawn from his evidence, resolving all discrepancies and contradictions in his favor. *Cutts v. Casey,* 165.

On motion to nonsuit, plaintiff's evidence is to be taken as true, and all the evidence considered in the light most favorable to plaintiff, and defend-

TRIAL—*Continued.*

ant's evidence which tends to impeach or contradict plaintiff's evidence must be disregarded. *Brinkley v. Insurance Co.*, 301; *Sawyer v. Insurance Co.*, 410; *Price v. Miller*, 690.

Discrepancies and contradictions in plaintiff's evidence are for the jury to resolve and do not justify nonsuit. *Thompson v. Thomas*, 450; *Brown v. Nesbitt*, 532.

§ 22. Sufficiency of Evidence to Overrule Nonsuit.

In order to overrule a motion to nonsuit there must be legal evidence of every material fact necessary to support a verdict, and if the material facts are in dispute and the evidence in regard thereto is such that conflicting conclusions may reasonably be reached, nonsuit is not proper. *Brinkley v. Insurance Co.*, 301.

§ 30. Effect of Judgment as of Nonsuit.

Our statute permitting a suit to be reinstituted within a specified time after dismissal of the original action by nonsuit does not apply when the original suit is brought in another jurisdiction. *High v. Broadnax*, 313.

§ 31. Directed Verdict and Peremptory Instructions.

A request by defendant for a directed verdict or for a peremptory instruction is properly denied when the evidence of plaintiff is sufficient to carry the case to the jury. *Brinkley v. Insurance Co.*, 301.

§ 34. Instructions on Burden of Proof.

Instruction on burden of proof held without error in this case. *Paris v. Aggregates, Inc.*, 471.

§ 40. Issues and Verdict — Form and Sufficiency of Issues.

Where plaintiff's allegations and evidence are sufficient to be submitted to the jury on the issue of liability for damage to plaintiff's dwelling from vibrations from blasting operations, and the complaint also contains allegations with respect to negligence unsupported by evidence, the submission of issues relating solely to absolute liability for blasting operations is proper, since only such issues as are raised by the pleadings and are supported by sufficient competent evidence need be submitted to the jury. *Paris v. Aggregates, Inc.*, 471.

§ 56. Trial and Hearing by the Court.

Where the court is authorized to find the facts without a jury, the weight and credibility of the evidence is for the court, and the court properly denies motion for involuntary nonsuit when conflicting inferences may be drawn from the evidence. *Reynolds Co. v. Highway Commission*, 40.

§ 57. Trial by the Court by Agreement of the Parties — Review of Findings and Judgment.

Where the parties waive a jury trial and agree that the court find the facts, the court has the function of weighing the evidence, and its findings are conclusive on appeal if supported by any competent evidence, notwithstanding that evidence to the contrary may also have been offered. *Huski-Bilt, Inc., v. Trust Co.*, 662.

USURY.

§ 1. Contracts and Transactions Usurious.

The fact that a bank lending money to a construction company on notes executed to the construction company by purchasers of houses from the construction company requires that the construction company pay premiums for credit life insurance on each of the purchasers, which premiums the bank delivers *in toto* to the insurance company issuing the policies, *held* not to constitute an exaction of usury in requiring such premiums in addition to the legal rate of interest, even though the bank and its officers own the majority of the stock of the insurance company, there being nothing to warrant disregard of the separate corporate entities of the bank and the insurance company. *Huski-Bilt, Inc., v. Trust Co.*, 662.

It is customary for a bank to charge interest in advance, and therefore where it lends a specified sum and adds thereto the interest on such sum for four years, the total to be repaid in installments during the four year term, the transaction does not constitute usury, provided the total amount of the interest paid does not exceed six per cent on the amount borrowed. *Ibid.*

VENDOR AND PURCHASER.

§ 1. Requisites, Validity and Construction of Contracts of Bargain and Sale and Options in General.

As between the parties, the vendor may be considered a mortgagee and the purchaser a mortgagor, and ordinarily the purchaser is not entitled to possession until he has fully paid the purchase price, although by express or implied agreement he may be given the right to possession prior thereto. *Brannock v. Fletcher*, 65.

