NORTH CAROLINA REPORTS

Vol. 272

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1967

APPELLATE DIVISION REPORTER:
JOHN M. STRONG.

ASSISTANT APPELLATE DIVISION REPORTER:
WILSON B. PARTIN, JR.

RALEIGH:
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PRINTERS TO THE SUPREME COURT
1968

In Memoriam

John Moore Strong
1905-1968

Reporter
to
The Supreme Court of North Carolina
1939 - 1968.

CITATION OF REPORTS.

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

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3 & 4 " "	"	20	"	6 " "	"	51	"
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3 " "	"	25	"	3 " "	"	56	"
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7 " "	"	29	"	1 and 2 Winston	"	60	"
8 " "	"	30	"	Phillips Law	"	61	"
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The opinions published in the first six volumes of the reports were written by the "Court of Conference" and the Supreme Court prior to 1819.

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

SUPREME COURT OF NORTH CAROLINA.

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WILLIAM B. RODMAN, JR.

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ASSISTANT DIRECTOR AND ADMINISTRATIVE ASSISTANT TO THE CHIEF JUSTICE:

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JOHN M. STRONG.[4]

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[1]Retired 3 February 1968. Appointed Emergency Justice.
[2]Appointed Associate Justice of the Supreme Court 5 February 1968.
[3]Appointed Director of the Administrative Office of the Courts 5 February 1968. Succeeded by Frank W. Bullock, Jr.
[4]Deceased 12 February 1968.
[5]Appointed Appellate Division Reporter 20 February 1968. Succeeded 11 March 1968 by Ralph A. White, Jr.

JUDGES OF THE SUPERIOR COURT

FIRST DIVISION

Name	*District*	*Address*
WALTER W. COHOON	First	Elizabeth City.
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HOWARD H. HUBBARD	Fourth	Clinton.
RUDOLPH I. MINTZ	Fifth	Wilmington.
JOSEPH W. PARKER	Sixth	Windsor.
GEORGE M. FOUNTAIN	Seventh	Tarboro.
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SECOND DIVISION

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E. MAURICE BRASWELL	Twelfth	Fayetteville.
COY E. BREWER	Twelfth	Fayetteville.
EDWARD B. CLARK	Thirteenth	Elizabethtown.
CLARENCE W. HALL	Fourteenth	Durham.
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HARVEY A. LUPTON	Twenty-first	Winston-Salem.
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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[2]	Twenty-sixth	Charlotte.
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FRANK W. SNEPP, JR.	Twenty-sixth	Charlotte.
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B. T. FALLS, JR.	Twenty-seventh	Shelby.
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HARRY C. MARTIN	Twenty-eighth	Asheville.
J. W. JACKSON	Twenty-ninth	Hendersonville.
T. D. BRYSON	Thirtieth	Bryson City.

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1Retired 9 February 1968. Succeeded 23 February 1968 by R. A. Collier, Jr., Statesville.
2Retired 29 February 1968. Appointed Emergency Judge. Succeeded 1 March 1968 by William T. Grist, Charlotte.
3Deceased 25 February 1968.
4Deceased 16 January 1968.

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SUPERIOR COURT, SPRING SESSIONS, 1968.

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).

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1967

ECONOMY FINANCE CORPORATION v. JASPER LEATHERS ET UX., LOUISE LEATHERS.

(Filed 22 November, 1967.)

1. Estoppel § 1— Owners of land held estopped to deny they held title at time they executed second deed of trust on same land.

The owners of land executed a deed of trust which was duly foreclosed, the deed of trust and the foreclosure deed being registered, and the property was bought in by the *cestui* named therein. Subsequent thereto the owners executed a second deed of trust on the same land for the benefit of the same *cestui*, and the *cestui* named therein later assigned his interest to plaintiffs. The second deed of trust was later foreclosed and the foreclosure deed made to plaintiffs who purchased at the sale. On the following day the trustee and the *cestui* in the first deed of trust executed a deed of trust in favor of plaintiffs. Later the trustee and *cestui* in the second deed of trust executed an ambiguous release deed to the original owners. The original owners remained in possession throughout, and plaintiffs brought this action in ejectment against them. *Held:* The original owners are estopped to deny that they had title at the time they executed the second deed of trust, and the evidence was sufficient to be submitted to the jury on the issue of plaintiff's ownership and right of possession under their foreclosure deed of the second deed of trust.

2. Ejectment § 6—

The common source of title doctrine by which a defendant in an ejectment action is precluded from denying the validity of a source of title under which both plaintiff and defendant claim and by which such defendant is prevented from showing a paramount title outstanding in a third person which is independent of the common source without connecting himself with it does not prevent a defendant from showing that he or a third person has acquired a title under the common source superior to that of plaintiff, since such a showing is not an attack upon the common

source but instead affirms the validity of the common source by showing good title therefrom into a third person.

APPEAL by plaintiff from *Bone, E.J.*, 23 May 1967 Civil Session of PITT.

Civil action by an Indiana corporation in ejectment to be put in the possession of a certain lot or parcel of land together with the improvements thereon situate in Greenville township, Pitt County, State of North Carolina, and to recover rents and profits of said property and damages for the unlawful retention of possession of said property by defendants. Defendants in their answer deny that plaintiff is an Indiana corporation and by their allegations place title in issue. Both plaintiff and defendants offered evidence all of which was documentary and there was no oral testimony. The trustee's deed and the other instruments through which plaintiff asserts its claim to ownership plus those upon which defendants base their defense are a part of a highly complicated and confused series of conveyances, each item of which is separately specified below with a brief summary of all the facts and details in regard thereto which are pertinent to this litigation.

Plaintiff first offered into evidence six items, designated Plaintiff's Exhibits 1, 2, 3, 4, 5, and 6, which are summarized below. The parenthetical enumeration following the various dates of execution and recordation is included to facilitate the determination of their proper order for which purpose no distinction is made between dates of execution and recordation. This applies also to defendants' exhibits.

Plaintiff's Exhibit 1 was two documents showing proof of plaintiff's corporate existence in the State of Indiana consisting of a paper writing executed by the Secretary of State of that State attesting to plaintiff's due corporate existence in Indiana, followed by a paper writing executed by the Governor of Indiana certifying that the Secretary of State was fully authorized to attest to plaintiff's due corporate existence in that State.

Plaintiff's Exhibit 2 was a warranty deed from John Jasper Leathers and wife, Dorothy Clark Leathers, to Louise Leathers, *feme* defendant. Executed: 10 February 1961 (1). Recorded: 4 October 1961, 9:54 a.m. (3).

Plaintiff's Exhibit 3 was a deed of trust from Jasper Leathers and wife, Louise Leathers, defendants, to Julius C. Smith, III (hereinafter referred to as Smith), trustee, in favor of Wise Homes, Inc., of Sharpsburg, North Carolina (hereinafter referred to as Wise), *cestui que trust;* securing defendants' note in the amount of $6,960. Executed: 1 May 1963 (6). Recorded: 12 August 1964 (13).

Plaintiff's Exhibit 4 was an assignment by Wise to Economy Finance Corporation, plaintiff, by which plaintiff acquired Wise's interest as *cestui que trust* under the deed of trust specified above as plaintiff's Exhibit 3. Executed: 29 July 1963 (9). Recorded: 10 September 1964 (15).

Plaintiff's Exhibit 5 was an instrument denominated an "Indenture" executed by plaintiff substituting Martin L. Cromartie (hereinafter referred to as Cromartie) in place of Smith as trustee in the deed of trust specified above as Plaintiff's Exhibit 3. Executed: 7 July 1964 (12). Recorded: 9 September 1964 (14).

Plaintiff's Exhibit 6 was a trustee's deed or "foreclosure deed" from Cromartie, substitute trustee, to plaintiff, *cestui que trust,* pursuant to a foreclosure sale made under the terms of the deed of trust specified above as Plaintiff's Exhibit 3. This deed of trust having been in default, foreclosure was had thereunder on 14 October 1964 at which time plaintiff became the last and highest bidder and bought the property in for the price of $625, receiving this trustee's deed. (Our examination of the photostatic copy of this trustee's deed as it appears of record in the Pitt County Registry reveals an error therein in that it recites that the deed of trust foreclosed under was executed 1 May *1964* while, in fact, the record of that instrument shows it to have been executed 1 May *1963* as stated above under Plaintiff's Exhibit 3.) Executed: 28 November 1964 (16). Recorded: 10 December 1964 (17).

Defendants introduced in evidence three instruments designated Defendants' Exhibits A, B, and C, which are summarized as follows:

Defendants' Exhibit A was a deed of trust from defendants to Smith, trustee, in favor of Wise, *cestui que trust;* securing defendants' note in the amount of $7,173.60. Executed: 16 August 1961 (2). Recorded: 4 October 1961, 9:54 a.m. (3).

Defendants' Exhibit B was a trustee's deed or "foreclosure deed" from Smith, trustee, to Wise, *cestui que trust,* pursuant to a foreclosure sale made under the terms of the deed of trust specified above as Defendants' Exhibit A. This deed of trust having been in default, foreclosure was had thereunder and a public sale was held by the trustee on 5 March 1963 at which time Wise became the last and highest bidder and bought the property in for the price of $3,100, receiving this trustee's deed. Executed: 19 March 1963 (4). Recorded: 16 April 1963 (5).

Defendants' Exhibit C was a deed of trust from Wise to Smith, trustee, in favor of plaintiff, *cestui que trust;* securing Wise's note in the amount of $6,962.80. Executed: 2 May 1963 (7). Recorded: 8 May 1963 (8).

After defendants had rested, plaintiff offered its final item of evidence, plaintiff's Exhibit 7. This exhibit was termed a "release deed" from Wise and trustee Smith to the defendants executed by the former for the consideration of $1 paid them by the latter. This instrument contains language which tends to create ambiguity and uncertainty, and the material part of it reads as follows:

> "WHEREAS, Jasper Leathers and wife, Louise Leathers, heretofore executed to said Julius C. Smith, III, Trustee, a certain deed of trust dated August 16, 1961, which deed of trust is recorded in the Pitt County Registry . . . [that instrument being Defendants' Exhibit A, specified above], to secure a certain note therein set out due and payable to Wise Homes, Inc. of Sharpsburg; and whereas, Jasper Leathers and wife, Louise Leathers, have requested that Wise Homes, Inc. of Sharpsburg release from the lien of said deed of trust all of the land therein conveyed which is described hereinafter, and the said Wise Homes, Inc. of Sharpsburg has agreed so to do and has requested said Trustee to join in said release;
>
> "NOW, THEREFORE, the said parties of the first part [Wise and Smith], for and in consideration of the sum of One Dollar to each of them paid by the parties of the second part [defendants], have remised and released and by these presents do remise, release, and forever quitclaim unto the said parties of the second part [the land in question]. . . .
>
> * * *
>
> "TO HAVE AND TO HOLD, said real property . . . free and discharged from the lien of the deed of trust dated August 16, 1961. . . ." Executed: 14 November 1963 (10). Recorded: 13 February 1964 (11).

All of the documents which were introduced in evidence were duly recorded in the office of the Pitt County Register of Deeds.

From a judgment of compulsory nonsuit entered by the court on motion of defendants, plaintiff appeals.

Harrell & Mattox by Fred T. Mattox for plaintiff appellant.
Richard Powell and Mitchell & Murphy for defendant appellees.

PARKER, C.J. A concise summary of this chain of circumstances is as follows: First was the execution of a warranty deed placing title in the *feme* defendant. Next and more than six months later, she and her husband, defendants, executed their first deed of trust in favor of Wise. This deed of trust was security for their note in

the amount of $7,173.60. Almost a month and a half later both of these instruments were simultaneously recorded, to wit, at 9:54 a.m. of the same day. One year and five months later this deed of trust was foreclosed and the land was sold by the trustee at public auction pursuant to a power of sale contained in the instrument. At that time *cestui* Wise, being the last and highest bidder, bought the property in for $3,100 and received a trustee's deed which was subsequently recorded. Up to this point all the transactions are regular and each conveyance which has been executed has been duly recorded before the execution or recordation of any other instruments concerning the *locus in quo*. However, with title vested in Wise, as above described, and with no apparent claim to or interest in the fee, defendants executed a second deed of trust in favor of Wise. This deed of trust was intended as security for their note in the amount of $6,960 and remained unrecorded for more than a year and three months during which time other transactions and conveyances concerning the disputed land intervened. On the day immediately following the execution of defendants' second deed of trust, Wise executed its own deed of trust in favor of plaintiff securing a note evidencing an indebtedness to the plaintiff of $6,962.80. This instrument was recorded a few days later. Thereafter an assignment was made by Wise to plaintiff by which plaintiff acquired any purported interest which Wise may have had as *cestui que trust* under the second deed of trust executed by defendants. This assignment was not entered of record for almost a year and two months, and during that interim period the land in question was further dealt with and transferred. Some three and one-half months after the execution of this assignment of the interest of the *cestui* under defendants' second deed of trust, Wise and Smith, for the consideration of $1, executed to the defendants the ambiguous "release deed," the pertinent parts of which are quoted above, which purported to restrict itself to a relinquishment of whatever interest the *cestui* and the trustee had under the first deed of trust executed by defendants which deed of trust had already been foreclosed under. That is, this "release deed" attempted to limit itself to the release of a non-existent interest. This "release deed" was recorded slightly less than three months later and before any of the other events herein involved had transpired. Next was the execution by plaintiff of an instrument by which a new trustee was substituted for the original one in defendants' second deed of trust. The last conveyance involved in this litigation was the trustee's deed executed by substitute trustee Cromartie to the plaintiff pursuant to a foreclosure of the defendants' second deed of trust under which plaintiff had been the *cestui que trust* by virtue of the assignment. Ac-

cording to the recitals in this trustee's deed a public foreclosure sale was held at the courthouse door in Greenville, Pitt County, at which plaintiff became the last and highest bidder for the price of $625.

In paragraph four of its complaint, plaintiff alleges, in substance, that the land in question was sold on 14 October 1964 by the trustee under a power of sale contained in the second deed of trust executed by defendants (Plaintiff's Exhibit 3); that plaintiff was the last and highest bidder at that sale; that it has complied with the terms of the bid; that it is now the owner of the land by virtue of the duly recorded deed to it from substitute trustee Cromartie dated 28 November 1964 (Plaintiff's Exhibit 6); and that defendants have no further right, title or interest in or to said land.

In paragraph five of its complaint, plaintiff alleges, in substance, that the defendants were in possession of the premises at the time of the foreclosure sale referred to immediately above and have continued to remain in possession since that sale; that plaintiff has made repeated demands upon the defendants for possession but they have refused to vacate; that plaintiff is being wrongfully deprived of possession; and that defendants have refused and still refuse to pay plaintiff for the use and occupancy of the premises.

Plaintiff concludes its pleading with a prayer that it be given possession of the property and damages for the defendants' alleged unlawful retention to be computed at the rate of $75 per month from the commencement of such purported unlawful retention.

In their answer, defendants deny all the material allegations of the complaint except that they admit that they have been in possession of the land described in plaintiff's complaint since and prior to 1964.

Plaintiff assigns as error that "the court erred in failing to sustain plaintiff's objection that the defendants were estopped to impeach the provisions of the deed of trust executed by them or to deny they had title at the time of execution of the said deed of trust." It is apparent from the record, p. 29, that this assignment of error refers to the deed of trust described above as plaintiff's Exhibit 3 — the second deed of trust executed by defendants in favor of Wise. This assignment of error is sustained.

Are the defendants, the grantors in the deed of trust which is designated as Plaintiff's Exhibit 3, estopped to deny anything in derogation of the rights which the deed of trust purports to convey? The answer is Yes. In *Edwards v. Meyer,* 100 Fla. 235, 130 So. 57, the syllabus by the Court under the first headnote in the Southern Reporter series says:

"A mortgagor is estopped from denying the validity of a mortgage on land executed by him as security for a loan upon the ground that he had no interest in or title to the land when he executed the mortgage, which mortgage is accepted by the lender on the mortgagor's representation that he was the owner of the land and in the belief that such representation was true."

The Court in its opinion said:

"But Edwards is estopped from denying the validity of the mortgage particularly as it was given and accepted through his suggestion and for his benefit. He accepted the proceeds of the mortgage, employed them for his own purposes, made no contest against the foreclosure, set up no defense against it, admitted the debt and execution of the mortgage, and neglected for more than two years to raise any question as to its validity, and, so far as the record discloses, remained in possession of the premises. (Citing authority.)

"Nor can the mortgagor plead his own want of title to the mortgaged premises in any case. (Citing authority.)"

To the same effect see 31 C.J.S., Estoppel, § 14.

Practically all the previous North Carolina cases dealing with the common source of title doctrine are collected by Winborne, J. (later C.J.) in *Stewart v. Cary,* 220 N.C. 214, 17 S.E. 2d 29, 144 A.L.R. 1287. The annotation in connection with this case in the volume of the American Law Reports just cited has since been superseded by a new annotation entitled "Common Source of Title Doctrine," 5 A.L.R. 3d 375. This annotation, at page 381, makes the following statement of the rule:

"The doctrine of common source of title is the well-established rule, in actions involving the title to or the right to possession of realty or an interest therein, that when the adverse parties claim title from the same source, it is not necessary for the plaintiff to trace the title back of the common source."

In a footnote to this statement the annotation says the following:

"The above statement of the rule appears to be the one most frequently used. Variants include (1) neither party can question the title of the common grantor, (2) plaintiff need not show title in such person, (3) a party is estopped from denying a title which is recognized in a deed under which he claims, and (4) ownership in the common source being admitted, it is presumed that his title is traced back to the sovereign."

The text of the annotation, at page 384, continues as follows:

> "The view of many courts concerning the basis of the rule that title need not be traced back of the common source is typified by the statement in *Jennings v. Marston,* (1917) 121 Va. 79, 92 S.E. 821, 7 A.L.R. 855, that the rule rests upon the principle of estoppel, the defendant not being allowed the inconsistency of claiming both under and against the same title.
>
> "Many other courts, while conceding that the rule is in the nature of and has the practical force and effect of an estoppel, take the view, as expressed in *Stewart v. Cary* [*supra*], that it is not strictly a rule of estoppel but is a rule of practice, founded in justice and convenience, which has become a rule of law, adopted by the courts for the purpose of aiding the administration of justice by dispensing with the necessity of requiring the plaintiff to prove the original grant and *mesne* conveyances, upon proof that the defendant claims under the same person."

At page 386 of the annotation *Harrison Mach. Works v. Bowers,* 200 Mo. 219, 98 S.W. 770 (1906) is paraphrased as follows:

> "(A) necessary corollary of the common source of title rule is that in any case wherein a common source of title is agreed upon, or assumed, or shown to exist, and is relied on, irregularities in conveyances beyond the common source become weaknesses peculiar to both litigants and hence 'immaterial.'"

Stewart v. Cary, supra, at 221, says the following:

> "While in an action to recover land the general rule is that plaintiff must rely upon the strength of his own title, and not upon the weakness of that of defendant, . . . there is in this State a well settled exception to this rule. It is that whenever in an action to recover land 'both parties claim title under the same person, neither of them can deny his right, and then, as between them, the elder is the better title and must prevail,' as aptly stated by Battle, J., in *Gilliam v. Bird,* 30 N.C. 280. This exception has been so often applied that it was termed an 'inflexible rule' as early as the decisions in *Gilliam v. Bird, supra,* and in *Christenbury v. King,* 85 N.C. 230. (Citing numerous authorities.)
>
> * * *
>
> "(W)hile defendant can defend by showing that he has a better title in himself than that of the plaintiff, derived from

the person from whom they both claim or from some other person who had such better title, he is not at liberty to show a better title outstanding in a third person. (Citing authority.)"

It seems that the salient point which plaintiff wishes to establish with reference to this doctrine is that defendants' evidence tends to impeach or deny the title of the common grantor and also tends to show a good title outstanding in a third person which plaintiff would say is in derogation of the above stated rules.

Defendants have not attempted to go behind the original deed into the *feme* defendant and show a paramount independent chain of title outstanding in the hands of a third person.

". . . The rule that a defendant in ejectment cannot show title in a third person independent of the common source without connecting himself with it is limited to paramount titles older than the common source, and does not preclude the defendant from showing an outstanding title which accrued *subsequent* to that of the common source, and the defendant, *if not otherwise estopped,* may defeat the plaintiff's recovery by showing that the title of the common source is outstanding in a third person by virtue of a tax sale, or *by virtue of an encumbrance created by the common source prior to the plaintiff's title.*" (Italics supplied.) Annot., 5 A.L.R. 3d, *supra,* at 404.

Defendants' evidence did tend to show an outstanding title in a third party, to wit, Smith as trustee in the deed of trust executed by Wise in favor of plaintiff (Defendants' exhibit C). However, this was in no way violative of the common source doctrine. That doctrine only prevents a defendant who claims under a source common to plaintiff from showing a title outstanding in a third party which is paramount to the common source itself. Annot., 5 A.L.R. 3d, *supra.* That would be an attack on the source under which defendant claims and an assertion of a title in another person which is better than any title derived from the common source; and, hence, such a defense is precluded. In order to set up such a title superior to the common source the litigant must connect himself with it. But the doctrine does not prevent a defendant from showing that it or *a third party* has a better title than the plaintiff *under* the common source. Annot., 5 A.L.R. 3d, *supra.*

Does the "release deed" (Plaintiff's Exhibit 7) convey any interest whatsoever to defendants? Applying the rule that the intention of the parties to this "release deed" must be gotten from the deed in its entirety or, as the courts have expressed it, from its "four corners," *Edgerton v. Harrison,* 230 N.C. 158, 52 S.E. 2d 357,

it seems to us that the clear intention of the parties as expressed in this "release deed" was merely to release the *locus in quo* from the lien of a deed of trust which had already been foreclosed, as shown in Defendants' Exhibit B. We are fortified in this opinion by the following facts: (1) That when this "release deed" was executed there was a deed of trust upon the *locus in quo* from the defendants to trustee Smith in favor of Wise securing defendants' note in the amount of $6,960 which was executed on 1 May 1963 but was not recorded until 12 August 1964, and is Plaintiff's Exhibit 3; and (2) that Plaintiff's Exhibit 4 was an assignment by Wise to plaintiff, by which plaintiff acquired Wise's interest as *cesqui que trust* under the deed of trust specified as Plaintiff's Exhibit 3, which was executed 29 July 1963 prior to the execution of the "release deed," but not recorded until 10 September 1964 after the recordation of the "release deed." Plaintiff's Exhibit 6 was a trustee's deed or foreclosure deed from Cromartie, substitute trustee, to plaintiff *cesqui que trust* pursuant to a foreclosure sale made under the terms of the deed of trust specified above as Plaintiff's Exhibit 3. This foreclosure deed was executed 28 November 1964, which was after the execution of the "release deed." All of these transactions show that no conveyance of the fee through the "release deed" was intended by Wise and Smith and none was expected by defendants. As the grantors in the "release deed" held no further interest under the previously foreclosed deed of trust executed by defendants in favor of Wise (Defendants' Exhibit A), there was no subsisting lien under this foreclosed deed of trust which could be released by the grantors in the "release deed." Therefore, there is no after-acquired title in the defendants. The answer to the question is No.