The purchaser in possession is not liable for rent prior to default. *Ibid.*

A purchaser in possession under agreement of the parties cannot be deprived of possession as long as he is not in default in the payment of the purchase price. *Ibid.*

Where prospective purchasers are given possession prior to the execution of the contract to purchase which recites the payment of a stated sum and stipulates monthly payments to be made each month thereafter, there is a necessary implication that the purchasers are entitled to possession of the property so long as they make the payments in accordance with the contract. *Ibid.*

Agreement by the vendors that the purchasers might make up payments in default at the end of the contract period does not preclude vendors from invoking the acceleration provision of the contract when the agreement to defer the payments is not supported by a new and independent consideration. *Ibid.*

Vendors may not invoke the acceleration agreement in the contract without first giving the purchasers adequate notice and reasonable opportunity to bring their payments up to date. *Ibid.*

Plaintiff purchasers' evidence tended to show that they were in possession of the property under an executory contract of purchase and sale, that defendant vendors wrongfully demanded that plaintiffs surrender the property at a time when plaintiffs were not in default, and that plaintiffs voluntarily surrendered the property. *Held:* Nonsuit was improperly entered in plaintiffs' action to recover payments made under the contract, since the evidence is sufficient to support a finding that the parties rescinded the contract, in which event plaintiffs would be entitled to recover the payments made. *Ibid.*

VENDOR AND PURCHASER—*Continued.*

§ 10. Abandonment and Cancellation of Contract.

The distinction between rescission, forfeiture, and the termination of an executory contract of purchase and sale because of the failure of the purchaser to perform his obligations, is important: rescission entitles each party to be placed *in statu quo ante,* requiring that payments made by the purchaser be refunded and that the vendors recover the amount of reasonable rents, while in the event of forfeiture or termination of the purchasers' contractual rights because of failure to make payments as stipulated, the purchasers would not be entitled to recover payments theretofore made. *Brannock v. Fletcher,* 65.

WILLS.

§ 1. Nature and Requisites of Testamentary Disposition of Property.

A person has no inherent or constitutional right to dispose of his property by will, but such right is conferred and regulated solely by statute. *Fullam v. Brock,* 145.

§ 8. Proof of Will and Probate in Common Form in General.

Words and figures included in matter tendered for probate as a will are improvidently probated when they constitute no part of the testamentary instrument; when included in the probate, the proper remedy is a motion before the clerk to revoke the probate of such words and figures. *Ravenel v. Shipman,* 193.

Where the clerk has probated matter tendered as a will, he may revoke the probate of words and figures which are not a part of the testamentary instrument, but he may not exclude from probate matter on the basis of a construction of the instrument. *Ibid.*

§ 12. Nature and Jurisdiction of Caveat Proceedings in General.

An instrument probated in common form is conclusive until set aside in a caveat proceeding unless the court has been imposed upon, misled, or some inherent or fatal defect appears on the face of the instrument. *Ravenel v. Shipman,* 193.

Where the clerk could have revoked probate of a part of the instrument on the ground of want of dispositive words so that such matter was not a part of the testamentary instrument, but the parties appeal from probate and the court adjudicates that such matter was void for uncertainty, the Supreme Court will not raise questions of jurisdiction *ex mero motu,* the result being correct whether the matter be treated as extraneous the testamentary instrument or as void for uncertainty. *Ibid.*

§ 18. Competency and Relevancy of Evidence in Caveat Proceedings.

Deeds executed after the testator's death whereby the propounders and the caveators had conveyed two tracts of the testator's lands are incompetent in evidence on the question of testator's intent in using words having a well defined meaning, since in such instance testator's intent must be gathered from the language of the will itself. *In re Will of Cobb,* 307.