Considering plaintiff's evidence in the light most favorable to it and giving it the benefit of every reasonable inference to be deduced therefrom, and considering defendants' evidence to the extent that it is not in conflict with plaintiff's evidence and tends to make clear or explain plaintiff's evidence, Supplement to 4 Strong's N. C. Index, Trial, § 21, and particularly defendants' admission in their answer that they have been in possession of the land described in the complaint and the *locus in quo* in controversy since and prior to 1964, it is our opinion that the judgment of compulsory nonsuit below was improvidently entered and it is reversed. There is no contention anywhere in the Record or anywhere in the briefs that the plaintiff fails to identify the land in the possession of defendants as the land covered by plaintiff's deeds.

We are dealing on this appeal with only documentary evidence which involves a highly complicated and confused series of conveyances, which are difficult to understand. No fraud is alleged in the

answer by defendants. It may be that when the case goes back for a new trial, defendants may pray the court for permission to amend their answer and to offer oral evidence. If they do so, that will be for consideration by the trial court.

The judgment of compulsory nonsuit below is

Reversed.

PEARL THOMPSON PRESNELL, ADMINISTRATRIX OF THE ESTATE OF HENRY JUNIOR PRESNELL, DECEASED, V. MAYBERRY PAYNE AND RUSSELL DEAN FOWLER.

(Filed 22 November, 1967.)

1. Negligence § 11—

As a general rule, one who has capacity to understand and avoid a known danger and fails to take advantage of this opportunity, and injury results, is chargeable with contributory negligence which bars recovery.

2. Automobiles § 81—

Allegations and evidence to the effect that intestate took a position on the fender of a truck which was pushing a stationwagon in order to keep one bumper from overriding the other, that when the engine of the stationwagon ignited and it moved ahead under its own power, the driver of the truck applied his brakes, causing intestate to fall from the fender and be run over by the truck, resulting in fatal injury, *held* to establish contributory negligence as a matter of law.

3. Negligence § 10—

The doctrine of last clear chance applies when the court finds defendant guilty of contributory negligence as a matter of law as well as when the jury answers the issue of contributory negligence in the affirmative; but the doctrine does not apply unless there is negligence on the part of plaintiff and contributory negligence on the part of defendant, and defendant has time and opportunity to avoid the injury after discovering the peril.

4. Automobiles § 89—

Allegations and evidence to the effect that intestate took a position on the fender of a truck which was pushing a stationwagon, that when the engine of the stationwagon ignited and it moved ahead under its own power, the driver of the truck applied his brakes, causing intestate to fall from the fender and be run over by the truck, resulting in fatal injury, *held* insufficient to support the submission of the issue of last clear chance, and therefore nonsuit was properly entered.

BOBBITT, J., dissenting.

SHARP, J., joins in dissenting opinion.

PRESNELL *v.* PAYNE.

APPEAL by plaintiff from *Seay, J.*, July 24, 1967 Civil Session, RANDOLPH Superior Court.

The plaintiff, administratrix of Henry Junior Presnell, instituted this civil action against the defendants to recover for the alleged wrongful death of her intestate.

The plaintiff alleged, and offered evidence in support of the allegations, that on June 10, 1963 Russell Dean Fowler, driving Mayberry Payne's truck, (by pushing) attempted to start Cletus Lineberry's stationwagon, which was stalled on the highway. Plaintiff's intestate took a seat on the right front fender of the truck for the purpose of preventing damage to the stationwagon by the front bumper of the truck overriding the rear bumper of the stationwagon. After the truck pushed the stationwagon for a short distance, its engine ignited and it moved forward under its own power. As Fowler applied brakes for the purpose of stopping or slowing down the truck, intestate lost his balance and fell from the fender, was run over, and fatally injured. The plaintiff alleged Fowler was negligent in that knowing of intestate's exposed position, he suddenly applied brakes, causing the truck to slow down and intestate to pitch forward in front of the truck, which ran over him.

The defendants, by answer, denied negligence on the part of Fowler and (conditionally) pleaded intestate's contributory negligence in that he voluntarily occupied a dangerous position on the fender of the truck which caused or contributed to his injuries, and this conduct constituted a bar to recovery. The plaintiff, by reply, alleged that notwithstanding defendant Fowler's negligence and intestate's contributory negligence (if such be found), that the defendant Fowler had the last clear chance to avoid injuring plaintiff's intestate and negligently failed and neglected to avail himself of that opportunity.

At the close of the evidence, the Court entered judgment of involuntary nonsuit, from which the plaintiff appealed.

John Randolph Ingram for plaintiff appellant.

Miller, Beck and O'Briant and Steve Glass by Adam W. Beck for defendant appellee Payne.

Coltrane and Gavin by T. Worth Coltrane, Jerry M. Shuping for defendant appellee Fowler.

HIGGINS, J. The plaintiff does not concede her intestate was contributorily negligent, as alleged in the answer, by voluntarily riding on the fender of the defendant's truck. Nevertheless, the plaintiff does stressfully contend that if it be determined by the Court as a matter of law, or by the jury as an issue of fact, that

the plaintiff's intestate was contributorily negligent, nevertheless plaintiff is entitled to recover upon the ground that defendant Fowler knew of intestate's exposed position; had time and opportunity to avoid the injury, and he negligently failed to avail himself of that opportunity.

As a general rule, one who has capacity to understand and avoid a known danger and fails to take advantage of that opportunity, and injury results, he is chargeable with contributory negligence, which will bar recovery. *Burgess v. Mattox,* 260 N.C. 305, 132 S.E. 2d 577; *Huffman v. Huffman,* 271 N.C. 465, 156 S.E. 2d 684; *Tallent v. Talbert,* 249 N.C. 149, 105 S.E. 2d 426. In such event, nonsuit is proper on the theory that defendant's negligence and plaintiff's contributory negligence are proximate causes of the injury. "The finding against the plaintiff on the latter issue (contributory negligence) precludes recovery based on negligence." *Boldridge v. Crowder Construction Co.,* 250 N.C. 199, 108 S.E. 2d 215; *Wilson v. Camp,* 249 N.C. 754, 107 S.E. 2d 743; *Badders v. Lassiter,* 240 N.C. 413, 82 S.E. 2d 357. The negligence referred to is that which is alleged in the complaint.

However, "'. . . If the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote.' (Citing cases). In *Baker v. R. R.,* 118 N.C. 1015, 24 S.E. 415, the last clear chance was referred to as 'intervening negligence after the careless act of the plaintiff (contributory negligence) was complete and became a fact accomplished.' This expression doubtless means that the negligence of the party injured must have spent itself before the principle of last clear chance would apply . . . 1. The doctrine of last clear chance does not arise until it appears that the injured party has been guilty of contributory negligence. 2. No issue with respect thereto must be submitted to the jury unless there is evidence to support it. . . . 5. The doctrine (last clear chance) does not apply when the contributory negligence of the injured party bars recovery as a matter of law."

The foregoing quotations are from *Redmon v. R. R.,* 195 N.C. 764, 143 S.E. 829. It seems clear that if recovery is barred, there can be no recovery. The Court's statement in (5) follows the statement in (1) that the doctrine does not arise until it appears that the injured party has been guilty of contributory negligence.

The opinion in *Redmon* and the cases therein cited were relied on as authority for this statement in *Ingram v. Smoky Mountain Stages, Inc.,* 225 N.C. 444, 35 S.E. 2d 337: "(1) the doctrine (last clear chance) does not apply when the plaintiff is guilty of con-

tributory negligence as a matter of law." Schenck, J., dissented. In *Redmon,* the Court said last clear chance does not arise when the contributory negligence bars recovery. In *Ingram,* the Court said the doctrine does not apply when the plaintiff is guilty of contributory negligence as a matter of law.

In *Dowdy v. R. R.* and *Burns v. R. R.,* 237 N.C. 519, 75 S.E. 2d 639, the Court, citing *Redmon, Ingram* and others, repeated the holding that: ". . . (L)ast clear chance does not apply when the plaintiff is guilty of contributory negligence as a matter of law." Johnson, J. dissented.

Redmon and *Ingram,* and other cases, were cited by the Court in *Arvin v. McClintock,* 253 N.C. 679, 118 S.E. 2d 129 as authority for this statement: "Moreover, having decided that plaintiff's intestate was negligent as a matter of law, the doctrine of last clear chance is not applicable." Bobbitt, J., in an opinion concurring in result but dissenting from the view that contributory negligence as a matter of law bars recovery under the last clear chance rule, assigns cogent reasons in support of the dissent. Higgins and Rodman, JJ. joined in the concurring opinion.

Our cases hold that an issue of last clear chance cannot arise until the negligence of the defendant and the contributory negligence of the plaintiff have been found. Such seems to be the general rule. At this point, however, our North Carolina cases add a twist by holding that the issue even then cannot arise if the contributory negligence of the plaintiff is determined by the Court as a matter of law, rather than by the jury as an issue of fact. Efforts to explain the difference seem to trail off in a confusion of words. The decisions making the distinction have been criticized by the *North Carolina Law Review* in recent articles as "confusing", "illogical", "baffling", and one article concludes ". . . the language should be promptly disavowed by the court". Vol. 33, p. 158; Vol. 40, p. 583; Vol. 42, p. 723.

The last clear chance doctrine imposes on a defendant the duty to use due care and prudence to avoid injury to a plaintiff who is in a perilous position even though negligence on the part of the defendant and contributory negligence on the part of the plaintiff have combined to place him in that position. After the peril arises, the defendant must have time and opportunity to avert it. Am. Jur., Vol. 38, Negligence, p. 904; *Carlson v. Connecticut Co.,* 94 Conn. 131, 108 A. 531.

In this case the defendants dismiss the last clear chance issue by saying contributory negligence appears as a matter of law and the issue cannot arise. We think the better reasoned view is that an issue of last clear chance may arise whether contributory negligence

is determined by the Court as a matter of law, or found by the jury as an issue of fact.

In this case, we hold the Court was correct in refusing to submit the issue of last clear chance, not because contributory negligence appears as a matter of law, but because evidence to support the issue is lacking. The judgment of nonsuit is

Affirmed.

BOBBITT, J., dissenting: I agree fully, for reasons stated in the concurring (in result) opinion in *Arvin v. McClintock,* 253 N.C. 679, 118 S.E. 2d 129, and in the Court's opinion in this cause, that the doctrine of last clear chance is equally available to an injured person without regard to whether contributory negligence appears as a matter of law or is determined by a jury on conflicting evidence.

Ordinarily, the doctrine of last clear chance applies when, in a factual situation created by the defendant's negligence and the plaintiff's contributory negligence, the defendant, by the exercise of due care under the circumstances *then existing,* could have avoided injury to the plaintiff but failed to do so. Here, plaintiff asserts the alleged negligent *action* of defendant, after plaintiff's intestate and defendant were both fully aware of the hazardous position of plaintiff's intestate, proximately caused the injury and death of plaintiff's intestate.

It is conceded defendant was negligent in operating the truck while plaintiff's intestate was sitting on the right front fender thereof, and that riding on the truck in that position constituted (contributory) negligence on the part of plaintiff's intestate. However, both men were fully aware of the purpose of this awkward maneuver and voluntarily accepted the ordinary risks incident thereto. Plaintiff cannot complain in respect of injury to her intestate resulting naturally in the course of his travel in this precarious position, for example, by slipping or falling in the normal course of travel. In my view, defendant would be liable if he, in the light of known hazardous conditions, increased the hazards to which plaintiff's intestate was exposed by additional positive acts of negligence and thereby proximately caused the death of plaintiff's intestate.

Although a borderline case, in my opinion the evidence, when considered in the light most favorable to plaintiff, tends to show defendant, when the station wagon moved ahead under its own power, failed to exercise due care under the circumstances in that he first put on brakes *abruptly,* thereby causing plaintiff's intestate to fall forward from the fender of the truck, and thereafter eased or released his brakes to such extent that the truck struck plaintiff's

intestate after he had fallen. For these reasons, I vote to reverse the judgment of involuntary nonsuit.

SHARP, J., joins in dissenting opinion.

SCOTT POULTRY COMPANY v. BRYAN OIL COMPANY.

(Filed 22 November, 1967.)

1. Pleadings § 2—

The nature of an action is not determined by what either party calls it, but by the issues arising on the pleadings and the relief sought.

2. Ejectment § 6; Quieting Title § 1—

An action in which plaintiff alleges title to the lands in question and that it is entitled to immediate possession thereof, that defendant claimed an interest therein adverse to plaintiff by virtue of an asserted deed, that such deed was void, and that defendant's claim is a cloud on plaintiff's title and that plaintiff is entitled to have the purported deed declared null and void and plaintiff declared the owner of the land, constitutes an action in ejectment, since the crux of the action is the obtaining of possession of the land by plaintiff under his claim of title.

3. Pleadings § 7—

Ordinarily it is for the trial judge to determine in its discretion whether in the circumstances of a particular case a plea in bar is to be disposed of prior to trial on the merits.

4. Same—

The effect of a plea in bar is to destroy plaintiff's action.

5. Estoppel § 4; Equity § 2; Limitation of Actions § 1—

Pleas of estoppel, laches, and the statutes of limitation are pleas in bar.

6. Ejectment § 7—

In an action in ejectment to recover possession of real property G.S. 1-56 cannot be applicable, and when defendant does not assert possession under a sheriff's deed upon tax foreclosure G.S. 1-52 does not apply, and G.S. 1-40 does not apply when defendant does not assert that he went into adverse possession for more than 20 years prior to the action.

7. Adverse Possession § 17—

A deed obtained from the purchase of land at the mortgage foreclosure sale constitutes color of title, even though the foreclosure sale was defective or void.

8. Corporations § 12; Mortgages and Deeds of Trust § 28—

An officer of a corporation may lend money to the corporation and take a deed of trust as security therefor where no unfair advantage is taken,

and therefore has the right to purchase at the foreclosure of such deed of trust.

9. Estoppel § 4; Equity § 2; Judgments § 38—

Defendant's pleas of estoppel, *res judicata* and laches are affirmative defenses upon which defendant has the burden of proof.

10. Ejectment § 10—

In plaintiff's action in ejectment, it is error for the court to enter judgment dismissing the action upon defendants' pleas of estoppel, laches, and seven years possession under color of title when the parties do not waive a jury trial and plaintiff does not admit all of the facts tending to establish defendants' pleas in bar.

APPEAL by plaintiff from *Clark, J.*, October 1966 Civil Session of WAYNE.

The complaint alleged that the purpose of this action is to remove cloud from title.

Plaintiff corporation alleged that it was the owner of and entitled to the immediate possession of the property in controversy (giving description of the property) and that defendant claims an estate or interest in the property adverse to plaintiff by virtue of a purported deed dated 9 November 1965 from E. W. Graves, Sr., *et ux,* recorded in Book 648 at page 434 in the Wayne County Registry; that defendant's claim was valid neither in law nor in fact because E. W. Graves, Sr., owned no valid interest in and had no valid claim to the property; that defendant's claim is a cloud on plaintiff's title to the property and plaintiff is entitled to have the purported deed to defendant declared null and void and plaintiff declared owner of the property.

Defendant denied the material allegations of the complaint and alleged it was the owner of the property in fee simple and was in lawful possession by virtue of a certain deed executed and delivered to defendant by E. W. Graves, Sr., and wife, dated 9 November 1965 and recorded in Book 648 at page 434 of the Wayne County Registry.

Defendant, in its further answer, defense and counterclaim, alleged fee simple ownership and lawful possession, *res judicata,* lack of legal capacity of plaintiff to sue, seven years adverse possession under color of title as provided in G.S. 1-38, the ten-year and the three-year statutes of limitations, estoppel, and laches.

Plaintiff's motion to strike certain portions of defendant's answer was denied.

Plaintiff alleged in its reply that the deed from E. W. Graves, Sr., and wife to defendant was executed on or about 12 November 1965, and defendant cannot claim adverse possession under color of

title other than by tacking its possession to the purported adverse possession of its grantor; that E. W. Graves, Sr., the purported grantor, was an officer of plaintiff corporation at the time he allegedly acquired a deed to the property and that as an officer of plaintiff corporation he could not legally hold title to the property adversely to that of plaintiff corporation. Plaintiff alleged that the purported foreclosure of the alleged deed of trust is null and void and of no legal effect; and if not null and void, the same is voidable, because there has never been a valid foreclosure under the terms of the deed of trust and the laws of the State of North Carolina; that at the purported foreclosure sale under the deed of trust, L. S. Hall was a "straw man" acting for and on behalf of E. W. Graves, Sr.; that defendant should be required to elect the theory upon which it defends this action in that the defenses of title by deed and by adverse possession are inconsistent.

A hearing was held before the judge of the Superior Court on the pleas in bar of seven years adverse possession under color of title as provided in G.S. 1-38, estoppel, laches, and *res judicata*. After hearing evidence as to the pleas in bar, the court upon its findings of fact and conclusions of law entered judgment dismissing plaintiff's action.

Plaintiff appealed.

Turner and Harrison for plaintiff.

Dees, Dees, Smith & Powell and Smith & Everett for defendant.

BRANCH, J. Initially, we must decide whether this is an action to remove cloud upon title or a suit in ejectment, in order to determine the defenses available to defendant.

In the case of *Hayes v. Ricard*, 244 N.C. 313, 93 S.E. 2d 540, the plaintiffs alleged that they were the owners of the land in controversy; that defendant claimed under a void conveyance and was in wrongful possession. Plaintiffs asked to be declared the owners, the conveyance to defendant be canceled, and that defendant be ousted. The defendant denied plaintiffs' claim of ownership and alleged title in itself. The Court, deciding that this was an action in ejectment, stated:

> ". . . The nature of the action is not determined by what either party calls it, but by the issues arising on the pleadings and by the relief sought.
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> . . .
>
> ". . . '. . . but where, as here, the defendants are in actual possession and plaintiffs seek to recover possession, the action is in essence in ejectment.' "

In the instant case the pleadings make out a cause of action in ejectment.

Plaintiff appealed from the lower court's judgment allowing several pleas in bar upon a hearing held before trial on the merits of plaintiff's cause of action.

Ordinarily, it is for the trial judge, in the exercise of his discretion, to determine whether in the circumstances of a particular case a plea in bar is to be disposed of prior to trial on the merits of plaintiff's alleged cause of action. *McAuley v. Sloan,* 173 N.C. 80, 91 S.E. 701; *DeLoache v. DeLoache,* 189 N.C. 394, 127 S.E. 419; *Bright v. Hood, Com'r. of Banks,* 214 N.C. 410, 199 S.E. 630. The record does not show whether the pleas in bar were heard by the court by agreement or in the exercise of the court's discretion.

The effect of a plea in bar is to destroy plaintiff's action.

In *Lithographic Co. v. Mills,* 222 N.C. 516, 23 S.E. 2d 913, this Court stated:

> " 'What constitutes a plea in bar has been considered and accurately defined by this Court in *Bank v. Evans,* 191 N.C. 538, as follows: "In a legal sense it is a plea or peremptory exception of a defendant, sufficient to destroy the plaintiff's action, a special plea constituting a sufficient answer to an action at law, and so called because it barred — *i.e.,* prevented — the plaintiff from further prosecuting it with effect, and, if established by proof, defeated and destroyed the action altogether." . . .' "

This Court has held estoppel, laches and statutes of limitations (including sole seizin by reason of twenty years adverse possession) to be pleas in bar. *Solon Lodge v. Ionic Lodge,* 245 N.C. 281, 95 S.E. 2d 921; *Duckworth v. Duckworth,* 144 N.C. 620, 57 S.E. 396.

Defendant pleaded G.S. 1-52 (three-year statute) and G.S. 1-56 (ten-year statute) in bar of any recovery by plaintiff. These statutes are not applicable to the present action in ejectment. The ten-year statute applies only to cases "not otherwise limited," and as to actions for recovery of real estate there are two statutes, G.S. 1-38 and G.S. 1-40, which are expressly applicable. *Williams v. Scott,* 122 N.C. 545, 29 S.E. 877. G.S. 1-52 relates to recovery of real estate only where property is sold for the nonpayment of taxes within three years after the execution of a sheriff's deed, G.S. 1-52(10), and is therefore not applicable. It is also evident that twenty years have not elapsed since defendant went into possession of the premises, and therefore G.S. 1-40 does not apply.

The remaining statute of limitation as to real property is G.S. 1-38, which provides:

> "When a person or those under whom he claims is and has been in possession of any real property, under known and visible lines and boundaries and under color of title, for seven years, no entry shall be made or action sustained against such possessor by a person having any right or title to the same, except during the seven years next after his right or title has descended or accrued, who in default of suing within that time shall be excluded from any claim thereafter made; and such possession, so held, is a perpetual bar against all persons not under disability; Provided, that commissioner's deeds in judicial sales and trustee's deeds under foreclosure shall also constitute color of title."

A deed obtained from the purchase of land at a mortgage foreclosure sale constitutes color of title, even though the foreclosure sale was defective or void. *Corbett v. Corbett,* 249 N.C. 585, 107 S.E. 2d 165.

In connection with this plea in bar, the court found as a fact:

> "6. E. W. Graves, Sr., was in continuous and uninterrupted possession of the subject property from the time the property was conveyed to him on October 19, 1950, until he conveyed it to Bryan Oil Company on November 9, 1965, his possession of subject property being under claim of ownership and under known and visible lines and boundaries and extending over all of the land up to the boundaries of the premises. He listed and paid taxes on the property during those years. He leased the premises during several years and collected all rents accruing therefrom."

However, the court concluded:

> "5. The defendant's plea of title by adverse possession under G.S. 1-38 raises an issue of fact which may not be heard by the court as a plea in bar but must be tried by a jury."

Appellant contends that there can be no adverse possession since Graves, an officer of the corporation which executed the foreclosed deed of trust, became the purchaser of the foreclosed property.

There is nothing to prevent a stockholder or director from lending money and taking a lien on corporate property for security where no unfair advantage is taken. *Investment Co. v. Chemicals Laboratory,* 233 N.C. 294, 63 S.E. 2d 637. It logically follows that he has

the right to purchase at judicial or other public sale in order to protect his interest. 19 Am. Jur. 2d, Corporations, Sec. 1316, p. 723.

There was plenary evidence introduced at the hearing by defendant before Judge Clark to support the above finding of fact. Generally, when pleaded, G.S. 1-38 is a proper plea in bar to an action in ejectment.

The record does not reveal that jury trial was waived. Therefore we must decide whether the court sitting without a jury could properly enter judgment under a plea in bar pursuant to G.S. 1-38 and the remaining pleas in bar not hereinabove discussed.

> "Ordinarily, the bar of the statute of limitations is a mixed question of law and fact. But where the bar is properly pleaded and all the facts with reference thereto are admitted the question of limitations becomes a matter of law." *Mobley v. Broome,* 248 N.C. 54, 102 S.E. 2d 407; *Currin v. Currin,* 219 N.C. 815, 15 S.E. 2d 279; *Ewbank v. Lyman,* 170 N.C. 505, 87 S.E. 348. See also *Perry v. Southern Surety Co.,* 190 N.C. 284, 129 S.E. 721.

In the case of *Sparks v. Sparks,* 232 N.C. 492, 61 S.E. 2d 356, the complaint alleged that plaintiff owned certain land in fee simple; that he was in actual possession of the land; that defendants wrongfully claimed some interest in the land adverse to plaintiff; that he was entitled to judgment establishing his absolute ownership of the land and removing any adverse claim of the defendants as a cloud on his title. The answer conceded that plaintiff held title to a one-third undivided interest and averred that defendants were the fee simple owners of the other two-thirds undivided interest. When the cause came on for trial by jury and plaintiffs and defendants undertook to support their respective allegations by testimony, the court announced the adoption of certain issues, and although the parties had not waived trial by jury, the court proceeded to answer the issues in favor of the plaintiff. The defendants appealed. In setting aside the judgment of the lower court and ordering a new trial, this Court said:

> "The Constitution of North Carolina guarantees to every litigant the 'sacred and inviolable' right to demand a trial by jury of the issues of fact arising 'in all controversies respecting property,' and he cannot be deprived of this right except by his own consent. N. C. Const., Art. 1, Sec. 19. The Code of Civil Procedure provides that issues of fact must be tried by a jury, unless a trial by jury is waived or a reference ordered. G.S. 1-172.

"The defendants did not waive their constitutional and statutory right to have the issues of fact joined on the pleadings in this case tried by a jury. N. C. Const., Art. IV, Sec. 13; G.S. 1-184. This being true, the presiding judge had no authority to answer the issues, and to enter judgment in favor of the plaintiff upon his answers to the issues."

The defendant's pleas in bar of estoppel, *res judicata* and laches are affirmative defenses, and the burden of proof is on the defendant. *Peek v. Trust Co.*, 242 N.C. 1, 86 S.E. 2d 745; *Gaither Corp. v. Skinner*, 241 N.C. 532, 85 S.E. 2d 909.

No conclusions of law in favor of defendant can be reached unless shown by plaintiff's evidence or established by the jury or unless all the facts relevant thereto are admitted. *Solon Lodge v. Ionic Lodge, supra; Mobley v. Broome, supra.* Here, all the facts relative to the issues raised by the pleadings are not admitted by the parties, nor does plaintiff's evidence establish the facts so that the evidence admits of only one conclusion as to the pleas in bar. Thus the court was without authority to enter judgment on the pleas in bar. Absent waiver of jury trial, the court should have submitted the proper issues to the jury for decision.

Ordinarily equitable defenses such as estoppel and laches are not recognized as pleas tenable in a court of law, the court being governed by the statute of limitations. Whether this rule has been strictly followed we need not inquire, since this cause must be remanded for other reasons.

The judgment entered by the court below is vacated and this cause is remanded for disposition in accord with this opinion.

Error and Remanded.

SCOTT POULTRY COMPANY, CORPORATION, v. E. W. GRAVES, SR. AND WIFE, JEANETTE GRAVES; GRAVES FEED MILL & HATCHERY, INC., A CORPORATION (FORMERLY GRAVES POULTRY FARMS, INC.); FIRST UNION NATIONAL BANK OF NORTH CAROLINA, AND GRAEME M. KEITH, TRUSTEE.

(Filed 22 November, 1967.)

APPEAL by plaintiff from *Clark, S.J.*, October 1966 Civil Session of WAYNE.

The complaint alleged that the purpose of this action is to re-

cover real estate currently in the possession of defendants and to recover for the unauthorized possession and use of real and personal property.

Plaintiff corporation alleged it was the owner of and entitled to the immediate possession of two tracts of land described in the complaint, the same now being in the possession of defendants; that defendants claim an estate, interest in, or lien upon the property adverse to plaintiff by virtue of various purported deeds and a deed of trust recorded in the office of the Register of Deeds of Wayne County. Plaintiff alleged that these claims constitute a cloud upon its title to the property, and that it is entitled to have the purported deeds and deed of trust declared null and void, and plaintiff declared owner of the property.

Plaintiff alleged, as a second cause of action, that defendant E. W. Graves, Sr., has been in possession of the property while an officer of plaintiff corporation, and has failed to account for returns and profits derived from the use of the property; that plaintiff is entitled to recover for the wrongful and unlawful conversion of the property to defendant's own use and benefit.

As a third cause of action, plaintiff alleged it was entitled to recover the value of certain described personal property which defendant E. W. Graves, Sr., possessed while an officer of plaintiff corporation and converted to his own use; that plaintiff was entitled to recover for the use and benefit of the same and for rents and profits derived from the use and sale thereof.

Defendant E. W. Graves, Sr., denied the material allegations of plaintiff's complaint and alleged in substance that plaintiff was not authorized to prosecute this action; that Graves Feed Mill & Hatchery, Inc., was the owner of the first tract of land, comprising 25.55 acres, described in plaintiff's complaint, tracing title back to plaintiff corporation. As to plaintiff's second cause of action, defendant Graves admitted that fee simple title at one time was vested in him, but denied the other allegations. As to plaintiff's third cause of action, defendant Graves admitted that at one time he did own the personal property described therein, but denied the other allegations.

Defendant Graves pleaded as further defenses and as pleas in bar estoppel, laches, seven years adverse possession under color of title (G.S. 1-38), the ten-year statutes of limitations (G.S. 1-47 and 1-56) and *res judicata.*

Defendant First Union National Bank denied plaintiff's title to or interest in the property superior or adverse to the defendants and claimed a lien on one of the tracts of land by virtue of a recorded

deed of trust, taken to secure a loan to Graves Feed Mill & Hatchery, Inc., and E. W. Graves, Sr.

Plaintiff's motion to strike portions of the answer of defendant E. W. Graves, Sr., was denied. Plaintiff entered a reply to both defendants' answers.

A hearing was held before the judge of the Superior Court on the pleas in bar of seven years adverse possession under color of title as provided in G.S. 1-38, estoppel, laches, and *res judicata.* After hearing evidence as to the pleas in bar, the court upon its findings of fact and conclusions of law entered judgment dismissing plaintiff's action.

Plaintiff appealed.

Turner and Harrison for plaintiff.
Dees, Dees, Smith & Powell for defendants.

PER CURIAM. By authority of *Scott Poultry Company v. Bryan Oil Company,* decided this day, and the cases therein cited, we hold that under the facts of the instant case the court was without authority to enter judgment on the pleas in bar. The judgment entered by the court below is vacated and this cause is remanded for disposition in accord with the opinion in *Scott Poultry Company v. Bryan Oil Company, ante,* 16.

Error and remanded.

GEORGE A. PHELPS, T. A. PHELPS AND DAN LAWSON, D/B/A PHELPS BROTHERS PRODUCE COMPANY v. THE CITY OF WINSTON-SALEM.

(Filed 22 November, 1967.)

1. Fires § 3—

Proof of the origin of the fire causing the damages in suit may be shown by circumstantial evidence, but the evidence in order to be sufficient to be submitted to the jury must have sufficient probative force to justify the jury in finding that the fire was proximately caused by the negligence of the defendant.

2. Evidence § 21—

Circumstantial evidence is evidence of facts from which other facts may be logically and reasonably deduced.

3. Negligence §§ 1, 7—

The law does not charge a person with all the possible consequences of his negligence, nor that which is merely possible; if the connection be-

tween the negligent act and the injury appears unnatural, unreasonable and improbable in the light of common experience, the negligence, if deemed a cause of the injury at all, is to be considered a remote rather than a proximate cause.

4. Fires § 3— Evidence that defendant allowed combustible materials to accumulate held insufficient to support a jury finding of defendant's negligence in causing fire.

Plaintiff's evidence tending to show that the defendant operated a public market in which tenants were assigned space within the building to sell produce, that flammable material was found in several sections of the building, that there were oil-burning stoves with cracks in them, and that materials of a combustible nature covered almost all of the wooden roof of a shed which had been constructed inside the building, and that the fire had started in the vicinity of the shed, is insufficient to be submitted to the jury on the issue of defendant's negligence in causing the fire complained of, when the only evidence relating to the cause of the fire was that it was unknown.

5. Same—

Proof of the burning alone is insufficient to establish liability for damage to property by fire, since, nothing else appearing, the presumption is that the fire was the result of accident or some providential cause.

6. Same—

Plaintiff's contention that the defendant's failure to provide fire fighting equipment was a proximate cause of damages to plaintiff's property by fire is without merit when all the evidence tends to show that, had the equipment been available, there would have been insufficient time to extinguish the fire.

BOBBITT, J., joins in result.

HIGGINS and SHARP, JJ., dissent.

APPEAL by plaintiffs from *Gambill, J.*, 17 April 1967 Civil Session, FORSYTH Superior Court.

This is an action to recover damages sustained as a result of a fire at the Winston-Salem Public Market. From a judgment of nonsuit the plaintiffs appeal.

The plaintiffs alleged that the City of Winston-Salem owned a building known as the Public Market in which it rented space for stalls to produce dealers who there marketed their products, and in doing so it was engaged in a private rather than a governmental function. W. E. Holland, Jr. managed the building and the City Market, and plaintiffs alleged that he knew there was an oil tank inside the market that created a hazardous fire condition; that he knew there was a coal bin at one entrance and that several tons of coal were in close proximity to "pot-bellied" stoves which were scattered around the building and used to heat it; that debris, boxes

and other flammable materials were also there and that defective electric wiring was also known to Holland. Plaintiffs further alleged that a salamander (a portable stove or incinerator) was allowed to remain in the premises and that Holland had been warned as to its danger; that the premises were not centrally heated and had to be heated by small coal and oil operated stoves which constituted fire hazards. Despite these hazards, the defendant had installed no fire-fighting equipment and provided no fire prevention supervision.

The plaintiffs further alleged that on 5 March 1959 a fire originated in the vicinity of the coal bin and a tomato shed where many inflammables were nearby; that several "pot-bellied" stoves were burning; that one of them had cracks in it through which fire seeped out; and that the fire rapidly spread all over the building, destroying property belonging to the plaintiffs and damaging them to the extent of $27,910.00.

In an amendment to the complaint, it was alleged that the City violated several sections of the Fire Prevention Code which had been adopted as an ordinance; that ethylene gas cylinders were stored in the building; that they were highly inflammable and subject to explosion; that they were required by law to be stored in a cool place and that the defendant failed to comply with the law; that after the fire was almost extinguished, it reached one of the cylinders, causing an explosion that put the entire building in a flaming condition.

The plaintiffs summarized the negligence of the City as knowingly permitting dangerous and flammable substances, defective stoves, poor electric wiring, failing to provide fire-fighting equipment, and failing to have a night watchman on duty, all of which caused its loss.

The defendant denied the material allegations of the complaint, pleaded governmental immunity, said that it maintained a night watchman, that the fire originated from unknown causes and that it spread so rapidly that there was no opportunity to use fire-fighting equipment; that the City Fire Department arrived on the scene almost immediately after the fire was discovered but that it was unable to prevent loss to the plaintiffs. It further alleged that even if the operation of the building was a private function that the prevention and extinguishment of fires was a governmental function and thereupon denied liability.

The evidence taken in the light most favorable to the plaintiffs tends to show that the defendant operated the Public Market in the exercise of its proprietary function and that the plaintiffs were three of several week-to-week tenants in the market, a building of concrete and steel construction. Each such tenant was assigned an

unpartitioned space in the building for the carrying on of his produce business. The building was managed by the City through its agent, although each individual tenant was responsible for policing his assigned space. General control over the building was retained by the City, as shown by the manager's supervision of parking within the building, admonitions to tenants to keep their premises clean, and control over the uses made of and modifications made to the leased spaces.

On the space rented to L. R. Blalock, Sr. he had constructed a two-room concrete block shed for use in a tomato "curing" operation and as an office. Both rooms had an oil circulator heating system, which had been installed with the permission of the manager of the Market. One of the exhaust pipes protruded from the side of the Market building; the other protruded through the wooden roof of the shed and discharged smoke into the Market Building itself. Combustible materials such as bales of shredded cellophane, flat baskets, bushel baskets, bean hampers, wood crates, tomato boxes and cabbage bags covered eighty per cent of the roof to a height of about ten feet, and were visible from the floor of the Market Building. Sometime prior to the fire from which this dispute arose, there had been a small fire on the roof of the shed of which the manager had knowledge and which he had failed to report, nor had he taken corrective action in respect to the storage of combustibles on the roof. The fire was first discovered by the privately employed night watchman of another tenant. He testified that on 5 March 1959 about 1:00 A.M. he was making his rounds and saw a fire about two feet over the top of the roof of the Blalock shed; that he started waking up people whom he knew to be in the Market Building; that after he woke up the last man he ran out and there was an explosion, spreading the fire all over the building.

The Fire Chief and the Captain in charge of the Fire Prevention Bureau both testified they could not determine the cause of the fire. It appeared to be the undisputed evidence that the City provided no fire-fighting apparatus of any kind in the building; indeed, the only source of water was a spigot at the far end of the building away from the Blalock shed.

The Court dismissed the action as of nonsuit, and the plaintiffs appealed.

Hatfield, Allman and Hall by Roy G. Hall, Jr., Attorneys for plaintiff appellants.

Womble, Carlyle, Sandridge & Rice by I. E. Carlyle and Allan R. Gitter, Attorneys for defendant appellee.

PLESS, J. Proof of the origin of fires usually presents a difficult, if not impossible, problem. It is extremely rare that direct evidence is available; consequently, as in this case, circumstantial evidence is the only available method in a large majority of actions, either civil or criminal.

The law in such cases is usually found where arson is charged or where railroad engines are alleged to have started the fire. Notwithstanding the necessity of its use in such cases, we cannot vary or liberalize the law of circumstantial evidence for this purpose.

Generally speaking, circumstantial evidence is evidence of facts from which other facts may be logically and reasonably deduced. In criminal cases, it must point unerringly to the guilt of the defendant and, in effect, must show not only that the defendant is guilty but that upon no reasonable interpretation of the evidence could he be innocent. And also, that if the evidence is consistent with a finding of either guilt or innocence that the innocent interpretation must be adopted.

The law in civil cases is so similar that little difference can be found. The "innocent interpretation" is applicable when we recall that the defendant, in such cases, is not required to prove his lack of responsibility, but the plaintiff must affirmatively fix it upon the defendant by the greater weight of the evidence. And it is not sufficient to show that the circumstantial evidence introduced *could* have produced the result — it must show that it *did*.

No citation or authority is needed to support the above well-established and universally accepted statement of the law of circumstantial evidence. However, we cite *Maguire v. R. R.*, 154 N.C. 384, 70 S.E. 737, in which some of the above principles are discussed. In that case the plaintiff showed that the railroad's right-of-way was in foul condition and that combustible material had been allowed to accumulate which caught fire and spread to the plaintiff's lands. The Court said that was not sufficient, that it must also be shown "that the defendant communicated fire from its engine to its foul right of way." And it must not only prove that the fire *might* have proceeded from the defendant's locomotive, but it must show by reasonable affirmative evidence that it *did* so originate. Citing *Ice Co. v. R. R.*, 122 N.C. 881, 29 S.E. 575. Later, the Court said:

> "There was every opportunity for this fire to have originated from some other source as well as from defendant's engine. All that can be reasonably said is that the fire *may* possibly have been set out by the engine, and it is equally true that it may not. As was said in *Peffer v. R. R.*, 98 Mo. App., 291, in which

the evidence that the fire was set out by the defendant was much stronger than in the present case, 'The truth is in such doubt as that to say one way or the other is no more than guessing.' "

In *Moore v. R. R.*, 173 N.C. 311, 92 S.E. 1, the Court made some statements we think pertinent here. Although that case related to a claim that the railroad's defective locomotive set fire to the plaintiff's property, the reasoning seems applicable.

"It is undoubtedly true that the fact in controversy here, as to the origin of the fire, may be established by circumstantial evidence, but the circumstances proven must have sufficient probative force to justify a jury in finding that the fire originated from a spark from defendant's engine before the issues can be submitted to them. . . . This Court has used various forms of expression in commenting on the subject."

The Court then quoted excerpts from various cases: "[I]f the evidence is 'conjectural or speculative, it should not be submitted to the jury.' . . . [T]he evidence must amount to more than that which raises 'a possibility or conjecture of a fact.' . . . 'There must be evidence from which they might reasonably and properly conclude that there was negligence.' . . . 'Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the parties having the burden of proof, unless the evidence be of such character as that it would warrant a jury to proceed in finding any verdict in favor of the party introducing such evidence.' "

The Court said that Professor Wigmore regarded as the best and fairest statement of the most satisfactory test that can be adopted the following question: " 'Are there facts in evidence which, if unanswered, would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?' "

The Court then said:

"There are many unaccountable ways by which sawmills catch fire, for they are notoriously very bad fire risks. . . . There are hundreds of lumber mills situated very near railroad tracks in this State, and to hold passing engines responsible for every unexplained fire that breaks out in them, without other evidence, would impose too great a liability upon the common carriers who are compelled to serve them."

Chief Justice Clark in a concurring opinion in the *Moore* case, *supra*, said:

"While direct evidence that the fire was caused by the negligence of the defendant is not required, but it may be inferred by the jury from the attendant circumstances, there must be more than bare evidence of a possibility, or even a probability, that the fire was so caused."

The law does not charge a person with all the possible consequences of his negligence, nor that which is merely possible. A man's responsibility for his negligence must end somewhere. If the connection between negligence and the injury appears unnatural, unreasonable and improbable in the light of common experience, the negligence, if deemed a cause of the injury at all, is to be considered a remote rather than a proximate cause. It imposes too heavy a responsibility for negligence to hold the tort feasor responsible for what is unusual and unlikely to happen or for what was only remotely and slightly probable. 38 Am. Jur., Negligence, § 61.

In 38 Am. Jur., Negligence, § 85, it is said:

"[L]iability for negligence in keeping a dangerous instrumentality, . . . which may be incurred, under certain social conditions, by the maintenance of an agency which is excessively dangerous to life and limb, is not an absolute liability. The mere fact that an instrumentality may become dangerous to others does not constitute its possessor an insurer against injury that may result therefrom."

It must still be shown that the alleged dangerous instrumentality proximately caused the damage complained of.

The plaintiffs claim that the City was negligent in permitting combustibles to accumulate on the roof of the shed where one fire had already occurred because of the hot oil heater flue. Although there is evidence that the fire started in the vicinity of the Blalock tomato shed and its roof was cluttered with combustible and flammable materials, the only evidence relating to the cause of the fire is that it was "unknown."

The case of *Maharias v. Storage Co.*, 257 N.C. 767, 127 S.E. 2d 548, is very much in point. There the plaintiff's restaurant was damaged by a fire which originated in a room of a nearby warehouse owned by the defendant. The Assistant Fire Chief testified that in his opinion the fire could have been caused by spontaneous combustion of a pile of furniture-polishing rags in the room of the warehouse; however, he also admitted that it was "possible that this fire could have happened from any one of a number of causes." The Court said:

"Plaintiff alleges that his loss was proximately caused by the negligence of defendant in permitting a pile of rags covered

by highly inflammable fluid to accumulate, and that the fire resulted from spontaneous combustion of the pile of rags.

"Nonsuit was proper. The evidence raised a mere conjecture, surmise and speculation as to the cause of the fire. A cause of action must be based on something more than a guess."

The evidence here is not even as strong as it was in that case, however, because neither of the experts offered by the plaintiffs testified that the fire even *could* have been caused by the accumulation of combustibles on the roof of the shed. Their testimony was that the cause of the fire was unknown.

In order to go to the jury on the question of defendant's negligence causing the fire, plaintiffs must not only show that the fire *might* have been started due to the defendant's negligence, but must show by reasonable affirmative evidence that it *did* so originate. *Moore v. R. R., supra.* In *Lumber Co. v. Elizabeth City,* 227 N.C. 270, 41 S.E. 2d 761, the Court held that nonsuit was proper where the origin of the fire was left in speculation and conjecture.

This is an "unexplained fire". Proof of the burning alone is not sufficient to establish liability, for if nothing more appears, the presumption is that the fire was the result of accident or some providential cause. There can be no liability without satisfactory proof, by either direct or circumstantial evidence, not only of the burning of the property in question but that it was the proximate result of negligence and did not result from natural or accidental causes. 5 Am. Jur. 2d, 836.

Here, combustible material was on the roof, there were oil burning stoves with cracks in them, and flammable material was in several sections of the building. For some of these conditions the City might have been responsible, but the tenants and customers may have been responsible for the remainder. People were sleeping in the building and were coming in and going out all through the night. It is possible that anyone of them may have let a lighted cigarette or a still-burning match come in contact with some of the combustible material. This is purely conjectural, of course, but so is the plaintiffs' evidence which seeks to hold the City responsible. It was not sufficient to be presented to the jury.