Testator bequeathed property "to my next of kin as provided by the General Statutes of North Carolina." The draftsman of the will, an attorney, sought to testify that he erroneously omitted the words "as if I had died intestate" from the language of the bequest, but that the testator had intended and had understood that his property would devolve under the intestacy laws. *Held:* The testimony was properly excluded, since, in the absence of evidence of fraud, duress, or mistake as to the identity of the instrument ex-

WILLS—*Continued.*

ecuted, the mistake of the draftsman in expressing the intent will be regarded as the mistake of the testator and binding upon him. *Ibid.*

§ 27. General Rules of Construction.

Each will must be construed to effectuate the intent of testator as expressed in the particular language used, and since the language of no two wills is identical, each will must be construed as a thing of itself. *Roberts v. Bank*, 292.

§ 29. Construction and Operation of Wills — Presumptions.

Where partial intestacy would not be avoided even if the language of the will be interpreted as a testamentary disposition of the particular property in question, the presumption against partial intestacy has no application. *Ravenel v. Shipman*, 193.

§ 31. Construction and Operation of Dispositive and Precatory Words.

Dispositive words may be implied when it cogently appears from the instrument that testator intended to dispose of the particular property by the will, but such words may not be implied merely to avoid intestacy or for any purpose other than to effectuate the intent of testator as gathered from the instrument. *Ravenel v. Shipman*, 193.

The holographic will in suit, after three pages directing disposition of the estate, contained two pages listing testatrix' possessions and a sixth page with signatures of testatrix and witnesses; on the back of the fifth page appeared a list of five charities with numbers opposite each. *Held:* The court may not supply dispositive words so as to constitute the words and figures on the back of page five a testamentary disposition of property, since a reading of the entire will does not necessarily import such intent. *Ibid.*

§ 34. Time of Vesting of Estates and Whether Estate is Vested or Contingent.

The law favors the early vesting of estates, and, in the absence of an intent plainly inferable from the terms of the will, courts will construe a devise as vesting upon the death of the testator rather than at the termination of the particular estate. *Roberts v. Bank*, 292.

Testator devised his property in trust for his daughter for life with provision that upon her death the property should go "in equal shares, *per stirpes*," to other children and the stepdaughter of testator, named in the will. *Held:* The term "*per stirpes*" denotes the inheritable quantity of the estate in remainder and does not annex time to the substance of the gift, and therefore the remainder vests as of the time of testator's death. *Ibid.*

§ 45. Designation of Beneficiaries — Gift to "Next of Kin".

Unless the will or deed expresses a contrary intent, the words "next of kin" will be construed to mean "nearest of kin," and nothing else appearing, the words do not permit a distribution under the principle of representation. *In re Will of Cobb*, 307.

§ 60. Dissent of Spouse and Effect Thereof.

At the time of the wife's death, the constitutional amendment authorizing the Legislature to empower the husband to dissent from his wife's will had been certified, but Chapter 849, Session Laws of 1965, re-enacting G.S. 30-1, 30-2, and 30-3 had not become effective. However, the statute directing the submission of the amendment provided that upon its certification, the word "spouse" in statutes dealing with testate and intestate successions, should ap-

WILLS—*Continued.*

ply alike to both husband and wife. *Held:* The husband had a right to dissent from his wife's will under the anticipatory provisions of the statute directing the submission of the amendment. *Fullam v. Brock*, 145.

The guardian of an incompetent widower is authorized to file a dissent by him from his wife's will. *Ibid.*

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

G.S.

1-25. Statute does not apply when original suit is brought in another jurisdiction. *High v. Broadnax*, 313.

1-86. Motion for special venire from another county is addressed to discretion of court. *S. v. Yoes*, 616.

1-123; 1-127. Complaint held to incorporate two causes of action as a single cause of action, and therefore demurrer should have been sustained with leave to plaintiff to plead the two causes of action separately. *Corprew v. Chemical Corp.*, 485.

1-127(6); 1-134. Defendant may not demur in Supreme Court on grounds of improper joinder. *Beam v. Almond*, 509.

1-151. Demurrer will not be sustained unless complaint is fatally defective. *Corprew v. Chemical Corp.*, 485.

1-180. It is required that court apply the law to the particular facts presented by the evidence. *Ingle v. Transfer Corp.*, 276.
Statement by court that witness was experienced and to let him testify as an expert held not expression of opinion. *Paris v. Aggregates*, 271.

1-276. Proceeding to remove executor or administrator is neither a civil action nor a special proceeding. *In re Estate of Lowther*, 345.

1-277. Appeal lies immediately by Highway Commission from order in condemnation proceedings that respondents own the land involved. *Highway Comm. v. Nuckles*, 1.
Motion to strike allegations on ground that they failed to state cause of action is equivalent to a demurrer. *Davis v. Highway Comm.*, 405.

9-1; 9-2. Statutes are directory and not mandatory. *S. v. Yoes*, 616.

1-568.1; 1-568.9; 1-568.10(b)(2). Affidavit for examination of adverse party prior to filing of complaint must show facts disclosing necessity for examination to prepare complaint and describing with reasonable particularity information sought. *Kohler v. Construction Co.*, 187.

1-568.4. Defendant is entitled to introduce plaintiff's pretrial examination of party notwithstanding that person examined is not a party at the time of the trial. *Pearce v. Barham*, 285.

1-568.11; 1-568.3(2). Pretrial examination in proper instances is available as a matter of right. *Furr v. Simpson*, 221.

2-1; 1-273. Jurisdiction of clerk with reference to administration of estates is altogether statutory, and his probate jurisdiction is separate and distinct from his general duties as clerk. *In re Estate of Lowther*, 345.

4-1. Common law is in force in this State unless abrogated or inconsistent with independence of State. *S. v. Lackey*, 171.

6-21.1. Is inapplicable in cases arising under Workmen's Compensation Act. *Bowman v. Chair Co.*, 702.

7-64. Is obsolete in those counties in which the District Courts are established. *S. v. Wall*, 675.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

7-295. Appeals in civil actions from general county courts to Superior Court are governed by statute, which makes no provision for filing case on appeal until the case is settled. *Paris v. Aggregates,* 471.

7A-270; 7A-272. District Court has original jurisdiction over all criminal actions below grade of felony and exclusive original jurisdiction of all misdemeanors except those specified in G.S. 7A-271(a)(b)(c)(d). *S. v. Wall,* 675.

8-56. Tape recording, made by husband without wife's knowledge, of conversation between them, held incompetent. *Hicks v. Hicks,* 204.

14-2; 14-18. Imprisonment for involuntary manslaughter may not exceed 10 years plus fine. *S. v. Efird,* 730.

14-4. Violation of municipal ordinance is a misdemeanor. *Bell v. Page,* 396.

14-5. Surplusage which does not contradict essential averments of indictment does not vitiate it. *S. v. Parker,* 414.

14-18. Punishment for involuntary manslaughter may be by fine and imprisonment not to exceed 10 years, or both. *S. v. Swinney,* 130.

14-21. Contention that enforcement of rape statute was discriminatory held without foundation. *S. v. Yoes,* 616.

14-54. Maximum sentence for breaking and entering is 10 years. *S. v. Robinson,* 448.

14-72. Maximum sentence for larceny of property by breaking and entering is 10 years. *S. v. Robinson,* 448.

15-4.1; 15-180; 15-221. Finding that indigent defendant had been denied right of appeal supports order appointing counsel to perfect his appeal and directing county to furnish transcript. *S. v. Staten,* 600.

15-6.2. Separate sentences entered in single prosecution run concurrently in absence of provision to the contrary in the judgment. *S. v. Efird,* 730. Concurrent sentences may be imposed for different grades of offenses which must be served at different places. *S. v. Brooks,* 462.

15-143. Motion for bill of particulars is addressed to discretion of trial court. *S. v. Spence,* 23.
Bill of particulars may not supply essential averment of indictment. *S. v. Ingram,* 538.

15-147. Indictment failing to allege prior escape is insufficient to support felony sentence and may not be aided by words on back of indictment "Indictment Third Escape." *S. v. Bennett,* 423.

15-170. Defendant, properly advised, may plead guilty to less degree of the same crime charged in the indictment. *S. v. Woody,* 544.