The plaintiffs also seek to recover upon the theory that the City was negligent in not furnishing fire fighting equipment for the building and that its absence allowed the fire to spread and hence was a proximate cause of damage to plaintiffs' property on another side of the warehouse from the Blalock shed where the fire was first sighted. Here again, the plaintiffs are met with absence of proof of any causal connection between the lack of fire fighting equipment

and damage to them. The plaintiffs have offered no evidence that under the conditions existing at the time the fire was discovered it could have been extinguished if the equipment had been available. Stated in classical textbook terminology: but for the lack of fire fighting equipment, the fire could and would have been extinguished at its source, and plaintiffs' damage would not have ensued. Such a contention is not supported by the evidence.

Mr. Fearington, the night watchman who discovered the fire, and the only one in a position to extinguish it, testified concerning the size of the fire which he discovered on top of the Blalock tomato shed. He then said: "I didn't pay much attention [to the fire]; I went to trying to get them fellows out of there that was asleep." Although he knew there was no water near Blalock's shed, nor fire fighting equipment in the Market, there is nothing in his testimony which suggests that he would have used such equipment had it been available, for he also knew there were people sleeping in the building. His first and natural concern was for their safety. He awakened the men sleeping in the building as expeditiously as possible. Even at this point he gave no thought to fighting the fire, which the first man awakened testified ". . . looked so dangerous, I cranked my truck up; . . . backed through produce and ran out the southeast corner. I saved my truck and my life, I believe."

Mr. Fearington further testified that after awakening the last man, "I started out as fast as I could, going to the door to go up there to turn in the fire alarm. . . . I had just about hit the sidewalk when that explosion went off. . . . It throwed fire all over the whole building."

None of the evidence allows an inference that fire fighting equipment would have been used if available. The night watchman's concern was for human life, and properly so; having attended to that priority matter, his next impulse was to call for professional fire fighters, which he did. The night watchman used his time wisely, and possibly just escaped with his life. In retrospect, there was no time to fight the fire, so lack of fire fighting equipment could hardly have been a proximate cause of plaintiffs' loss.

The plaintiffs complain of the exclusion of other evidence offered by them. We do not consider it relevant but have nevertheless taken it into consideration in determining that the judgment of nonsuit was proper. In the trial below, there was

No error.

BOBBITT, J., joins in result.

HIGGINS and SHARP, JJ., dissent.

CLYDE J. HUGGINS, WALTER E. JOHNSON, ERNEST G. NORTHCUTT, LOTTIE H. SCONYERS AND DORIS T. WHITE, AND OTHERS SIMILARLY SITUATED, v. THE WAKE COUNTY BOARD OF EDUCATION.

(Filed 22 November, 1967.)

1. Evidence § 3—

It is a matter of common knowledge, and therefore a matter of which the courts may take judicial notice, that a large-scale transfer of students and teachers from one school to another in the midst of the academic year would entail widespread confusion and disruption in both schools.

2. Injunctions § 1—

While a preliminary mandatory injunction may be issued to restore a status, wrongly disturbed, the issuance of such an order rests in the sound discretion of the court and is generally deemed to require a clear showing of substantial injury to the plaintiff, pending the final hearing, if the existing status is allowed to continue to such hearing.

3. Injunctions § 14—

The findings of fact and other proceedings upon a hearing to determine whether a temporary injunction should issue are not proper matters for the consideration of the court or jury in passing upon such issues at the final hearing and are, therefore, not binding upon them.

4. Same—

The decision of the Supreme Court upon an appeal from an order denying a temporary injunction does not determine any other right of the parties that might be raised at a later stage of the proceedings.

5. Injunctions § 12—

An application for a temporary injunction is ordinarily addressed to the sound discretion of the court.

6. Appeal and Error § 58—

While the Supreme Court, upon an appeal from the granting or denial of a temporary injunction, is not bound by the findings of fact in the court below and may review the evidence and make its own findings of fact, the burden is upon the appellant to show error by the lower court.

7. Injunctions § 13—

Application for a temporary injunction is properly denied where the injury likely to be sustained by the plaintiff from the continuance of the conduct of which he complains, pending the final hearing of the matter, is substantially outweighed by the injury which will be done the defendant by the prevention of such conduct during the litigation.

8. Same—

In determining whether or not a temporary injunction should issue pending the outcome of litigation, the court may properly take into account probable injuries to persons not parties to the action and to the public if such an injunction were to be issued.

9. Same; Schools § 4— Application for restraining order which would result in transfer of pupils and teachers during school year held properly denied.

Six days prior to the opening of the school year, plaintiffs applied for a temporary order to restrain a board of education from discontinuing instruction in grades 10, 11 and 12 at one high school and consolidating these grades with the corresponding grades of another high school at the second school, and from transferring the ninth grade of the second school to the first school, such order to continue pending a hearing as to the board's authority to operate a school offering only ninth-grade instruction. *Held:* The application for a restraining order was properly denied, since the reassignment of pupils and teachers necessary to restore the former status of instruction in grades 9 through 12 at both schools would disrupt the operation of the school facilities to the detriment of the students and to the public, and especially so when a substantial part of the school year has passed.

APPEAL by plaintiffs from *Bickett, J.*, in Chambers in WAKE, 31 August 1967.

This is an appeal from an order denying an application for a temporary injunction following a hearing pursuant to an order to the defendant to appear and show cause why it should not be restrained, pending the trial of the action, as prayed for in the complaint.

The complaint prays that the defendant be enjoined, *pendente lite* and permanently, from discontinuing grades ten, eleven and twelve at West Cary High School and grade nine at Cary High School, and that it be ordered to operate both schools for the benefit of pupils living in the Cary school attendance area. In substance, it alleges:

> Each plaintiff resides in the Cary school attendance area and is the parent of a child attending a public high school therein. They bring this action on behalf of themselves and others similarly situated, too numerous to be named. For several years two high schools — Cary High School and West Cary High School — have been operated in the Cary school attendance area. On 27 February 1967, the defendant adopted a resolution authorizing the assignment of all ninth grade students in the area to West Cary High School. Thereafter, the plaintiffs learned through the news media that the high schools in the area would be reorganized so that all students in grades ten, eleven and twelve would attend the Cary High School and only those in grade nine would attend West Cary High School. The proposed one grade West Cary High School will not qualify for accreditation and will not constitute a "legally defined high school." This will do irreparable injury to students enrolled

therein. On 7 August 1967, after the plaintiffs' contentions were presented to the defendant, the defendant adopted another resolution purporting to assign to the West Cary High School all ninth grade students and to the Cary High School all tenth, eleventh and twelfth grade students residing in the area. The statutory procedure for the assignment of students has not been followed. The proposed reorganization is "in effect a *de facto* consolidation" of the two high schools, which is not within the authority of the defendant. The threat of irreparable injury to the plaintiffs and their children is immediate and pressing since the schools are scheduled to open on or about 1 September 1967. The plaintiffs have exhausted every available administrative remedy to avoid this irreparable injury.

This suit was instituted 25 August, six days before the schools were to open, and the order directing the defendant to appear and show cause was issued on that date. The hearing was held before Judge Bickett on 31 August 1967, and his order denying the temporary injunction was entered on that date.

A document designated the "answer" of the board, having been verified but not filed at the time of the hearing on the order to show cause, was introduced as an affidavit by the defendant. It states, in substance:

The West Cary High School is only two years old. Prior to the institution of this action, it was "predominantly a Negro high school which had never been accredited." No child of any plaintiff had attended it prior to the institution of this suit. On 27 February 1967, the defendant adopted a resolution authorizing the assignment of all ninth grade students in the Cary school attendance area to the "West Cary Junior High School." During the month of March 1967, students and their parents were furnished forms on which to indicate their choice of the school to be attended by the child. Of the 337 ninth grade students in the area all but four chose, or had chosen for them, attendance at the "former West Cary High School Campus." On 29 May 1967, 330 of the students "who had been assigned to West Cary Junior High School" for the 1967-68 school year, and their parents, signed class registration forms for classes at the "West Cary Junior High School." On 11 August 1967, "notice of assignment" of these students was given by mail. No application for reassignment was made to the defendant by or on behalf of any child, and the ten days allowed therefor expired before the institution of this action. For the year 1967-68, the board proposes to operate "Cary High School," an accred-

ited school consisting of grades ten, eleven and twelve, and "West Cary Junior High School," consisting of the ninth grade only. Students attending the West Cary Junior High School will suffer no injury by reason of such operation, having the right, upon the completion of the ninth grade, to enter, and thereafter graduate from, the accredited Cary High School. The West Cary Junior High School "will offer courses and in every category will exceed the requirements for accreditation." The "educational welfare" of the children in the Cary school attendance area will be promoted and enriched by the proposed operation of the two schools. The North Carolina State Board of Education, upon the recommendation of the defendant, created one school district for all of Wake County and the action of which the plaintiffs complain was "only an assignment of pupils within the same school attendance area according to G.S. 115-176." There has been no consolidation of the two schools.

The matter was heard upon affidavits. The court made detailed findings of fact. Among these findings are the following (summarized, except as otherwise indicated, and renumbered):

(1) In the year 1967, the defendant was confronted with the so-called "Guidelines" promulgated by the Office of Education of the Department of Health, Education and Welfare of the United States.

(2) The defendant, after an extensive investigation, determined, in the exercise of its discretion, that it would be better for the welfare of the pupils and for the efficient operation of the schools to place the eighth and ninth grades in the West Cary High School. Thereafter, upon further investigation, it determined that the facilities of that school could accommodate only the ninth grade pupils. It thereupon adopted a resolution providing for the assignment of all pupils in the ninth grade to the West Cary Junior High School, and all pupils in the tenth, eleventh and twelfth grades to the Cary High School. (The designations, "West Cary High School" and "West Cary Junior High School," refer to the same facilities.)

(3) Thereafter, in order to comply with the Guidelines issued by the United States Commissioner of Education, a freedom of choice plan was inaugurated by the defendant. The result was that 333 out of 337 pupils elected to attend the West Cary Junior High School and 330 of these pupils, together with their parents, signed registration forms setting forth the courses to be taken by them at the West Cary Junior High School during the 1967-68 school year.

(4) At all times the defendant, "in its consideration of this problem, has acted in good faith, after hearing and consultation with the Cary Advisory Council and other local authorities, after consultation with the State Board of Education, the attorneys for the Board of Education and the office of the Attorney General." The actions taken by the defendant "have all been based upon careful investigation, a survey of the situation and after due study and proper deliberation."

(5) The defendant proceeded to make preparations for the opening and operation of the West Cary Junior High School for the 1967-68 school year, which plans had been completed and, in part, put into effect at the time this action was instituted.

(6) The defendant, in preparing its educational facilities and making its plans, "has not only acted in good faith but from an educational viewpoint and from the viewpoint of the best interests of the pupils and the best interests of the public schools of the Cary attendance area has adopted the proper course and the best plan available to it under the circumstances and conditions with which the Board has to deal, and in all said matters the Board has acted after due consideration, adequate investigation and according to its best judgment in making a discretionary decision, and said Board has not abused its discretion, and the action taken by said Board is reasonable and proper."

(7) On 11 August 1967, notice of assignment was sent to all parents of children in the Cary school attendance area, as provided in G.S. 115-177. No appeal to the Wake County Board of Education was taken by any parent or student, as provided by G.S. 115-178.

(8) Any change in plans when schools are opening for the 1967-68 school year "will create a chaotic condition, cause great confusion in the public schools in the Cary attendance area, will disrupt plans made by pupils as well as plans made by school authorities, and will create great and undue hardship on all concerned with the public schools of the Cary attendance area."

Upon these findings, the court reached certain conclusions, including the following (summarized):

The defendant has not violated G.S. 115-5 or G.S. 115-6. It is not mandatory that a junior high school consist of more than one of the upper grades. The board, in its discretion, may regulate and locate the grades in buildings and facilities as it deems

proper. The court should not substitute its judgment for that of the defendant. The defendant had the authority to make the assignment of pupils to the West Cary Junior High School which it did make. No appeals from such assignment having been entered, the plaintiffs have not exhausted their administrative remedies and are not entitled to any injunctive relief in this action. The defendant has not abused its discretion but it has acted with proper judgment and consideration. A temporary injunction would cause disruption and confusion in the schools and irreparable damage and injury to them and is not necessary to preserve any rights of the plaintiffs. The defendant "under the facts and circumstances of this case has complied with the public school law as set forth in Chapter 115 of the General Statutes."

The court thereupon ordered "that the application of the plaintiffs for a temporary restraining order in this cause is hereby denied, refused and disallowed."

Everett & Creech for plaintiff appellants.
Mordecai, Mills & Parker for defendant appellee.

LAKE, J. This is not an appeal from an assignment of a child to a public school. It appears from the record that some children of some of the named plaintiffs are eligible for enrollment in the ninth grade of a public school and were assigned, properly or not, by the defendant to the school facility herein called the West Cary Junior High School for the 1967-68 school year. In the absence of anything to indicate the contrary, we assume that all such children of such plaintiffs are now enrolled in and are attending that school facility. The record does not show whether some of the plaintiffs also have children who are assigned to and are now enrolled in and attending the Cary High School as pupils in the tenth, eleventh or twelfth grade. However that may be, there is nothing in the record to indicate that any child of any plaintiff, or any other child, is presently assigned to or enrolled in any school facility other than that to which such child, or the parents of such child, requested assignment for the school year of 1967-68. We, therefore, do not have before us, and the superior court did not have before it, any question as to the right of any plaintiff to compel the reassignment and transfer of any child to any school.

The plaintiffs say in their brief:

"The Board has consistently taken the position that its new plan of operation involved only a question of pupil assignment.

> The plaintiffs, with equal consistency, have contended that the new plan of operation was really a consolidation undertaken in violation of statutory requirements and that, in any event, there is no authority under State law to operate a school consisting only of the ninth grade."

What the plaintiffs seek in this action is a permanent injunction and an injunction *pendente lite* which will restrain the Board of Education from discontinuing the offering of instruction in grades ten, eleven and twelve at the West Cary Junior High School facility, and in grade nine at the Cary High School facility. To grant them the relief sought would require the defendant, with approximately one-third of the school year already past, to reassign and transfer immediately to the Cary High School facility from the West Cary Junior High School facility enough ninth grade teachers and ninth grade pupils to permit the efficient operation of a ninth grade curriculum at the Cary High School, and, at the same time, to transfer from the Cary High School facility to the West Cary Junior High School facility enough pupils in each of the tenth, eleventh and twelfth grades, and enough qualified teachers for those grades, to permit the efficient operation of the curricula of those grades at the West Cary Junior High School facility. There is nothing in the record to suggest that any parent of any child desires or would accept such reassignment or transfer of such child, or that any teacher would acquiesce in such transfer of his or her activities. It is a matter of common knowledge and, therefore, a matter of which this Court may take judicial notice, that such wholesale reshuffling of students and teachers in the midst of an academic year would entail widespread confusion and disruption in the work of both school facilities.

This suit was instituted six days before the opening of the school term. The hearing before Judge Bickett was had the day before the children and teachers were to commence work at their respective school facilities. Had he then granted the injunction *pendente lite*, as prayed for by the plaintiffs, the two schools would have commenced their year's work in uproar and confusion. To require the issuance of such an order at this time would be far more disturbing to the instruction of the pupils in both schools. In form, the plaintiffs seek a prohibitory injunction. In effect, what they seek would now be a mandatory injunction requiring a reshuffling of students and teachers in order to resume school operations not now in being. While a preliminary mandatory injunction may be issued to restore a status, wrongly disturbed, the issuance of such an order rests in the sound discretion of the court and is generally deemed to

require a clear showing of substantial injury to the plaintiff, pending the final hearing, if the existing status is allowed to continue to such hearing. See *Creel v. Gas Co.*, 254 N.C. 324, 118 S.E. 2d 761; *Ingle v. Stubbins*, 240 N.C. 382, 82 S.E. 2d 388; 28 Am. Jur., Injunctions, § 32.

The plaintiffs contend that the present operation at the West Cary Junior High School facility is beyond the lawful authority of the Board of Education and, therefore, should be enjoined. They rely upon G.S. 115-5 and G.S. 115-6. These statutes provide:

> G.S. 115-5. "*School system defined.* — The school system of each county and city administrative unit shall consist of twelve years of study or grades * * *. The system may be organized in *one of two ways* as follows: The first eight grades shall be styled the elementary school and the remaining four grades, the high school; or if more practicable, *a junior high school may be formed by combining the first year of high school with both the seventh and eighth grades or with the eighth grade alone*, and a senior high school which shall comprise the last three years of high school work. * * *" (Emphasis supplied.)
>
> G.S. 115-6. "*Schools classified and defined.* — The different types of schools are classified and defined as follows: * * *
>
> "(4) A junior high school, that is, a school which embraces not more than the first year of high school with not more than the upper two elementary grades. * * *"

The contention of the plaintiffs that the operation of a school facility, at which only pupils in the ninth grade are enrolled and instructed, is not within the authority of the defendant Board of Education presents a question which is not rendered moot by the opening of the 1967-68 school year since the defendant is now carrying on that operation and proposes to continue to do so at least through the present school year. That is not, however, the question before us on this appeal. The question before us is whether, at this time, the present operation of the two school facilities in question should be disrupted by the issuance of an injunction pending the hearing of the matter in the superior court upon its merits. We think the answer is clearly, "No."

Neither the findings of fact nor the conclusions of law of the superior court, in denying the temporary injunction, will be binding upon that court at the trial of the action upon its merits. Findings and proceedings upon a hearing to determine whether a temporary injunction should be issued are not proper matters for the con-

sideration of the court or jury in passing upon such issues as may arise at the final hearing. *Carroll v. Board of Trade,* 259 N.C. 692, 131 S.E. 2d 483; *Gene's, Inc. v. Charlotte,* 259 N.C. 118, 129 S.E. 2d 889; *Huskins v. Hospital,* 238 N.C. 357, 78 S.E. 2d 116; *Fremont v. Baker,* 236 N.C. 253, 72 S.E. 2d 666; *Grantham v. Nunn,* 188 N.C. 239, 124 S.E. 309. Similarly, the decision of this Court upon an appeal from an order denying a temporary injunction does not determine any other right of the parties. We are not to be understood as expressing in this opinion any view as to any contention of the plaintiffs other than their contention that they are entitled to the issuance of a temporary injunction requiring the defendant to reorganize the schools in question pending the final hearing of the matter in the superior court. *Conference v. Creech,* 256 N.C. 128, 123 S.E. 2d 619; *Church v. College,* 254 N.C. 717, 119 S.E. 2d 867; *Service Co. v. Shelby,* 252 N.C. 816, 115 S.E. 2d 12.

An application for a temporary injunction is ordinarily addressed to the sound discretion of the court. *Conference v. Creech, supra; Huskins v. Hospital, supra.* While this Court, upon an appeal from the granting or denial of a temporary injunction, is not bound by the findings of fact in the court below and may review the evidence and make its own findings of fact, the burden is upon the appellant to show error by the lower court. *Conference v. Creech, supra; Whaley v. Taxi Company,* 252 N.C. 586, 114 S.E. 2d 254.

It is not error to deny an application for a temporary injunction where the injury likely to be sustained by the plaintiff from the continuance of the conduct of which he complains, pending the final hearing of the matter, is substantially outweighed by the injury which will be done the defendant by the prevention of such conduct, during the litigation, if it is ultimately determined that the defendant had the right to engage in it. *Conference v. Creech, supra; Service Co. v. Shelby, supra; Huskins v. Hospital, supra.* It is also proper for the court to take into account probable injuries to persons not parties to the action and to the public if such an injunction were to be issued. *Jones v. Lassiter,* 169 N.C. 750, 86 S.E. 710. "The rule of 'balancing conveniences' is that an injunction will not usually be granted or continued where 'it will do more mischief and work greater injury than the wrong which it is asked to redress.'" McIntosh, North Carolina Practice and Procedure, 2d ed., § 2211.

We find no error in the finding and conclusion of the superior court that to restrain the Board of Education, on the eve of the opening of the public schools, from pursuing a program for their operation, announced by it several months before and known during the interval by the plaintiffs, would cause more damage to the

public than would the continuation, during the litigation of the operation to which the plaintiffs object. Furthermore, the balance is now tipped even more in favor of the defendant by reason of the actual commencement of the operation in question and the passage of a substantial part of the current school year. The school operation which the plaintiffs asked the superior court to preserve has now been changed. While such alteration of the former status pending an appeal does not necessarily prevent a reversal of the lower court's denial of a temporary injunction, it is a circumstance to be considered by the appellate court, especially where, as here, to restore the former condition of things would disrupt the operation of a school and thereby jeopardize the interests of the children enrolled therein and the interests of the public in their education. See: McIntosh, North Carolina Practice and Procedure, 2d ed., § 2221; 28 Am. Jur., Injunctions, § 12.

As Parker, J., now C.J., said in *Whaley v. Taxi Company, supra,* "Appellants have not shown that the denial of their motion for an interlocutory injunction was 'contrary to some rule of equity, or the result of improvident exercise of judicial discretion.' "

Affirmed.

STATE OF NORTH CAROLINA v. GRADY WORTH OLD, Nos. 66-CRS-7, 66-CRS-9, 66-CRS-10.

(Filed 22 November, 1967.)

1. Criminal Law § 29—

Order by the resident judge committing defendant to a State hospital for the purpose of determining his mental capacity to stand trial is a precautionary measure and is specially authorized by G.S. 122-91.

2. Criminal Law § 92—

Ordinarily, an indictment for a minor offense should not be consolidated for trial with a capital charge.

3. Same— Indictments for assaults and for murder held properly consolidated under facts of this case.

Where defendant is charged in two indictments with assault with a deadly weapon and in another indictment with murder, and it appears that the first assault was committed about daybreak, that the person assaulted identified defendant and immediately obtained a warrant charging defendant with felonious assault, that officers arrived at defendant's home shortly thereafter, that soon thereafter there was a shotgun blast from near the front door of defendant's home and that a deputy sheriff who had remained near that door staggered out in view, mortally wounded, and that shortly thereafter there was another shotgun blast from the

house at another deputy at his car, *held*, the indictments were properly consolidated for trial, since the three charges are so connected that evidence of each fits into and complements the others.

4. Criminal Law § 41—

In a criminal prosecution, evidence tending to establish any incident which, with evidence of other incidents, tends to form a composite picture identifying defendant as the perpetrator of the offense charged, is competent.

5. Homicide § 20; Assault and Battery § 14— Evidence held sufficient to sustain verdicts of defendant's guilt of assaults with a deadly weapon and murder in the first degree.

Evidence of a neighbor of defendant positively identifying defendant as the person who shot a rifle into the neighbor's house early in the morning, the shot shattering the windowpane and passing over the bed where the neighbor was lying, that the neighbor immediately obtained a warrant charging defendant with felonious assault, that when the deputy sheriffs arrived at defendant's home, one of them left the front porch to go to the back of the house and that after he had passed the corner of the house there was a blast from a shotgun from near the front door, and that the other deputy, who had remained at that door, staggered into view, mortally wounded, that thereafter there was another shotgun blast from the house at another deputy at his car, together with evidence that a search of defendant's home under a warrant revealed a repeating shotgun with an exploded shell in the chamber, that officers found defendant hiding in a ditch some 150 feet from defendant's house, armed with a repeating rifle with ten charges therein, and that defendant gave himself up only after repeated demands, *held* sufficient to be submitted to the jury in a prosecution of defendant on a charge of murder in the first degree and charges of assaults with a deadly weapon, notwithstanding the absence of evidence of motive for the first shot at the witness who obtained the warrant of arrest or evidence positively identifying defendant as the person who fired the shot inflicting fatal injury and the shot hitting the deputy sheriff's car.

THE appeals were argued here on August 29, 1967. Our decision, reported in 271 N.C. 341, remanded the cause to the Superior Court of CAMDEN County for correction of the record.

The corrections were made in the Superior Court after full hearing in which the defendant, his counsel, and the solicitor were present. The record now discloses that defendant entered pleas of not guilty in each of the three cases. After hearing the evidence, the argument of counsel, and the charge of the Court, the jury returned these verdicts: In 66-CrS-7, "guilty of assault with a deadly weapon on E. L. Taylor"; in 66-CrS-9, "guilty of the charge of murder in the first degree with recommendation of life imprisonment"; in 66-CrS-10, "guilty of assault with a deadly weapon upon John Joseph Walston". On each of the assault charges, the Court imposed a prison sentence of two years. On the murder charge, the Court imposed the mandatory sentence of life imprisonment.

The evidence, in short summary, disclosed that on November 8, 1966, E. L. Taylor lived alone about two miles from South Mills in Camden County. At the same time, the defendant lived alone approximately 300 yards from the Taylor home. As day was breaking, Taylor, while in bed, was awakened by gun fire outside his bedroom window. A rifle bullet shattered the windowpane, passed over the bed, and lodged in the wall. The bedroom was on the first floor. A line from the hole in the window to the hole in the wall indicated the bullet passed about 14" over Taylor's bed. Immediately, Taylor went to the window, saw and positively identified the defendant standing outside the shattered window with a 30-30 rifle in his hand. Other shots were fired.

Immediately after the shooting, Taylor slipped out by a back door, went to the home of a magistrate, and obtained a warrant charging the defendant with a felonious assault with intent to kill. Deputy Sheriff John Joseph Walston and Deputy Sheriff Montelle Williams went to the home of the defendant for the purpose of serving the warrant. The officers arrived at the defendant's home, taking with them E. W. Old, Jr., nephew of the defendant. Old, Jr. and the two officers went to the front door, which was closed. Old called "Uncle Grady" two or three times, receiving no answer. Deputy Sheriff Walston and Old left the front porch to go to the back of the house. After they had passed the corner of the house, there was a blast from a shotgun near the front door. Immediately, Deputy Sheriff Williams, who had remained near that door, staggered out in view of Walston and fell. Walston ran to his automobile for a revolver which was in the glove compartment. As he opened the door of the automobile, and was bent over the seat in the act of opening the glove compartment, there was another shotgun blast from the house and three of the pellets penetrated the windshield. Walston, while lying on the floorboard, managed to start the car and back it out into the road. He drove a short distance, got in communication with the Sheriff, and reported the shooting of Williams.

At about 9:00 or 9:15, the Sheriff, with other deputies and a highway patrolman, came to the Old home. Deputy Sheriff Walston delivered to the Sheriff the warrant which charged the defendant with felonious assault on Taylor. In searching the house, the officers discovered 7 or 8 guns, one a 30-30 rifle and at least two shotguns. A repeating shotgun was lying on a chair, with an exploded shell in the chamber. They also found another empty 12 gauge shotgun shell which smelled of freshly burned gun powder. No one was in the house. However, an old ditch, along which weeds, bushes and trees had grown, extended from a point near the house several hundred

feet across a pasture field in which the defendant's cattle were grazing. The officers found the defendant concealed in this ditch, at a point 100 to 150 feet from the house. One of the officers, with a megaphone, addressed the defendant, informing him that other officers had him surrounded and that he must come out with his hands up. This he did, and submitted to arrest. The defendant, when first seen, had a rifle in his hand. Witnesses found two empty 30-30 cartridge cases at the point outside Taylor's bedroom window where he had seen the defendant at the time or shortly after the shots were fired.

The shots were fired at Taylor about 6:00 in the morning. Walston and Williams attempted to serve the warrant about 8:00. At this time, the shots were fired at Walston and Williams. The Sheriff and other deputies arrived at 9:00 or 9:15, and shortly thereafter arrested the defendant.

The autopsy showed that Montelle Williams had been hit in the face, neck and chest with 40 shotgun pellets. The Pathologist testified that some of these had damaged blood vessels and tissues and as a consequence had caused the lungs to fill with fluid. One lung had collapsed. Death resulted.

The three charges were consolidated and tried together, with the results heretofore disclosed. From judgment upon the verdicts of guilty, the defendant appealed, assigning many errors.

T. W. Bruton, Attorney General; George A. Goodwyn, Assistant Attorney General, for the State.

John T. Chaffin for the defendant-appellant.

HIGGINS, J. The record, including the corrections, covers almost 300 pages. Defense counsel, alert to the interests of his client at all stages of the trial, noted 275 exceptions. They are presented here for review under 65 assignments of error, most of which are discussed in the defendant's carefully prepared brief. We have examined each assignment. Those not discussed have been found to be without merit.

The defendant assigns as error the pre-trial order by the resident judge which committed the defendant to a state hospital for the purpose of determining his capacity to stand trial. This procedure was a precautionary measure on the part of the judge and is specially authorized by G.S. 122-91. *State v. Arnold,* 258 N.C. 563, 129 S.E. 2d 229.

Judge Peel consolidated for trial the two charges of felonious assault on Taylor and Walston, and the capital charge of murder.

The assault on Taylor was charged in the warrant which officers Walston and Williams were attempting to serve when the shot was fired at Walston and Williams was killed. The three charges were so connected and tied together that evidence of each offense fits into and complements the others. Evidence of the entire episode is competent on the question of identification. In these circumstances, joinder is authorized by G.S. 15-52. *State v. Arsad,* 269 N.C. 184, 152 S.E. 2d 99; *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269. Ordinarily, and unless as here, the evidence showing guilt of a minor offense fits into the proof on the capital charge, the minor offenses should not be included.

Numerous exceptions and assignments of error are based on the admission of evidence. While the witness Taylor saw the defendant armed with the rifle outside his window on the occasion of the shooting into his bedroom, there was no witness able to say the defendant fired the shots that missed officer Walston and felled officer Williams. The State, therefore, had to rely on circumstantial evidence to fix on the defendant responsibility for these shootings. Many circumstances were detailed in the evidence which, standing alone, were of small moment, but when they were fitted together, they complemented each other in such manner as rendered them sufficient to warrant the jury in finding the defendant did the shooting. While no motive appears for the assault on Taylor, the evidence positively identified the defendant as the person who fired the shots. The State's evidence disclosed the defendant knew Montelle Williams and knew he was a deputy sheriff. The evidence was sufficient to warrant the jury in finding the shooting of the officers was for the purpose of preventing arrest. The totality of the circumstances detailed in the evidence was sufficient to identify the defendant as the perpetrator of the crimes although direct evidence of the assault on Walston and the fatal shooting of Williams is lacking. The defendant began the day by shooting at Taylor. Thereafter, from the defendant's house the shots were fired at officers Walston and Williams. These came from the front door of the defendant's house where he lived alone. A search of the house disclosed a rather formidable arsenal, and a repeating shotgun with an exploded shell in the chamber was lying on a chair. Outside the house, a distance of 100 to 150 feet from it, the officers found the defendant hiding in a ditch, armed with a repeating rifle with 10 cartridges in the magazine. Only after repeated demands that the defendant come out with his hands up did he heed the command and submit to arrest. This is only the framework of the State's case, supplemented by other details indicating guilt. *State v. Stephens,* 244

N.C. 380, 93 S.E. 2d 431; *State v. Thompson,* 256 N.C. 593, 124 S.E. 2d 728; *State v. Moore,* 262 N.C. 431, 137 S.E. 2d 812; *State v. Rowland,* 263 N.C. 353, 139 S.E. 2d 661; *State v. Roux,* 266 N.C. 555, 146 S.E. 2d 654; *State v. Williams,* 269 N.C. 376, 152 S.E. 2d 478.

The defendant's counsel cross-examined the witnesses about the guns found in the defendant's home, and was permitted rather wide leeway in his cross-examination. Inasmuch as the defendant did not testify, and did not offer evidence, only the State's evidence is involved. Nothing beneficial to the defendant was excluded on the State's objection. The officers entered and searched the defendant's home under the authority of a warrant charging the owner with a felony. The discovery of the guns and the empty shells resulted from the defendant's lawful entry into the house from which the shootings originated. The evidence as to the guns, etc. was not challenged by objection. Careful examination fails to disclose any prejudicial error in the admission of evidence.

In the assault cases, the Court instructed the jury the evidence was insufficient to make out a case of felonious assault. The Court correctly instructed the jury with respect to the lesser offenses involved in the assault indictments. Evidence was sufficient to support the verdicts finding the defendant guilty of assault with a deadly weapon on Taylor and on Walston. The sentence of two years imprisonment in each case run concurrently with each other and with the life sentence on the first degree murder charge.

The evidence, in our opinion, was sufficient to survive the motion to dismiss. Evidence of motive for the shots fired at Taylor was lacking. Evidence was ample from which the jury could reasonably find the shots at officers Walston and Williams were fired in an effort to resist arrest. Arrest was effected only after the officers discovered the defendant concealed in the ditch, surrounded him and notified him by megaphone to come out with his hands up. This he did, leaving his loaded rifle in his hiding place. The evidence qualifies as sufficient to permit its submission to the jury and to support the verdicts. *State v. Lakey,* 270 N.C. 786, 154 S.E. 2d 900; Strong, N. C. Index, 2d Ed., Vol. 2, § 41, Lawyers Cooperative Publishing Company, 1967.

The defendant, by 14 assignments of error, challenges parts of the charge. However, when taken in its entirety, the charge covers all material parts of the evidence and correctly applies the law thereto. The charge is free from valid objection.

No error.

STATE v. WADE AYCOTH AND JOHN SHADRICK.

(Filed 22 November, 1967.)

1. Attorney and Client § 5—

The professional obligation of court-appointed counsel to his client and to the court is no less than that of privately retained counsel, and the failure of such counsel to comply with the Rules of the Supreme Court subjects him to removal and censure.

2. Criminal Law §§ 154, 156—

Defendant's case on appeal, although not served upon the State within the prescribed time nor docketed in the Supreme Court at the appropriate Term, is treated as a petition for *certiorari* in this case and decided on its merits as in the case of an authorized belated appeal, notwithstanding the failure of the defendant's court-appointed attorney to explain the delay, since it appears from the case that the defendant is entitled to relief.

3. Criminal Law § 9—

All who are present at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for such purpose to the knowledge of the actual perpetrator, are principals and equally guilty.

4. Same—

The mere presence of a person at the scene of a crime at the time of its commission does not make him a principal in the second degree, even though he makes no effort to prevent the crime, or even though he may silently approve, or even secretly intend to assist the perpetrator in case his aid becomes necessary, it being necessary to constitute him a principal in the second degree that he give active encouragement to the perpetrator by word or deed or make it known to the perpetrator in some way that he would lend assistance if it should become necessary.

5. Same; Robbery § 4—

Evidence of the State tending to show that the defendant remained seated on the right, or passenger, side of an automobile while the driver went inside a store and, armed with a pistol, demanded and received approximately $100 in cash from an employee, *is held* insufficient to be submitted to the jury on the issue of defendant's guilt as an aider and abettor in the commission of an armed robbery, there being no evidence that defendant moved from his position in the car, that he could observe what was taking place in the store, or that he shared in the proceeds of the robbery.

PLESS, J., dissenting.

APPEAL by defendant Shadrick from *McLaughlin, J.*, October 31, 1966 Session of UNION.

Criminal prosecution on a bill of indictment charging Wade Aycoth and John Shadrick with the armed robbery, as defined in G.S. 14-87, of Mrs. Keith Stevenson.

Evidence offered by the State tends to show: The place of business known as Outen's Grocery, located near a crossroads in Union County, consists of a grocery store and service station. The grocery store, where meats, groceries and drinks are sold, is in a one-story building. The service station consists of two gasoline pumps located twenty-four feet from the entrance to the store. Mrs. Stevenson, an employee, was in charge of Outen's Grocery on October 25, 1966, about 1:15 p.m., when a car operated by Aycoth drove up and stopped between the gasoline pumps and the store. Shadrick, a passenger, was on the right front seat. Aycoth got out of the car, told Mrs. Stevenson "to fill it up with gas," started into the store and then came back and told her "to put in $2.00 worth of gas." Mrs. Stevenson "put the gas in and went into the store, with Aycoth following (her)." Inside the store, Aycoth, armed with a pistol, demanded and received the money in the cash register, approximately one hundred dollars. As he backed out of the store, with the pistol pointed towards Mrs. Stevenson, Aycoth threatened to kill her if she followed him. Thereafter, he got into the car and drove away. Aycoth and Shadrick were together when arrested in Union County about 9:00 p.m. the same day.

Evidence offered by Shadrick, consisting of his own testimony, tends to show that he and Aycoth got together in Mecklenburg County about 3:00 p.m. and did not leave for Union County until 8:00 p.m. Aycoth did not testify or offer evidence.

Each defendant was represented by separate court-appointed counsel; Aycoth by R. Roy Hawfield, Esq., and Shadrick by Robert Huffman, Esq.

As to each defendant, the jury returned a verdict of "guilty of armed robbery."

As to Shadrick, the court pronounced judgment imposing a prison sentence of "not less than 15 years nor more than 20 years."

Shadrick excepted and appealed. An (undated) order entered by Judge McLaughlin permitted Shadrick to appeal *in forma pauperis* and provided that Union County pay for the transcript and other documents incident to his appeal.

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

Robert L. Huffman for defendant appellant.

BOBBITT, J. Aycoth and Shadrick were indicted jointly and tried together at October 31, 1966 Session of Union Superior Court. Aycoth's appeal, in compliance with Rule 5, Rules of Practice in the Supreme Court, 254 N.C. 783, 786-787, was docketed and heard at

our Spring Term 1967. On such appeal, this Court, while holding "(t)here was plenary evidence to withstand Aycoth's motion for judgment as in case of nonsuit and to support the verdict," awarded Aycoth a new trial on account of the prejudicial incident discussed in the opinion. See *State v. Aycoth,* 270 N.C. 270, 154 S.E. 2d 59.

By order dated November 7, 1966, Shadrick was "allowed 90 days in which to make up and serve case on appeal" and the State was allowed thirty days thereafter to file exceptions or prepare and serve counter-case. The record shows the solicitor accepted service of Shadrick's case on appeal in these words: "SERVICE of defendant's foregoing Case on Appeal accepted, *in apt time,* this 21 day of April, 1967." (Our italics.) Under our Rule 5, Shadrick's appeal should have been, but was not, docketed for hearing at our Spring Term 1967. There should have been a single record relating to the appeals of both Aycoth and Shadrick. Separate appeals and records involve additional costs which, on account of the indigency of the appellants, must be paid by Union County.

The professional obligation of court-appointed counsel to his client and to the court is certainly no less than that of privately retained counsel. Competence and diligence are expected and required. Court-appointed counsel are subject to removal and censure unless they comply with the requirements of our rules.

The record before us contains no explanation as to why Shadrick's case on appeal was not served within the prescribed time or as to why his appeal was not docketed at the Spring Term 1967 of this Court. We do not rule out the possibility that a reasonable explanation may exist for what appears to be an inexcusable delay in bringing forward Shadrick's appeal. However, we must consider an appeal on the record before us; and if such reasonable explanation exists it should have been set forth in the case on appeal so that this Court could pass upon the legal sufficiency thereof. Obviously, Shadrick's appeal is subject to dismissal for noncompliance with our rule. However, absent a motion by the State that Shadrick's appeal be dismissed, and in view of our own conclusion that Shadrick is entitled to relief, we have elected to treat Shadrick's appeal as a petition for *certiorari* and to allow it and decide the case on its merits as in case of an authorized belated appeal.

The State does not contend that Shadrick actively participated in the alleged armed robbery. The question is whether there is sufficient evidence to require submission to the jury and to support a verdict with reference to Shadrick's guilt as an aider and abettor of Aycoth in the commission of the alleged armed robbery.

Decision turns on the application of these legal principles:

"The mere presence of a person at the scene of a crime at the

time of its commission does not make him a principal in the second degree; and this is so even though he makes no effort to prevent the crime, or even though he may silently approve of the crime, or even though he may secretly intend to assist the perpetrator in the commission of the crime in case his aid becomes necessary to its consummation. (Citations.)" *State v. Birchfield,* 235 N.C. 410, 413, 70 S.E. 2d 5, 7.

"All who are present at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for such purpose to the knowledge of the actual perpetrator, are principals and equally guilty. (Citations.) An aider and abettor is one who advises, counsels, procures, or encourages another to commit a crime. (Citations.) To render one who does not actually participate in the commission of a crime guilty of the offense committed, there must be some evidence tending to show that he, by word or deed, gave active encouragement to the perpetrator of the crime or by his conduct made it known to such perpetrator that he was standing by to lend assistance when and if it should become necessary. (Citations.)" *State v. Ham,* 238 N.C. 94, 97, 76 S.E. 2d 346, 348; *State v. Burgess,* 245 N.C. 304, 309, 96 S.E. 2d 54, 58; *State v. Horner,* 248 N.C. 342, 350, 103 S.E. 2d 694, 700; *State v. Hargett,* 255 N.C. 412, 415, 121 S.E. 2d 589, 592; *State v. Gaines,* 260 N.C. 228, 231, 132 S.E. 2d 485, 487.

The evidence, when considered in the light most favorable to the State, tends to show: The robbery occurred inside the store. Aycoth was in the store "no more than two or three minutes." There is no evidence that Shadrick moved from where he was sitting on the right (passenger) side of the front seat of the car. He had no conversation with Mrs. Stevenson. There is no evidence that he had a weapon of any kind. Mrs. Stevenson testified she could see Shadrick and Shadrick could have seen her through the plate glass window but Shadrick "never did look around." There is no evidence that Shadrick could or did observe what was taking place inside the store. There is evidence that Aycoth concealed his pistol before he stepped out of the store. There is no evidence that Shadrick shared in the proceeds of the one hundred dollar robbery beyond the fact that Shadrick, when arrested, had about fifteen dollars and some change on him. There were weapons under the seat of the car when Aycoth and Shadrick were arrested. However, there is no evidence that Shadrick owned or controlled the car. An officer testified that Aycoth had stated that he was the owner of the car.

Although there are circumstances which point the finger of suspicion towards Shadrick, we are constrained to hold that the evidence is insufficient to warrant a verdict that he is guilty of the al-

leged armed robbery as an aider and abettor of Aycoth. Hence, the court below should have allowed defendant's motion at the conclusion of all the evidence for judgment as in case of nonsuit. For error in this respect, the judgment of the court below is reversed.

Reversed.

PLESS, J., dissenting: The driver of a get-away car plays an important part in a robbery, and he seldom commits any overt act to show his participation in, or knowledge of, the robbery. He merely sits in the car, usually with the motor running; but where he is an actual confederate his presence gives encouragement to the active perpetrators, which makes him responsible.

In *State v. Allison,* 200 N.C. 190, 156 S.E. 547, it is said:

> " 'Where the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as encouraging.' "

The evidence showed the association of Shadrick and Aycoth over a period of many hours on the day in question. This would be some indication of the friendship of the two men. A person's knowledge can seldom be shown except by circumstances, and I am of the opinion that the circumstances shown here are sufficient to import knowledge to Shadrick.

Shadrick rode to the scene of the robbery with Aycoth. The fact that he was sitting on the right front seat of the car is not, in my opinion, a controlling factor. He could easily change sides to the driver's seat when his confederate came back. The State's evidence was to the effect that Shadrick was in the same car later that night and was seen to get out from the left, or the driver's side. While the victim did not see Shadrick look toward the store, she testified he could have seen her while she was being robbed and that she saw him well enough that she could identify him. When the car was later searched, a loaded pistol was found under the left front seat and another was found under the right front seat. This fact plus his presence within eight feet of the store and his arrival and departure with the robber are, in my opinion, sufficient to submit the case to the jury. That is usually all that can be shown as to the get-away driver, and the jury has adopted the common-sense view that Shadrick didn't come along "just for the ride."

I am afraid the majority opinion describes a course of conduct for the drivers in these cases whereby they can be absolved of blame. I dissent.

MARGARET STUMPF GOLDSTON v. BRENDA HENDERSON CHAMBERS, EDWIN RAY CHAMBERS, HENRY SLOAN MEDLIN AND GROVER CLEVELAND MEDLIN

AND

ROBERT JOHN GOLDSTON v. BRENDA HENDERSON CHAMBERS, EDWIN RAY CHAMBERS, HENRY SLOAN MEDLIN AND GROVER CLEVELAND MEDLIN

AND

MARGARET STUMPF GOLDSTON v. BRENDA HENDERSON CHAMBERS LYNCH, EDWIN RAY CHAMBERS, HENRY SLOAN MEDLIN, AND GROVER CLEVELAND MEDLIN

AND

ROBERT JOHN GOLDSTON v. BRENDA HENDERSON CHAMBERS LYNCH, EDWIN RAY CHAMBERS, HENRY SLOAN MEDLIN AND GROVER CLEVELAND MEDLIN.

(Filed 22 November, 1967.)