15-176.1. Solicitor is entitled to argue that jury should not recommend life imprisonment. *S. v. Spence,* 23.

20-7; 20-35. Must be construed *in pari materia* and punishment is limited by G.S. 20-35(b). *S. v. Tolley,* 459.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

20-7(a). District Court has exclusive original jurisdiction of prosecution under this section. *S. v. Wall,* 675.

20-7(a); 20-7(n); 20-35(b). Punishment for operating motor vehicle on highway without first obtaining license may not exceed six months. *S. v. Wall,* 675.

20-13. Moving violation of Motor Vehicle Statute by minor driver requires mandatory suspension prior to amendment. *Wing v. Godwin,* 426.

20-38(23). Failure of motorist to yield the right of way to traffic upon public highway does not compel finding of contributory negligence as matter of law. *Galloway v. Hartman,* 372.

20-38(38). Bicycle is vehicle within purview of statute. *Lowe v. Futrell,* 550.

20-79(b). Conflicting evidence as to whether driver had garage owner's authority to drive at time of accident held to raise issue for jury. *Brinkley v. Ins. Co.,* 301.

20-105. Violation of this statute is misdemeanor and is not a less degree of crime of larceny. *S. v. Wall,* 675.

20-140. Violation of safety statute constitutes culpable negligence provided such violation is either intentional or accompanied by a reckless disregard of consequences. *Ingle v. Transfer Corp.,* 276.

20-140(c). Punishment for reckless driving is limited to fine not exceeding $500 or imprisonment not exceeding six months. *S. v. Tolley,* 459.

20-141; 20-180; 20-176(b). Punishment for speeding not in excess of 80 miles per hour is limited to fine of $100 or imprisonment not more than 60 days. *S. v. Tolley,* 459.

20-149(b). Motorist is under common law duty to sound horn when exigencies of situation require it in exercise of due diligence. *Lowe v. Futrell,* 550.

20-154. Whether negligence of driver in turning left was proximate cause of collision held for jury. *Stutts v. Burcham,* 176.

20-166. Evidence held to support conviction of failing to stop after accident causing death. *S. v. Massey,* 555.

20-174(a). Pedestrian crossing highway at point other than within marked crosswalk or intersection must yield right of way to vehicles. *Price v. Miller,* 690.

28-32. The clerk of Superior Court has power to revoke letters of administration for mistake of fact and to remove administrator who has been guilty of default or misconduct. *In re Estate of Lowther,* 345.

29-14; 29-30. Wife does not have present right of possession of land owned by entirety so as to entitle her to maintain action in ejectment. *Oil Co. v. Richardson,* 696.

30-1; 30-2; 30-3. Even prior to enactment of statutes, widow had right of dissent under statute submitting constitutional amendment. *Fullam v. Brock,* 145.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

30-2. Guardian of incompetent widower is authorized to file dissent from wife's will. *Fullam v. Brock,* 145.

45-45. Allegations of wife that husband conveyed property to trustee without her joinder for purpose of defeating her right to protect her property from a prior deed of trust in which she joined, fails to state a cause of action, since husband's conveyance without her joinder does not prevent her from redeeming land from prior deed of trust. *Oil Co. v. Richardson,* 696.

47-27. Whether statute applied to Highway Commission prior to 1959 amendment, *quære? Highway Comm. v. Nuckles,* 1.

53-42(6). Charging interest in advance does not constitute usury. *Huski-Bilt v. Trust Co.,* 662.

58-32. Bank requiring credit life insurance in insurance company in which it had interest is not guilty of usury. *Huski-Bilt v. Trust Co.,* 662.

58-44.7. Insurer and not lender collecting premiums for insurer is liable for refunds due, which refunds must be paid to borrowers rather than lender. *Huski-Bilt v. Trust Co.,* 662.

62-260(a). Municipality may grant franchise for carriage of passengers to and from airport notwithstanding Utilities Commission had theretofore granted franchise to operate to boundary of airport. *Harrelson v. Fayetteville,* 87.