1. Appeal and Error § 41—

Where there are separate appeals in four separate cases, but in all four the pleadings, evidence, charge of the court, the issues and the order are substantially the same, it is necessary to have only one statement of case on appeal. Rule of Practice in the Supreme Court No. 19(2).

2. Judgments § 2—

In the present case the record disclosed that the court heard argument for all parties upon defendants' motion to set aside the verdict, and that counsel agreed that the "order and appeal entries may be signed out of the district and out of the term." *Held:* The judge was authorized to enter an order out of the district and after the term setting aside the verdict as a matter in his discretion.

3. Appeal and Error § 6; Trial § 48—

Although the verdict of the jury should not be set aside without material consideration, the trial court has the power to set aside a verdict in whole or in part in the exercise of his sound discretion, G.S. 1-207, and his order doing so is not reviewable on appeal in the absence of abuse of discretion.

4. Automobiles § 56—

Evidence tending to show that plaintiff's car was stationary on the highway behind another car whose lights were blinking indicating a left turn, that the car immediately behind plaintiff passed both cars on the right shoulder, and that appealing defendants' car, which was the second car behind plaintiff ran into the rear of plaintiff's car, *held* sufficient to be submitted to the jury and overrule appealing defendants' motion to nonsuit, and appealing defendants may not complain that the verdict of the jury in their favor was set aside by the trial court in the exercise of his discretion on motion of the other defendants, the owner and driver of the third car behind plaintiff's car, against whom the jury returned an adverse verdict.

APPEAL by plaintiffs and by defendants Chambers from *Latham, S.J.*, 27 February 1967 Civil Session of RANDOLPH.

This was an action for personal injuries and property damage arising out of a rear-end collision which occurred on 8 June 1964 on U. S. Highway #19-23 about seven miles west of Asheville, North Carolina. Plaintiff Robert John Goldston was the owner and operator of an automobile which he had brought to a complete stop on the highway behind an automobile which was stopped with a signal light on indicating a left turn. Margaret Stumpf Goldston, his wife, was a passenger in his automobile, and sued for personal injuries. Immediately behind plaintiff was a Rambler automobile, and this automobile went around plaintiff's car and the car in front of him on the right-hand shoulder of the highway and traveled on down the highway. Defendant Edwin Ray Chambers was the owner of a car which was immediately behind the Rambler and which was being operated by his wife, Brenda Henderson Chambers, who since the accident has been divorced and is now Brenda Henderson Chambers Lynch. The Chambers automobile ran into the rear end of the Goldston automobile inflicting personal injuries upon the plaintiffs and causing damage to their automobile. Defendant Grover Cleveland Medlin was the owner of an automobile which was immediately behind the Chambers automobile and which was being operated by his son, the defendant Henry Sloan Medlin. The Medlin automobile ran into the rear end of the Chambers automobile causing it to strike plaintiff's automobile again.

Although we have four separate cases on appeal—two substantially identical in the Robert John Goldston case and two substantially identical in the Margaret Stumpf Goldston case — it is apparent that there are only two cases, because in all four records the pleadings, the evidence, the charge of the court, the issues, and the orders are substantially the same. The two actions without objection were consolidated for trial. We can only speculate that the attorney for the appellants Goldston, Mr. Burton, prepared two records on appeal, and that the attorney for the appellants Chambers, Mr. Beck, prepared two records on appeal, and that is why we have four cases on appeal. Under the facts here, it was necessary to have only one statement of the case on appeal. Rule 19(2) of the Rules of Practice in the Supreme Court, 254 N.C. 783, 797.

Plaintiffs offered evidence, the defendants Chambers offered evidence, and the defendants Medlin offered no evidence. When all the evidence had been introduced and after the court had delivered its charge, the following five issues were submitted to the jury in the Robert John Goldston case, and answered as indicated:

"1. Was the plaintiff, Robert John Goldston, injured and damaged by the negligence of the defendants, Brenda Hender-

son Chambers (Lynch) and Edwin Ray Chambers, as alleged in the complaint?

ANSWER: No.

"2. Was the plaintiff, Robert John Goldston, injured and damaged by the negligence of the defendant, Henry Sloan Medlin, as alleged in the complaint?

ANSWER: Yes.

"3. Was the defendant, Henry Sloan Medlin, operating the car of his father, Grover Cleveland Medlin, at the time and place set out in the complaint as an agent and employee of the defendant, Grover Cleveland Medlin, as alleged in the complaint?

ANSWER: Yes.

"4. What amount, if any, is the plaintiff, Robert John Goldston, entitled to recover of the defendants for his personal injuries?

ANSWER: $7,500.00.

"5. What amount, if any, is the plaintiff, Robert John Goldston, entitled to recover of the defendants for his property damage?

ANSWER: $528.00."

The first four issues set out above were submitted to the jury in the Margaret Stumpf Goldston case with the exception that the name Margaret Stumpf Goldston was substituted for the name Robert John Goldston, and were answered in the same manner as indicated above, except that on the fourth issue the jury awarded her $3,750.00.

Upon the coming in of the verdicts, defendants Medlin moved in open court that the verdicts be set aside and that a new trial be granted upon the following grounds: (1) For errors committed during the course of the trial; (2) that the verdicts are contrary to the greater weight of the evidence; and (3) that the damages awarded by the jury were excessive. The record shows that Judge Latham, after hearing argument of counsel for all parties, signed orders setting both verdicts aside as a matter of discretion on 17 March 1967, after the term had expired and while he was out of the district in which the trial had taken place. This action by the court was done pursuant to an agreement of the parties which is reflected in the following recital contained in the appeal entries signed by Judge Latham: "It is further agreed by counsel for all parties that the Order and Appeal Entries may be signed out of the District and out of the Term."

From the court's discretionary order setting the verdicts aside, plaintiffs and defendants Chambers appeal.

Ottway Burton for Margaret Stumpf Goldston and Robert John Goldston, appellants and appellees.

Steve Glass and Miller, Beck & O'Briant by Adam W. Beck for defendants Chambers, appellants.

Smith, Moore, Smith, Schell & Hunter by Richmond G. Bernhardt, Jr., for defendants Medlin, appellees.

PARKER, C.J. The orders were signed by the trial judge out of term and out of the district by agreement of the parties, and such action when so authorized is permissible.

In *Knowles v. Savage,* 140 N.C. 372, 52 S.E. 930, the facts were these:

> "The record states that counsel, desiring to leave the court pending the deliberation of the jury, agreed that upon the return of the verdict, the judge could sign judgment 'out of term.' That neither of the counsel were present at the rendition of the verdict. The court announced from the bench that it would set the verdict aside if any one was present to make the motion. That while the judge was in another county, counsel, by letter, requested him to set the verdict aside, which he declined, because, in his opinion, he had no power to do so after the expiration of the term. From a judgment upon the verdict defendant appealed, assigning as error the refusal of the court to grant his motion to nonsuit plaintiff, and the refusal to set the verdict aside."

The Court, in its unanimous opinion, said:

> "Neither exception can be sustained. It is conceded that a motion to set aside the verdict for insufficient evidence must be made before the judge who tried the case upon his minutes and at the same term at which the trial is had. (Citing authority.) It is equally clear that unless otherwise agreed, the judgment must be signed during the term. The defendant contends that the agreement empowering the judge to sign the judgment after adjournment included the power to hear and determine the motion to set the verdict aside. We do not concur in this view. Such is not a reasonable construction of the agreement. Signing the judgment involved no judicial discretion or ruling. This, if omitted for any reason, could be done at a succeeding term. (Citing authority.) Hearing and determining a

motion to set the verdict aside is quite another matter — involving recollection of the testimony, manner and demeanor of witness and other incidents of the trial not likely to be impressed upon the memory of the judge that he may safely act upon them after adjournment. While convenience of counsel often occasion and usually justify outside agreements of the character made in this case, they frequently lead to confusion and irregularity in the administration of justice. The courts will not by construction extend their terms beyond the fair and reasonable import of the language used. We concur with his Honor that he had no power after the adjournment of the term to hear and pass upon the motion. The judgment must be affirmed."

In *Cogburn v. Henson,* 179 N.C. 631, 103 S.E. 377, the facts were these:

"The trial ended on Saturday afternoon, the last day of the term. The jury had not returned their verdict at 4:45 p.m. and the trial judge desiring to board a train scheduled to depart at 4:51 p.m., had the following entry made by consent of counsel for plaintiff and defendant:

" 'It is agreed by the counsel for the plaintiff and the defendant that the jury may return their verdict to the Clerk, and that the judgment may be signed out of term and out of the county.'

"The judge then left the court to board the train, and the jury afterwards returned a verdict in favor of the defendant. No judgment was signed at the July term, but at the following (September) term his Honor entered the following:

" 'In this cause, the same being tried at the July Term, 1919, of this court, and a verdict on the issues found by the jury in favor of the defendant, and counsel agreeing that the court might sign judgment out of term, and out of the county; the court now, in its discretion and upon its own motion, sets the verdict in said case aside and orders the case to be reinstated on the civil issue docket of this court to the end that a new trial be had upon the issues submitted before another jury.'

"Defendant appealed."

The Court, in an opinion written by Chief Justice Clark and joined in by Justices Brown, Hoke, and Allen, held as correctly summarized in the second headnote in our Reports:

"An agreement by the parties to an action, the last case on trial at the expiration of the term, that 'the judgment may be

> signed out of term and out of the county' in effect continues the term in so far as it affects the particular matter, but reserves the right to each party to have the judge exercise the discretionary powers over the verdict, invested in him by law, and his action in setting the verdict aside in his discretion, at the next subsequent term of the court, is within the purview of the agreement, and valid. This custom is discouraged by the Court, as a bad one."

Justice Walker wrote a dissenting opinion stating in substance that the decision in *Knowles v. Savage, supra,* should be followed and not overruled. He closed his dissenting opinion with this language: "I shall, though, hereafter accept this decision of the court and abide by its construction of such agreements as it is only a question of procedure, which should be finally decided, and closed." See as apposite to the decision in the *Cogburn* case, *Bailey v. Mineral Co.,* 183 N.C. 525, 112 S.E. 29.

In the *Knowles* case the agreement was simply that the judge could sign the *judgment* out of term. In the present case the agreement was, as stated in the appeal entries, that "it is further agreed by counsel for all parties that the *Order* and Appeal Entries may be signed out of the District and out of the Term." (Italics ours.) It seems to us that the only reasonable and just construction of the agreement here made in open court at the trial term by counsel for all the parties was that for the purposes of entertaining such motions and signing orders related thereto the term of the court was prolonged, and this case should be treated by Judge Latham as if the trial term of the court were in session. We are fortified in our opinion by the fact that counsel in their briefs have not assailed Judge Latham's power to set the verdicts aside in his discretion except on the ground that he committed a manifest abuse of discretion. According to the agreement here, we are of the opinion and so sold that Judge Latham had the power to set aside the verdicts in his discretion out of the district and out of the term.

Judge Latham was fully authorized to set aside the verdicts in these two consolidated cases as a matter of discretion. It is within the power of the trial judge in the exercise of his sound discretion to set aside a jury verdict, in whole or in part. G.S. 1-207; *Alligood v. Shelton,* 224 N.C. 754, 32 S.E. 2d 350; *Geer v. Reams,* 88 N.C. 197. A verdict is a solemn act of a jury, and it should not be set aside without mature consideration; but the power of the court to set aside a verdict as a matter of discretion has always been inherent and is necessary to the proper administration of justice. *Bird*

v. Bradburn, 131 N.C. 488, 42 S.E. 936. This is said in *Settee v. Electric Ry.,* 170 N.C. 365, 86 S.E. 1050:

> "The discretion of the judge to set aside a verdict is not an arbitrary one to be exercised capriciously or according to his absolute will, but reasonably and with the object solely of preventing what may seem to him an inequitable result. The power is an inherent one, and is regarded as essential to the proper administration of the law. It is not limited to cases where the verdict is found to be against the weight of the evidence, but extends to many others. While the necessity for exercising this discretion, in any given case, is not to be determined by the mere inclination of the judge, but by a sound and enlightened judgment in an effort to attain the end of all law, namely, the doing of even and exact justice, we will yet not supervise it, except, perhaps, in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited."

We have held repeatedly since 1820 in case after case, and no principle is more fully settled in this jurisdiction, that the action of the trial judge in setting aside a verdict in his discretion is not subject to review on appeal in the absence of an abuse of discretion. *Scott v. Trogdon,* 268 N.C. 574, 151 S.E. 2d 18; *Goldston v. Wright,* 257 N.C. 279, 125 S.E. 2d 462; *Walston v. Greene,* 246 N.C. 617, 99 S.E. 2d 805; *Goodman v. Goodman,* 201 N.C. 808, 161 S.E. 686; *Bird v. Bradburn, supra; Brink v. Black,* 74 N.C. 329; *Long v. Gantley,* 20 N.C. 457; *Alley v. Hampton,* 13 N.C. 11; *Armstrong v. Wright,* 8 N.C. 93. The records in these two cases disclose no abuse of discretion on the part of the trial judge; hence, the order setting aside the verdict in each case is not subject to review on appeal.

The assignment of error of plaintiffs that the court erred in setting aside the entire verdict in each case in its discretion is without merit and is overruled.

Defendants Chambers assign as error the setting aside of the verdict on the first issue in each case which found that neither plaintiff was injured nor the male plaintiff's car damaged by the negligence of the defendants Chambers. They contend that the setting aside of the verdict on the first issue in each case in his discretion by the trial judge was a manifest abuse of discretion and has produced a "miscarriage of justice," "an inequitable result," and "a palpable error," for the reason that the plaintiffs presented no evidence tending to show any actionable negligence on the part of the defendants Chambers, and that they are entitled to a judgment on the verdict adjudging and decreeing that each plaintiff have and recover nothing from the defendants Chambers. Considering plaintiffs' evidence

in the record before us as true and in the light most favorable to them and giving them the benefit of every reasonable inference in their favor which may be reasonably deduced therefrom, plaintiffs presented sufficient evidence to carry the case to the jury. 4 Strong's N. C. Index, Trial, § 21. No manifest abuse of discretion on the part of Judge Latham appears in the record. Defendants Chambers were not entitled to have the suit as against them terminated by a judgment of compulsory nonsuit. All assignments of error of the defendants Chambers are overruled.

Appeals of plaintiffs and defendants Chambers are Dismissed.

STATE v. JAMES PARTLOW.

(Filed 22 November, 1967.)

1. Indictment and Warrant § 15; Criminal Law §§ 127, 146—

The sufficiency of a bill of indictment may be raised by motion to quash or by motion in arrest of judgment, or the Supreme Court may take notice of a fatally defective warrant *ex mero motu*.

2. Indictment and Warrant § 9—

An indictment must charge the offense with sufficient certainty to identify the offense and to protect the accused from being put in jeopardy for the same offense, and enable the accused to prepare for trial, and to enable the court, upon conviction or plea of *nolo contendere*, to pronounce sentence, since defendant is entitled to preserve his constitutional right not to be put in jeopardy upon a subsequent prosecution which is for the same offense both in law and fact. Constitution of North Carolina, Art. I, § 17.

3. Criminal Law § 10; Robbery § 2—

An indictment charging defendant with being an accessory before the fact to an armed robbery committed by named persons on a specified date, without any factual averments as to the identity of the victim, the property taken or the manner or method in which defendant counseled, incited, induced or encouraged the principal felons, is fatally defective, since such indictment is too indefinite to protect defendant from a prosecution for any other armed robbery which might have been committed by the principal felons on the same day.

4. Indictment and Warrant § 9—

Where a statute charges an offense in general terms, an indictment therefor must particularize and identify the crime so as to protect defendant from a subsequent prosecution for the same offense.

5. Criminal Law § 127—

Where judgment is arrested for fatal defect in the indictment, the State may thereafter put defendant on trial under a proper bill of indictment, if it so elects.

6. Criminal Law § 106—

The unsupported testimony of an accomplice is sufficient to support a conviction if it satisfies the jury of defendant's guilt beyond a reasonable doubt.

7. Criminal Law § 167—

The presumption is in favor of the regularity of the trial below with the burden on defendant to show error affecting the result adversely to him.

8. Criminal Law §§ 10, 138—

A defendant on trial upon an indictment charging him with being an accessory before the fact may not complain that the judge in the exercise of his discretion failed to sentence the principal felons upon their plea of guilty until the court had heard all of the evidence, including the evidence adduced upon the trial of defendant as an accessory before the fact, since during the term the judgment of the court remains *in fieri*, there being nothing to indicate that any threats or promises of reward were made to any of the witnesses.

9. Criminal Law § 177—

Where defendant is convicted under two bills of indictment consolidated for trial, and the judge directs that the sentence upon the second conviction should begin at the expiration of the sentence imposed upon the first, the cause must be remanded for proper judgment when the judgment on the first conviction is arrested for fatal defect in the indictment.

APPEAL by defendant from *Bailey, J.*, 8 May 1967 Schedule "B" Criminal Session of MECKLENBURG.

Criminal action tried under two bills of indictment charging defendant with being (1) an accessory before the fact of armed robbery, and (2) an accessory after the fact of armed robbery. Defendant entered pleas of not guilty.

Both counts were consolidated for trial with the case of *State v. Avery Partlow,* who was indicted as one of the principals in the armed robbery. Defendant Avery Partlow's motion for nonsuit was allowed at the conclusion of the State's evidence.

The State's evidence in pertinent part is as follows:

Ralph James testified that he owned the Diamond Restaurant at 1901 Commonwealth Avenue in Charlotte, N. C. After closing the business at 9:00 P.M. on 3 December 1966, only he and the clean-up boy remained on the premises. As he was locking the kitchen door, two boys, identified by James as Willie Moore and Don Land, approached him and said, "This is a holdup. Get back inside." Moore and Land had previously worked for James. Moore had a gun. Moore and Land took approximately $900 in cash and $300 in checks, contained in separate bank deposit bags. James offered no resistance because they had a gun pointed at him. The money was never recovered.

Don Land, one of the principals in the armed robbery, testified that on 3 December 1966, he and Willie Moore asked defendant to get them transportation because they wanted to rob the Diamond Restaurant. Defendant replied that he would try to get a car. Later that night, defendant told Moore and Land that he had transportation. The three of them got into the car with Avery Partlow and one other man and three girls. After making one stop, they asked Avery Partlow, the driver, to take them to a location about one and a half blocks from the Diamond Restaurant. Land stated that only he, Moore and defendant knew about robbing the Restaurant. Moore, with the gun, told Ralph James that this was a robbery. Moore and Land left with the money and the two money bags. When they returned to the car, they told defendant, "everything went off all right." Moore, Land and defendant left in another car and, at defendant's suggestion, went to South Carolina. While there, the money was divided among them. After returning to Charlotte, Land and defendant went to Miami, Florida, where they stayed for about two months. Land came back to Charlotte and talked to Mr. Smith and Mr. Bruce S. Treadway about the events before and after the robbery. His statement was reduced to writing and signed by him. He said that he had pleaded guilty to armed robbery growing out of the occurrence to which he had testified but had not yet been sentenced.

Willie Moore, the other principal in the armed robbery, testified that he did not know Land had talked to defendant about getting an automobile but stated that defendant had said something about having gotten a car for him. Moore stated that he had pleaded guilty to the charge of armed robbery growing out of the incident he testified to, but had not yet been sentenced. He also had signed a statement concerning the occurrence. His other testimony was generally a repetition of Land's testimony.

Detective Bruce S. Treadway of the Charlotte Police Department testified that he had investigated the armed robbery, had talked to Land and Moore, and that they had made statements which had been reduced to writing and signed by them.

At the conclusion of the State's evidence defendant's motion for nonsuit was denied.

Defendant's evidence may be summarized as follows:

Vera Graham testified that defendant drank about four or five cans of beer and some liquor and was drunk when they arrived near the Diamond Restaurant. She did not know anything about the robbery. She testified about the trip to South Carolina.

Avery Partlow testified about being with defendant on 3 December 1966. He said that defendant had been drinking and became

sick; that he drove Moore and Land to a place near the Diamond Restaurant at their request, and that he heard nothing about a robbery.

The jury returned verdicts of guilty as charged: accessory before the fact of armed robbery and accessory after the fact of armed robbery. Upon the verdicts returned by the jury, judgment was entered sentencing defendant to imprisonment in the State Prison for a term of ten years, to be assigned to do labor as provided by law on the charge of accessory before the fact of armed robbery; and upon the charge of accessory after the fact of armed robbery, sentencing defendant to imprisonment in State Prison for a term of ten years, to be assigned to do labor as provided by law, this sentence to commence at the expiration of the sentence imposed for accessory before the fact of armed robbery.

Defendant appealed.

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

E. Glenn Scott, Jr., for defendant appellant.

BRANCH, J. Defendant's conviction of accessory before the fact of armed robbery was based upon the following bill of indictment.

> "The Jurors for the State upon their oath present, That James Partlow, late of the County of Mecklenburg, on the 3rd day of December, in the year of our Lord one thousand nine hundred and sixty-six, with force and arms, at and in the County aforesaid, unlawfully, wilfully and feloniously, did be and become an accessory before the fact of armed robbery committed by one Willie Moore and one Don Lands, the same being the principal felons, in that he, James Partlow, counseled, incited, induced, procured and encouraged the principal felons to commit the aforesaid felony of armed robbery, against the form of the statute in such case made and provided and against the peace and dignity of the State.

The proper methods to raise the question of the sufficiency of a bill of indictment are by motion to quash or motion in arrest of judgment. However, if the offense is not sufficiently charged in the indictment, this Court, *ex mero motu*, will arrest the judgment. *State v. Walker*, 249 N.C. 35, 105 S.E. 2d 101.

In the case of *State v. Greer*, 238 N.C. 325, 77 S.E. 2d 917, the Court considered the validity of a bill of indictment, and Parker, J. (now C.J.) stated:

"The authorities are in unison, that an indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such constitutional provisions is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case. *S. v. Cole,* 202 N.C. 592, 163 S.E. 594; *S. v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140; *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166; *S. v. Miller,* 231 N.C. 419, 57 S.E. 2d 392; *S. v. Gibbs,* 234 N.C. 259, 66 S.E. 2d 883."

In considering the validity of this indictment we recognize that by statute (G.S. 14-5) the facts which formerly had been called "accessory before the fact" are made a substantive felony and it is not necessary to first convict principals in order to convict an accessory to a crime. *State v. Jones,* 101 N.C. 719, 8 S.E. 148. However, it will be of assistance to examine the indictments in certain cases of robbery in order to decide whether this indictment is valid.

The defendants were charged with robbery with firearms in the case of *State v. Mull,* 224 N.C. 574, 31 S.E. 2d 764. The bill of indictment charged the property taken to be "two dollars in money." The court charged, "I instruct you that . . . gas tickets or coupons are recognized as personal property, and that the taking of them is a breach of the statute. . . ." Defendants contended that this instruction erroneously enlarged upon and departed from the bill of indictment. Holding that there was no error, this Court stated:

"Initially, it should be observed that the bill charges robbery from the person by the use or threatened use of firearms of two dollars in money the property of Cleveland Whisenant. The gist of the offense, as thus alleged, is the accomplishment of the robbery by the use or threatened use of firearms. Force or intimidation occasioned by the use or threatened use of firearms, is the main element of the offense. 'In such case it is not necessary or material to describe accurately or prove the particular identity or value of the property, *further than to show it was the property of the person assaulted or in his care, and had a value.*'" (Emphasis added.)

In the case of *State v. Guffey,* 265 N.C. 331, 144 S.E. 2d 14, the Court considered the appellant's contention that the indictment for

common law robbery was fatally defective in that it did not describe the property taken. Holding the indictment defective, the Court said:

> "We have said in a number of cases that in an indictment for robbery the kind and value of the property taken is not material — the gist of the offense is not the taking, but a taking by force or putting in fear. *State v. Sawyer,* 224 N.C. 61, 29 S.E. 2d 34; *State v. Brown,* 113 N.C. 645, 18 S.E. 51; *State v. Burke,* 73 N.C. 83. See also *State v. Mull,* 224 N.C. 574, 31 S.E. 2d 764. However, in these cases the objection was not that there was no description but that the description was insufficient; the indictments described the property in general terms, such as 'money'.
>
> "In our opinion an indictment for robbery must contain a description of the property sufficient, at least, to show that such property is the subject of robbery. To constitute the offense of robbery the property taken must be such as is the subject of larceny. *State v. Trexler,* 4 N.C. 188; 46 Am. Jur., Robbery, Sec. 8, p. 142."

Former jeopardy, being based on the fundamental legal principle that a person cannot be tried twice for the same offense, is a good plea. *State v. Mansfield,* 207 N.C. 233, 176 S.E. 761; N. C. Const., Art. I, Sec. 17. Further, a plea of former jeopardy must be grounded on the *same* offense both in law and fact. *State v. Davis,* 223 N.C. 54, 25 S.E. 2d 164.

The bill of indictment in the instant case charges the defendant with accessory before the fact of armed robbery in the general words of the statute, without any factual averments as to the identity of the victim, the property taken, or as to the manner or method in which defendant "counseled, incited, induced, procured and encouraged the principal felons." It is apparent that if the principal felons had committed more than one armed robbery in Mecklenburg County on 3 December 1966, defendant would be unable upon a subsequent prosecution to show that the latter prosecution was for the same offense as charged in the instant bill of indictment.

In the case of *State v. Banks,* 247 N.C. 745, 102 S.E. 2d 245, the Court stated:

> ". . . '. . . while it is a general rule prevailing in this State than an indictment for a statutory offense is sufficient if the offense be charged in the words of the statute, *S. v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149, the rule is inapplicable where the words of the statute do not in themselves inform the accused of

> the specific offense of which he is accused so as to enable him to prepare his defense or plead his conviction or acquittal as a bar to further prosecution for the same offense, as where the statute characterizes the offense in mere general or generic terms, or does not sufficiently define the crime or set forth all its essential elements. In such situation the statutory words must be supplemented by other allegations which so plainly, intelligible and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged.' See also *S. v. Helms, ante* 740."

Since the bill of indictment which attempts to charge accessory before the fact of armed robbery does not sufficiently particularize and identify the crime charged so as to protect the defendant from subsequent prosecution for the same offense, we hold that the bill of indictment is fatally defective, and the judgment entered thereon is arrested.

However, defendant is not entitled to discharge. The State may put him on trial under a proper bill of indictment if it so elects.

The only assignment of error brought forward and argued in defendant's brief is that defendant did not receive a fair and impartial trial as guaranteed by Article I, Sec. 17, of the North Carolina Constitution, in that defendant was convicted upon the testimony of alleged accomplices who had pleaded guilty and whose sentences were withheld until after defendant's trial.

The court follows the rule that the unsupported testimony of an accomplice is sufficient to support a conviction if it satisfies a jury of defendant's guilt beyond a reasonable doubt. *State v. Terrell,* 256 N.C. 232, 123 S.E. 2d 469; *State v. Saunders,* 245 N.C. 338, 95 S.E. 2d 876; *State v. Tilley,* 239 N.C. 245, 79 S.E. 2d 473.

The fact that the witnesses Land and Moore had pleaded guilty was clearly brought to the attention of the jury. There is no evidence that any threats or promises of reward were made to the witnesses. The jury, after hearing all the evidence, returned verdicts of guilty as charged.

Since the presumption is in favor of the regularity of the trial below, the burden is on the defendant to show error that affected the result adversely to him. *State v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508; *State v. Shepherd,* 230 N.C. 605, 55 S.E. 2d 79.

It is a settled principle of law in this State that until a term of court expires the judgment of the court remains *in fieri* and the judge may modify, change, alter, amend, or substitute another judgment for a prior judgment entered during that term. *State v. Gross,*

230 N.C. 734, 55 S.E. 2d 517; *State v. Godwin,* 210 N.C. 447, 187 S.E. 560.

Defendant's contention that his constitutional rights were impaired because the judge withheld sentencing of his alleged accomplices until after they testified at his trial is an obvious fallacy. The judge has full power in the exercise of his discretion not only to change and modify the judgment of the court entered during the term, but to hear *all* of the evidence in open court, both as to the facts in the case, the character and conduct of the parties, including their demeanor and conduct on the witness stand if they elect to testify, before imposing sentence on any of the defendants. This power is necessary in order for the judge to wisely administer appropriate justice.

Upon the arrest of judgment as to the charge of accessory before the fact of armed robbery, the sentence imposed on the charge of accessory after the fact of armed robbery becomes indefinite, since it originally was to commence at the expiration of the sentence imposed for accessory before the fact of armed robbery. The case as to accessory after the fact of armed robbery is remanded to the Superior Court of Mecklenburg County to the end that proper judgment may be entered for modification as to the time when the sentence shall begin.

As to the charge of accessory before the fact of armed robbery: Judgment arrested.

As to the charge of accessory after the fact of armed robbery: Error and remanded for modification of sentence.

STATE v. NEILL McKAY ROSS.

(Filed 22 November, 1967.)

1. Embezzlement § 1—

The crime of embezzlement is solely statutory.

2. Statutes § 10—

Statutes creating criminal offenses must be strictly construed.

3. Statutes § 5—

The doctrine of *ejusdem generis* that where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be restricted by the particular designations so as to include only things of the same kind, character and nature as those spe-

cifically enumerated, is a rule of construction to be used only as an aid in ascertaining the legislative intent.

4. Statutes § 5—

Words of a statute having a clear and definite meaning cannot be ignored in its construction, since it must be presumed that the General Assembly used the words advisedly to express its intent.

5. Embezzlement § 1—

A commissioner who, under authority of and subject to orders of the clerk of the Superior Court, receives and handles money and disburses it to those entitled thereto under the law has substantially the same status as a court-appointed receiver, and as such is a fiduciary in the same sense that a receiver is a fiduciary, and therefore, under the doctrine of *ejusdem generis*, comes within the statutory definition of those who may be prosecuted for embezzlement of funds coming into their hands in trust.

APPEAL by the State of North Carolina from *Braswell, J.*, August 1967 Session of HARNETT.

At said August 1967 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 Neill McKay Ross, late of the County of Harnett, on the 5th day of March, in the year of our Lord one thousand nine hundred and sixty-seven, with force and arms, at and in the County aforesaid, was the Commissioner and Fiduciary of the Clerk of the Superior Court of Harnett County and as such Commissioner and Fiduciary as aforesaid, was then and there entrusted by the said Clerk of Superior Court of Harnett County, to receive in accordance with his commission Seven Thousand and Seven Hundred Twenty-two and 90/100 Dollars for the said Clerk of Superior Court of Harnett County and that being so employed, commissioned and entrusted as aforesaid, the said Neill McKay Ross then and there did receive and take into his possession and have under his trust and care, for and on account of the said Clerk of Superior Court of Harnett County, and Harnett County certain property, to wit: Seven Thousand Seven Hundred Twenty-two and 90/100 Dollars, and that afterwards, to wit, on the day and year aforesaid, in the county aforesaid, he, the said Neill McKay Ross (then and there being of the age of sixteen years and more), knowingly, willfully, fraudulently, corruptly, unlawfully and feloniously did embezzle and convert to his own use, and did take, make away with and secrete with intent to embezzle and fraudulently convert to his own use, the Seven Thousand Seven Hundred Twenty-two and 90/100 Dollars so received by him as aforesaid and then and there belonging to Harnett County against the form of the statute in such case made and provided and against the peace and dignity of the State."

Defendant, before pleading thereto, moved, through his counsel, to quash said bill of indictment; and the court, being of the opinion the bill "does not allege a crime," allowed the motion, quashed the bill and dismissed the action.

The State excepted and appealed.

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

Bryan & Bryan and D. K. Stewart for defendant appellee.

BOBBITT, J. The crime of embezzlement, unknown to the common law, was created and is defined by statute. *State v. Thornton,* 251 N.C. 658, 111 S.E. 2d 901, and cases cited.

Statutes creating criminal offenses must be strictly construed. 4 Strong, N. C. Index, Statutes § 5, p. 179. This rule has been applied with vigor in the construction of our embezzlement statute. *State v. Whitehurst,* 212 N.C. 300, 193 S.E. 657; *State v. Eurell,* 220 N.C. 519, 17 S.E. 2d 669; *State v. Blair,* 227 N.C. 70, 40 S.E. 2d 460.

In *State v. Whitehurst, supra,* Stacy, C.J., set forth the history, including the successive amendments, of our embezzlement statute. The statute, then codified as C.S. 4268, was amended in 1939 so as to apply to "any receiver, or any other fiduciary" (Public Laws of 1939, Chapter 1), and in 1941 so as to apply to a "bailee" (Public Laws of 1941, Chapter 31). The words "unincorporated association or organization" were incorporated in G.S. 14-90 by Chapter 819, Session Laws of 1967.

The statute, now codified as G.S. 14-90, provides: "If any person exercising a public trust or holding a public office, or any guardian, administrator, executor, trustee, *or any receiver, or any other fiduciary,* or any officer or agent of a corporation, or any agent, consignee, clerk, *bailee* or servant, except persons under the age of sixteen years, of any person, shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or shall take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable security whatsoever belonging to any other person or corporation, *unincorporated association or organization* which shall have come into his possession or under his care, he shall be guilty of a felony, and shall be punished as in cases of larceny." (Our italics.)

In *State v. Ray,* 207 N.C. 642, 178 S.E. 224, the defendant, appointed commissioner in a special proceeding, sold lands and collected the purchase price. He was indicted, tried and convicted on a two-count bill, each count charging that he embezzled a portion of the purchase money, to wit, the sum of $2,955.00. The first count charged that defendant received the $2,955.00 "as commissioner of the Superior Court of Orange County, and as agent of the Superior Court of Orange County, and the aforesaid parties," and the second count charged that he received it "as agent and attorney of J. L. Phelps and others." The opinion states: "(T)he status of a commissioner appointed to sell land is not that of a trustee, generally speaking, nor of an agent, either of the court or of the parties to the suit. . . . The defendant could not be convicted on the second count as agent or attorney, but only on the first as commissioner. C.S. 4268. This distinction was not pointed out to the twelve. Indeed, the jury was left with the impression that both counts of the bill were valid, and that a conviction might be had on either or both." The opinion continues: "Whether the defendant had embezzled any part of the funds which came into his hands as commissioner, and not as agent or attorney, was the issue arising on the evidence. (Citations.) This, and this alone, was the question to be determined by the jury. (Citation.)" A new trial, limited to the first count, was awarded. The opinion and decision assume the first count charged the crime of embezzlement.

In *State v. Whitehurst, supra,* it was held that "a receiver of an insolvent corporation (was) not within the terms of the statute." While noting the rule of strict construction did not require that the statute "be stintingly or even narrowly construed," it was said the statute could not "be extended by construction to persons not within the classes designated." The opinion states: "A receiver is usually denominated an officer of the court — an 'arm' or 'hand' of the court — but he holds no public office. (Citations.) Nor is he engaged in exercising a public trust. (Citations.) He is not an agent within the meaning of the embezzlement statute. (Citation.) . . . Nor is he a trustee in the sense this term is used in the statute. The property he administers is said to be *in custodia legis.* . . . It may be noted, however, that the offense here charged apparently took place prior to the amendment of 1931, interpolating the word 'trustee,' and the term is not used in the indictment." The opinion states that *State v. Ray, supra,* "wherein a commissioner to sell land was charged with embezzlement, is not an authority in support of the present indictment. There the bill was not challenged by demurrer or motion to quash, and its sufficiency was not mooted. The case was made to

turn on the inadequacy of the court's charge to the jury." The opinion closes with this suggestive comment: "Whether the scope of the statute should again be enlarged so as to include receivers is a legislative rather than a judicial question."

State v. Whitehurst, supra, was decided November 3, 1937. The General Assembly of 1939, by its enactment of Chapter 1, Public Laws of 1939, amended C.S. 4268 by adding after the comma following the word "trustee" and before the words "or any officer," the following: "or any receiver, or any other fiduciary." The manifest purpose of the 1939 amendment was *to enlarge the scope* of the embezzlement statute. The words, "or any other fiduciary," show clearly the General Assembly did not intend to restrict the application of the 1939 amendment to receivers.

Defendant, in his brief, states: "A commissioner is not included by name, and therefore unless it *(sic)* is included as being 'or any other fiduciary,' it is not within the statute." Citing the rule of *ejusdem generis,* he contends that "commissioner is not in the same class as guardian, administrator, executor, trustee, or receiver, which are the words preceding 'or any other fiduciary.' "

"In the construction of statutes, the *ejusdem generis* rule is that where general words *follow* a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated. The rule does not necessarily require such limitation in scope of the general words or terms. It is but a rule of construction to aid in ascertaining and giving effect to the legislative intent where there is uncertainty." *State v. Fenner,* 263 N.C. 694, 697-698, 140 S.E. 2d 349, 352.

It is noteworthy that a guardian, an administrator and an executor are fiduciaries whose duties are prescribed by law and who act under the supervision and orders of the court. A "trustee' is a fiduciary. Whether the word "trustee" in the embezzlement statute refers only to a court-appointed trustee need not be determined. A receiver, as stated in *State v. Whitehurst, supra,* is an "arm" or "hand" of the court.

The words, "or any other fiduciary," were put into the embezzlement statute simultaneously with the words, "or any receiver," and cannot be ignored. It must be presumed the General Assembly used the words of the statute advisedly and thereby expressed its intent. 50 Am. Jur., Statutes § 227, p. 212.

One who, under authority of and subject to the orders of the clerk of the superior court, is commissioned to collect, receive and handle

money, and to disburse it to those entitled thereto under the law, has substantially the same status as a court-appointed receiver. Such commissioner is a fiduciary in the same sense a receiver is a fiduciary. See definitions of "fiduciary" in 36A C.J.S., pp. 381-389. Special confidence and trust is imposed in him. In our opinion, and we so hold, the status of such commissioner is "of the same kind, character and nature" as the status of a receiver. Hence, the rule of *ejusdem generis* does not conflict with but rather tends to support our conclusion that the embezzlement statute, subsequent to the 1939 amendment, includes such commissioner.

In *State v. Eurell, supra,* it was held that, prior to the amendment of 1941, the portion of C.S. 4268 referring to "any agent, consignee, clerk or servant," did not include a "bailee." The indictment charged defendant was "the agent, consignee, clerk, employee and servant of Lessie Carr" and as such had embezzled the money thus entrusted to him. It was stated that "(t)he cause was tried upon the theory that the contract the evidence for the State tended to establish constituted the defendant an agent." The words, "or any other fiduciary," do not appear in the portion of the statute pertinent to that case. Nor does the indictment contain any reference thereto.

Although it might well have set forth with greater particularity the facts concerning the proceedings in which defendant was appointed commissioner, we hold the indictment sufficient to withstand defendant's motion to quash. Hence, the judgment of the court below is reversed.

Reversed.

STATE OF NORTH CAROLINA v. FRED S. PARDON.

(Filed 22 November, 1967.)

1. Criminal Law § 166—

Exceptions and assignments of error not brought forward in the brief are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court.

2. Constitutional Law § 36; Disorderly Conduct and Public Drunkenness—

Prior to the enactment of Chapter 1256, Session Laws of 1967, a sentence of eight months imprisonment, imposed upon a third conviction of public drunkenness within a twelve-month period, was within the two-year maximum sentence permitted for a misdemeanor, and did not constitute cruel and unusual punishment in the constitutional sense.

3. Disorderly Conduct and Public Drunkenness—

Chapter 1256, Session Laws of 1967, rewriting G.S. 14-335, did not repeal the public drunkenness statute, but had the effect of reducing and making uniform throughout the State the maximum punishment for the offense of public drunkenness, and of establishing chronic alcoholism as an affirmative defense to the offense.

4. Criminal Law § 1—

It is a general rule that where a criminal statute is expressly and unqualifiedly repealed after a crime has been committed but before a final judgment has been entered upon conviction, no punishment can be imposed.

5. Criminal Law § 134—

A judgment imposed in a criminal case is not a final judgment as long as the case is pending on appeal.

6. Constitutional Law § 35—

An attempt by statute to increase the punishment for a criminal act committed before the enactment of the statute is invalid as *ex post facto* legislation.

7. Same; Criminal Law § 138—

Where the law under which a defendant was convicted is amended pending appeal so as to reduce the punishment that could be imposed under the prior law, the defendant is entitled to mitigation of sentence in conformity with the new law.

8. Same; Disorderly Conduct and Public Drunkenness— Amendment of statute pending defendant's appeal held to inure to defendant's benefit.

Pending an appeal from a judgment imposing a term of eight months' imprisonment upon defendant's plea of guilty to a charge of public drunkenness, such judgment constituting the fourteenth conviction of defendant of the offense within a twelve-month period, the Legislature enacted Chapter 1256, Session Laws of 1967, which rewrote G.S. 14-335 by decreasing the punishment for a second, or subsequent, conviction of public drunkenness within a twelve-month period, and, in addition, by creating the defense of chronic alcoholism. *Held:* Defendant is entitled, at the least, to a mitigation of sentence in conformity with Chapter 1256, but, in view of evidence at the trial of this case tending to show that the defendant is a chronic alcoholic, he is entitled to a trial *de novo* so that he may have an opportunity to plead and prove the defense of chronic alcoholism.

APPEAL by defendants from *Johnston, J.*, 1 May 1967 Non-Jury Mixed Session of FORSYTH.

In a warrant issued by the Municipal Court of the City of Winston-Salem, defendant was charged with public drunkenness on 13 April 1967, the offense being his fourteenth within a period of twelve months. Upon his plea of guilty, defendant was sentenced to ninety days in prison. He appealed to the Superior Court, where he again pleaded guilty.

The judge examined defendant, who was not represented by counsel, for the purpose of determining what sentence to impose. His examination and investigation revealed that defendant is a chronic alcoholic, who has been convicted of public drunkenness in excess of fifty times. He has been in institutions for alcoholics in Missouri and Kentucky. Defendant's record also included numerous convictions of traffic violations and larceny, vagrancy, gambling, trespass, and forgery, as well as a number of other offenses. At the time he was arrested for public drunkenness on 13 April 1967, he was a patient at the Veterans Hospital in Durham but was at home on "a weekend pass." He requested the court not to send him to prison but to commit him to "an institution" for an indefinite period of time. The court, being informed that the Veterans Hospital would not readmit defendant and being of the opinion that a term in prison was "all that is left to do," sentenced defendant to eight months in jail. From this judgment defendant appeals.

T. W. Bruton, Attorney General, and Ralph Moody, Deputy Attorney General, for the State.

Charles Lawrence James for defendant appellant.

SHARP, J. In his brief, appellant brings forward only his exception to the eight-months' sentence. He thereby abandoned all others. Rule 28, Rules of Practice in the Supreme Court of North Carolina.

At the time defendant was sentenced on 2 May 1967, G.S. 14-335(11) (1965 Cumulative Supplement) made the third offense of public drunkenness within any twelve-months' period a general misdemeanor punishable within the discretion of the court. On that date, a sentence of eight months, being within the two-year maximum sentence permitted for misdemeanors, was not cruel and unusual punishment. *State v. Robinson,* 271 N.C. 448, 156 S.E. 2d 854; *State v. Driver,* 262 N.C. 92, 136 S.E. 2d 208; *State v. Farrington,* 141 N.C. 844, 53 S.E. 954. While the appeal in this case was pending, however, the legislature by Chapter 1256 of the Session Laws of 1967, rewrote G.S. 14-335 to make the punishment for public drunkenness uniform throughout the State. In doing so, it reduced the maximum prison sentence of thirty days to twenty days for the first offense. For any subsequent offense within a twelve-months' period, it made the punishment a fine of not more than $50.00 or imprisonment of not more than twenty days in the county jail or commitment to the custody of the Director of Prisons for an indeterminate sentence of not less than thirty days and not more than six months. It also made chronic alcoholism an affirmative defense to the charge

of public drunkenness and empowered the court to retain jurisdiction over the alcoholic for a period of two years for the purpose of supervising his treatment for the disease.

The effect of Chapter 1256 was not to repeal the statute against public drunkenness, G.S. 12-4, but — as of 6 July 1967 — to reduce and make uniform the maximum punishment for the offense. See *Houston v. State,* 143 Tex. Crim. 460, 158 S.W. 2d 1004. The question posed by this appeal, therefore, is whether the changes in the law, which occurred while defendant's appeal was pending, inure to his benefit.