97-2(9). Under Workmen's Compensation Act disability refers to diminished earning capacity and not physical infirmity. *Ashley v. Rent-A-Car Co.,* 76.

97-25. Does not limit payments when disability is permanent and treatment will tend to lessen degree of disability. *Ashley v. Rent-A-Car Co.,* 76.

97-88. Industrial Commission cannot award attorney's fees except in instances authorized by statute. *Bowman v. Chair Co.,* 702.

135-1; 135-18. Person engaged in part-time employment as teacher is not teacher or employee as defined by statute, and Trustees may not suspend payments after beneficiary has earned $1500 during year. *Harrill v. Retirement System,* 357.

136-19. Is a statute of limitations and not a condition precedent to right of action. *Highway Comm. v. Nuckles,* 1.

136-29(a). Limitation on filing claim on highway contract does not begin to run until Commission tenders unconditional payment. *Reynolds Co. v. Highway Comm.,* 40.

136-104. Land owner selling prior to condemnation by Highway Commission may not recover for asserted depreciation in price resulting from anticipation of condemnation. *Highway Comm. v. Hettiger,* 152.

136-107; 136-108. Issue of whether Highway Commission had authority to condemn land may be determined by Superior Court without a jury, and objection thereto may be set up within 12 months of the Highway Commission's taking. *Highway Comm. v. Thornton,* 227.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

136-108; 136-119. Court may determine questions as to parties, title, estates condemned and area taken in condemnation proceedings and appeal may be taken as a matter of right from court's adjudication of such taking. *Highway Comm. v. Nuckles*, 1.

143-291. Tort Claims Act does not authorize action that Highway Commission made false representations as to time it would require possession of property it was to condemn. *Davis v. Highway Comm.*, 405.

148-89. Where trial within period prescribed by Interstate Agreement on Detainers Act results in mistrial, defendant is not entitled to discharge at later trial had with due diligence. *S. v. George*, 438.

153-9(58). County may not contract with funeral home for ambulance service without vote prior to enactment of statute. *Moody v. Transylvania County*, 384.

160-1; 63-2; 63-49(a); 63-50; 63-53. Municipality may grant franchise for carriage of passengers to and from municipal airport. *Harrelson v. Fayetteville*, 87.

160-179. Municipality may retain use of property in violation of valid zoning ordinance. *Gastonia v. Parrish*, 527.

160-239; 160-241. Municipality has sole responsibility to determine necessity for public improvements and authority to apportion the cost by any recognized and established rules. *Raleigh v. Mercer*, 114.

160-272. Presumption is in favor of validity of zoning ordinance certified by city clerk. *Gastonia v. Parrish*, 627.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

Art. I, § 7. State Employees' Retirement System does not violate Constitution. *Harrill v. Retirement System*, 357.

Art. I, § 14. Punishment within statutory maximum cannot be cruel or unusual. *S. v. Lovelace*, 593.

Art. I, § 17. Evidence held to support finding that there was no racial discrimination in selection of grand or petit jury. *S. v. Yoes*, 616.
Private property may not be condemned even upon payment of full compensation except for a public purpose. *Highway Comm. v. Thornton*, 227.

Art. IV, § 10(2). Superior Court has general jurisdiction throughout the State except as otherwise provided by statute. *S. v. Wall*, 675.

Art. IV, § 10(3). General Assembly has power to prescribe jurisdiction of District Courts. *S. v. Wall*, 675.

Art. X, § 6. Statute submitting constitutional amendment contains anticipatory provisions making G.S. 30-1 effective prior to its re-enactment. *Fullam v. Brock*, 145.

Art. XI, § 2. Contention that enforcement of rape statute was discriminatory held without foundation. *S. v. Yoes*, 616.

CONSTITUTION OF UNITED STATES, SECTIONS OF, CONSTRUED.

Fourteenth Amendment. Evidence held to support finding that there was no racial discrimination in selection of grand or petit jury. *S. v. Yoes*, 616.

State Employees' Retirement System does not violate Constitution. *Harrill v. Retirement System*, 357.