The rule is that when a criminal statute is expressly and unqualifiedly repealed after the crime has been committed, but before *final judgment* — even though after conviction —, no punishment can be imposed. *State v. Perkins,* 141 N.C. 797, 53 S.E. 735; *United States v. Chambers,* 291 U.S. 217, 78 L. Ed. 763, 54 S. Ct. 434. A judgment is not final as long as the case is pending on appeal. The headnote in *State v. Nutt,* 61 N.C. 20, succinctly states the rule: "If, pending an appeal in a criminal case, the statute authorizing the indictment is repealed, judgment will be arrested." In *State v. Williams,* 97 N.C. 455, 2 S.E. 55, the defendant was convicted in September 1886 of selling spirituous liquor within five miles of Bethel Church and fined five dollars. From this judgment he appealed to the Supreme Court. On 7 March 1887, while the appeal was pending, the legislature narrowed the limits of the prohibited territory to two miles from that church. In ordering the judgment arrested, Smith, C.J., speaking for the Court, stated the reason for the rule:

> "So that it is not criminal to do now what was done before the repeal and whereof he is convicted, and no sentence upon such a finding can be pronounced. The act punished must be *criminal when judgment is demanded,* and authority to render it must still reside in the court. The recent statute has no saving clause, continuing it in force until pending prosecutions are ended, and in withdrawing the power, the act arrests all further action in the matter." *Id.* at 456, 2 S.E. at 56.

Accord, In Re Estrada, 63 Cal. 2d 740, 48 Cal. Rptr. 172, 408 P. 2d 948; 24 C.J.S. Criminal Law § 1544 (1961).

Statutes are frequently adopted which change the degree and kind of punishment to be imposed for a criminal act. Where the punishment is increased, and the old law is not expressly or impliedly repealed by the new, which is prospective only in its application, punishment will be imposed under the prior law. *State v. Mull,* 178 N.C. 748, 101 S.E. 89; *State v. Broadway,* 157 N.C. 598, 72 S.E. 987; *State v. Perkins, supra; State v. Putney,* 61 N.C. 543. Any statutory

attempt to increase the punishment of a crime committed before its enactment is, of course, invalid as *ex post facto* legislation. 21 Am. Jur. 2d Criminal Law § 578 (1965). In the words of Chase, Justice, *ex post facto* laws are:

> "1st. Every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." *Calder v. Bull,* 3 Dall. 386, 390, 1 L. Ed. 648, 650.

"The rule is, not that the punishment cannot be *changed,* but that it cannot be *aggravated.*" *State v. Kent,* 65 N.C. 311, 312; 16 Am. Jur. 2d Constitutional Law §§ 400, 403 (1964). See *Sekt v. Justice's Court,* 26 Cal. 2d 297, 159 P. 2d 17; 167 A.L.R. 833. The legislature may always *remove* a burden imposed upon citizens for State purposes. And, when this occurs pending an appeal, absent a saving clause, a manifest legislative intent to the contrary, or a constitutional prohibition, the appellate court must give effect to the new law. *State, use of Mayor & C. C. of Balto., vs. Norwood, et. al.,* 12 Md. 195. See *State v. Williams,* 45 Am. Dec. 741 (S.C.), 2 Richardson's Law 418; *Moorehead v. Hunter,* 198 F. 2d 52 (10th Cir.) (*habeas corpus* proceeding). Since the judgment is not final pending appeal "the appellate court must dispose of the case under the law in force when its decision is given, even although to do so requires the reversal of a judgment which was right when rendered." *Gulf, Col. & S. F. Ry. v. Dennis,* 224 U.S. 503, 506, 56 L. Ed. 860, 861, 32 S. Ct. 542, 543.

An amendatory act which imposes a lighter punishment can be constitutionally applied to acts committed before its passage. *In re Estrada, supra.* After a defendant, who did not appeal, has begun serving his sentence, a change or repeal of the law under which he was convicted does not affect his sentence absent a retrospective provision in the statute. Orfield, Criminal Procedure from Arrest to Appeal 589 (1947). When, however, the law under which a defendant was convicted is amended pending appeal so as to mitigate the punishment, it is logical to assume that the legislature intended the new punishment, which it now feels fits the crime, to apply whenever possible. This is especially true when the legislation is enacted

for the purpose of combatting alcoholism and rehabilitating alcoholics. As Peters, J., speaking for the court in *In Re Estrada, supra,* said:

> "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. . . . [T]o hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." 63 Cal. 2d 740, 745, 48 Cal. Rptr. at 175, 408 P. 2d at 951.

In *In Re Estrada, supra,* the Supreme Court of California reconsidered and disapproved the four-to-three decision in *People v. Harmon,* 54 Cal. 2d 9, 4 Cal. Rptr. 161, 351 P. 2d 329, that the punishment in effect when a crime is committed prevails. In doing so it relied upon the rationale forcefully expressed in *People v. Oliver,* 1 N.Y. 2d 152, 151 N.Y.S. 2d 367, 134 N.E. 2d 197:

> "This application of statutes reducing punishment accords with the best modern theories concerning the functions of punishment in criminal law. According to these theories, the punishment or treatment of criminal offenders is directed toward one or more of three ends: (1) to discourage and act as a deterrent upon future criminal activity, (2) to confine the offender so that he may not harm society and (3) to correct and rehabilitate the offender. There is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution. . . . A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law. Nothing is to be gained by imposing the more severe penalty after such a pronouncement; the excess in punishment can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance. As to a mitigation of penalties, then, it is safe to assume, as the modern rule does, that it was the legislative design that the lighter penalty should be imposed in all cases that subsequently reach the courts." *Id.* at 160, 151 N.Y.S. 2d at 373, 134 N.E. 2d at 201-02.

In addition to mitigating the punishment, the provisions of Chapter 1256, G.S. 14-335(c), make chronic alcoholism a defense to the *crime* of public drunkenness. Thus, an accused who is able to establish this affirmative defense exonerates himself of crime and subjects himself to enforced rehabilitative treatment. That defendant is, and was at the time of his trial, a chronic alcoholic is unquestioned on the record before us. If he were not, however, he would be entitled to have his sentence decreased in conformity with G.S. 14-335 (1967). *A fortiori,* notwithstanding his plea of guilty, under the facts here disclosed, he is also entitled to the benefit of the change in the law which would allow him to prove that his conduct on 13 April 1967 was not criminal.

The judgment below is vacated, and the case is remanded to the Superior Court for a trial *de novo* in which defendant will be entitled to prove, if he can, the affirmative defense of chronic alcoholism.

New trial.

RONALD JEROME ALMOND, BY HIS NEXT FRIEND, HOYLE JEROME ALMOND, v. KAREN LYNN BOLTON, BY HER GUARDIAN AD LITEM, WILLIAM BOLTON.

(Filed 22 November, 1967.)

1. Automobiles § 79— Evidence held to disclose contributory negligence in passing stationary truck on its right side at intersection.

Plaintiff's evidence tended to show that he was traveling on a two-lane highway behind a truck, that the truck stopped at an intersection with its lights blinking for a left turn, indicating it could not proceed because of traffic approaching from the opposite direction, that plaintiff, driving a motorcycle, passed to the right of the truck, which obstructed his view so that he did not see defendant's vehicle, which had approached from the opposite direction and had started a left turn at the intersection, until too late to avoid colliding with it. *Held:* Even conceding negligence on the part of defendant in violating G.S. 20-153(a) and G.S. 20-154, the evidence discloses contributory negligence as a matter of law on the part of plaintiff. G.S. 20-149(a).

2. Automobiles § 8—

The duty to keep a proper lookout requires increased vigilance when the danger is increased by conditions obstructing the motorist's view.

APPEAL by plaintiff from *Johnston, J.,* at the 8 May 1967 Civil Session of the Superior Court of STANLY County.

The plaintiff alleged that on 7 August 1965 he was operating his 1965 Honda motorcycle in an eastern direction on Highway 27 near its intersection with Hennings Drive in Albemarle; that Highway

27 had one lane for eastbound traffic and one lane for westbound traffic; that the road was straight and the pavement dry; that as he approached and entered the intersection the defendant suddenly made a left turn from the westbound traffic lane in her 1958 Anglia automobile; that the vehicles collided, he was thrown from his motorcycle and suffered personal injuries, for which he sought to recover $25,000.

The defendant denied negligence and claimed contributory negligence of the plaintiff in that the plaintiff overtook and passed on the right a truck which was standing at the intersection giving a left-turn signal; that the truck blocked the plaintiff's view, and that he came into the intersection without seeing her car which was making a left turn with its left turn signals operating; that he failed to yield the right-of-way to the defendant, and that his alleged negligence was a proximate cause of his injuries.

The plaintiff testified that as he approached the intersection, the truck was sitting in front of him with its blinkers indicating a left turn and its brake lights on. The plaintiff drew a diagram which indicated that he passed the truck on his right, entered the intersection and struck the Anglia in the side as it was making a left turn.

On cross examination, the plaintiff said there was a solid double yellow line leading up to the intersection; that when he first saw the truck it appeared to be slowing down and was already signaling for its left turn; and that when it stopped about 150 to 200 feet ahead of him, he "knew the likelihood for its stopping there was traffic coming the other way or it would have made a left turn, either that or it was stalled." He said he passed the truck on the right and was in front of the door of the truck when he first saw the car. "The truck blocked my view as I started to go around it, and it wasn't until I got alongside the truck that I was able to see what traffic was either in the intersection or just east of it. . . . The first time I saw the car it had its left turn signal on and was starting to cut across the center line of # 27 on the bridge. . . . I was not able to see the car until I was about the front of the truck, and before that the truck blocked my view . . . of oncoming traffic until I got up around the front of it. And I passed the truck before I could see what was ahead of me in the oncoming lane."

The plaintiff offered no other evidence, and at the close, the defendant's motion for judgment as of nonsuit was allowed. The plaintiff appealed.

Carl W. Howard, Attorney for plaintiff appellant.

Carpenter, Webb & Golding by John G. Golding, Attorneys for defendant appellee.

PLESS, J. The plaintiff contends that the defendant was negligent in that she violated G.S. 20-153(a) which requires that in making a left turn a motorist shall pass beyond the center of the intersection before turning the vehicle to the left. He claims that Miss Bolton "angled" across the intersection and that this was a proximate cause of the collision and the injuries he sustained. But even had she complied with this statute, the plaintiff came from concealment behind the truck at a speed of twenty miles per hour, and he could not have stopped his Honda within the short distance available.

The plaintiff also claims that the defendant violated G.S. 20-154 in making a left turn without first seeing if it could be done in safety. In *McNamara v. Outlaw*, 262 N.C. 612, 138 S.E. 2d 287, the Court said: "The provisions of G.S. 20-154(a) do not require infallibility of a motorist, and do not mean that he cannot make a left turn upon a highway 'unless the circumstances be absolutely free from danger' "; and Miss Bolton was not required to foresee that the plaintiff would violate G.S. 20-149(a) by passing the truck on its right.

The plaintiff's contentions are not convincing, but even assuming his evidence to be sufficient to withstand the nonsuit motion, the plaintiff's admissions establish his own contributory negligence to an impressive degree.

He violated G.S. 20-149(a) in passing the truck on the right. It provides that the overtaking driver "shall pass at least two feet to the left" of the other vehicle. While it would have been negligence for the plaintiff to pass on the left, which would have required him to cross a double yellow line, the collision probably would not have resulted, since from the left side of the truck he could have seen the defendant's oncoming car. He admitted that the truck was giving a left turn signal and was stopped, which indicated that it could not proceed because of traffic coming in the opposite direction. With this warning, the plaintiff nevertheless passed the truck, which was of average truck size, and entered the intersection at a speed of some 20 miles an hour when his view of the highway ahead had been completely obstructed as he traveled the length of the truck. Analyzed, this means that he could not possibly keep a proper lookout and that he entered the intersection under these conditions. In doing so, he did that which a person of ordinary prudence, or of any prudence, would not have done.

The duty to keep a proper lookout requires increased vigilance when the danger is increased by conditions obstructing the motorist's view. 1 Strong, N. C. Index 2d, Automobiles, § 8. In *Hines v. Brown*, 254 N.C. 447, 119 S.E. 2d 182, it was held that "[t]he dark-

ness of the night should have increased the traveler's vigilance." It has also been held that fog may increase the hazard with the same requirement of increased caution. *Moore v. Plymouth,* 249 N.C. 423, 106 S.E. 2d 695.

The plaintiff voluntarily and unlawfully created a situation that caused his view to be obstructed and which required extra vigilance on his part. He was guilty of contributory negligence as a matter of law which justified the action of the Judge below, and the ruling of the Court in allowing the motion for nonsuit was correct.

No error.

NANCY E. JENKINS v. ALLEN GAINES.

(Filed 22 November, 1967.)

1. Appeal and Error § 31—

An assignment of error to an excerpt from the charge containing a number of legal propositions, without pointing out any specific particulars of the charge as erroneous, must fail if any one of the propositions is correctly stated.

2. Automobiles § 19—

An instruction in this case to the effect that if plaintiff had the green light when she entered the intersection she had the right to proceed unless defendant, approaching along the intersecting street, had the green light and had already entered and was in the intersection, in which event it would be plaintiff's duty to yield the right of way, *held* without error, and the court's further charge on the question of proximate cause as related to the variant factual situations presented by the evidence is correct.

APPEAL by plaintiff from *Patton, E.J.,* May 1, 1967 Schedule D Civil Session, MECKLENBURG Superior Court.

The plaintiff instituted this civil action against the defendant to recover for the personal injuries and property damage she sustained as a result of a collision between the 1966 Chevelle automobile she owned and was driving and the 1964 Chevrolet automobile which the defendant owned and was driving.

The collision occurred at approximately 6:43 on the morning of September 13, 1966 at the intersection of West Trade Street and South Summit Street in the City of Charlotte. West Trade is a four lane street, the two south lanes marked for traffic east; the two north lanes marked for traffic west. South Summit is a two lane street, the east lane marked for traffic north; the west lane marked for traffic south. Synchronized electric traffic control signals alternately displaying green, yellow, and red lights controlled traffic at the in-

tersection. The plaintiff approached the intersection driving east on the inside lane of Trade Street. The defendant approached the intersection driving north on Summit Street. The plaintiff testified: ". . . I came down Tuckaseegee Road onto Trade Street and was in the left hand lane and as I came up to the light, this bus was parked beside me waiting for the light. As I came up to the light, my light turned from red to green and I just let off my brake and kept going. I did not completely stop and I couldn't see Mr. Gaines' car coming down Summit because of the bus beside me and as I got right here at the bus, I saw the front of his car and couldn't stop and I hit him. . . ." The defendant testified: ". . . The traffic light was still green when I entered the intersection from South Summit Street. The only traffic I saw to my left on Trade Street as I entered the intersection was a city bus. . . . I was making my turn and this car came on the other side of the bus and struck me. . . . Her left front struck my left side about the driver's side. . . ."

A passenger on the bus testified the light changed to caution as the defendant's vehicle crossed the line at the intersection. The bus had not moved when the cars collided. The investigating officer testified the collision occurred near the center of the intersection.

Both parties offered evidence. The Court submitted three issues — negligence, contributory negligence and damages. The jury answered the first issue "No", thereby finding the defendant was not negligent. The other issues were not answered. The Court entered judgment in favor of the defendant and dismissed the action. The plaintiff appealed.

Joel L. Kirkley, Jr., for plaintiff appellant.

J. Donnell Lassiter; Kennedy, Covington, Lobdell & Hickman by Charles V. Tompkins, Jr., for defendant appellee.

HIGGINS, J. The plaintiff noted only six exceptions during the trial. Each is the subject of a separate assignment of error. Assignments 1 and 2 bracket and designate as objectionable more than a page of the Court's charge. In each instance a number of legal propositions are included and discussed. Many, if not all, are entirely free of objection. As presented, the objection is broadside and does not conform to Rule 21, *Rules of Practice in the Supreme Court*, 254 N.C. 785 (803, *et seq.*). The rule is stated in *Doss v. Sewell*, 257 N.C. 404 (409), 125 S.E. 2d 899: ". . . 'This exception falls under the condemnation of the necessary rule of appellate practice that an exception must point out some specific part of the charge as erroneous, and that an exception to a portion of a charge embracing a number of propositions is insufficient if any one of the propositions

is correct.' *Powell v. Daniel,* 236 N.C. 489, 73 S.E. 2d 143, citing many cases." *Williams v. Boulerice,* 269 N.C. 499, 153 S.E. 2d 95; *In Re Adams Will,* 268 N.C. 565, 151 S.E. 2d 59; *Balint v. Grayson,* 256 N.C. 490, 124 S.E. 2d 364.

Assignment of Error 3 challenges the Court's instruction that if the plaintiff had the green light when she entered the intersection, she had the right to proceed through unless the defendant, in obedience to a green light, had already entered and was in the intersection, in which event it would be her duty to yield the right-of-way. The part of the charge objected to was addressed to the issue of plaintiff's contributory negligence and the circumstances under which her negligence might be one of the proximate causes of the collision between the automobiles. The jury did not reach the issue of contributory negligence. We do not perceive any valid objection the plaintiff has to that part of the charge challenged by Assignment 3.

The fourth assignment relates to the proximate cause of the accident. The Court carefully charged as to the legal rights of each of the parties in traversing the intersection and gave instruction as to applicable law to the different factual situations disclosed by the evidence. The plaintiff's evidence tended strongly to indicate at least as she crossed the line into the intersection the light had changed to green or was in the act of so changing. She admitted she did not stop. The city bus was parked on the outside lane. The driver intended to proceed through the intersection when the green light appeared. However, before the bus moved, the plaintiff passed it and struck the defendant's vehicle.

The defendant's evidence tended to show that the light was green for him; that he saw the bus stopped on a red light, but did not see plaintiff until she passed the bus and struck his vehicle in the intersection. The jury found the defendant was not negligent. The plaintiff does not challenge the sufficiency of the evidence to support that finding.

Assignments 5 and 6 are formal — 5 is addressed to the Court's refusal to set the verdict aside, and 6 is addressed to the signing of the judgment. The record does not disclose any valid reason in law why the verdict and judgment should be disturbed.

No error.

DEWITT CARPENTER v. STATE.

(Filed 22 November, 1967.)

1. Constitutional Law § 32; Criminal Law § 181— Where record discloses that defendant charged with capital offense was not represented by counsel, new trial must be ordered upon post-conviction hearing.

Where the record discloses that a 17 year old defendant was called upon to plead to an indictment charging him with burglary in the first degree (prior to the statute permitting the jury to recommend life imprisonment for such offense), and that a plea of guilty to second degree burglary was entered on his behalf by an able attorney who had talked with the petitioner only for about five minutes for the sole purpose of explaining to him, at the request of the presiding judge, the difference between the various pleas which might be entered upon such an indictment, that the attorney testified positively that he was not appointed to represent defendant and did not consider himself defendant's counsel, *held* to disclose a deprivation of defendant's constitutional right to be represented by counsel, and to require the ordering of a new trial upon a post-conviction hearing. Constitution of North Carolina, Art. I, § 11; Fourteenth Amendment to the Federal Constitution.

2. Criminal Law § 21—

Neither the service of a warrant of arrest on a capital charge nor a preliminary hearing upon the charge is a prerequisite to a valid trial upon a bill of indictment properly returned.

ON *certiorari* to review judgment of *Johnston, J.*, at the 27 March 1967 Session of STANLY, denying the petition of Dewitt Carpenter for post conviction review of the judgment and sentence imposed upon him at the November 1947 Session of Stanly.

The petitioner's petition to the superior court, as amended, alleged that he was sentenced to imprisonment for life at the November 1947 Session of the Superior Court of Stanly County upon his plea of guilty to the offense of second degree burglary. He sought a new trial on the ground that counsel was appointed to represent him at the original trial only a few minutes before the convening of the session of court at which his case was called for trial, and upon the further grounds that he was not given a preliminary hearing, did not have opportunity to summon witnesses, and was questioned numerous times without benefit of counsel.

The petitioner was represented by court appointed counsel at the hearing upon his petition for post conviction relief and in this Court.

Upon the hearing of the petition for post conviction relief, both the petitioner and the State introduced evidence. The superior court adjudged that the petitioner's constitutional rights had not been

violated and that he is lawfully confined in the State Prison System, making findings of fact which may be summarized as follows:

The petitioner was arrested on a warrant charging him with burglary in the first degree and the grand jury returned an indictment charging him with that offense. On 18 November 1947, Rousseau, J., the judge presiding, entered an order which is recorded in the minutes of the court and which provided:

> "It appearing to the court and the court finding as a fact that the above named defendant is charged with the crime of burglary in the first degree; that his case is to be tried at this term of the court; that the defendant is without counsel and states that he is unable to employ counsel to defend him; the court therefore appoints T. B. Mauney, Esq., of the Stanly County Bar, to represent the defendant and prepare his defense in this case and orders that the Board of Commissioners of the County of Stanly pay to the said T. B. Mauney, Esq., for his services so rendered the sum of $100.00."

On 18 November 1947, the petitioner entered a plea of guilty to burglary in the second degree, which plea the State accepted, and the court entered judgment that the defendant be confined in the State Prison for the term of his natural life. The plea was entered for the petitioner by his court appointed counsel, he having explained its consequences to the petitioner. The petitioner was present in the courtroom when the plea of guilty was entered and did not protest its entry. In 1950, while serving such sentence, the petitioner escaped. He was recaptured and escaped again in 1954. This time he remained at liberty until 26 September 1966, when he voluntarily surrendered himself. Since that date he has been confined in the State Prison System under the judgment so entered on 18 November 1947. Until the filing of this petition, the petitioner has at no time protested the disposition of his case at the November 1947 Session of the superior court. Rousseau, J., who presided at the November 1947 Session, the court reporter and most other persons then present in the court have since died, and those persons then present who are still living do not remember the case.

The petitioner excepted to the finding that he had entered a plea of guilty to burglary in the second degree, it being his contention that he did not enter such plea and did not have the effective assistance of counsel in presenting his case. He also excepted to the court's finding that a warrant was served upon him on 11 November 1947, and to the court's conclusion that his constitutional rights had not been violated. These findings and this conclusion are now assigned as error.

The record contains a warrant, proper in form, issued 11 November 1947, for the arrest of the defendant upon the charge of first degree burglary. There is no entry upon the reverse side of this warrant showing service thereof upon the petitioner.

At the November 1947 Session of the Superior Court of Stanly County, the grand jury returned an indictment, proper in form, charging the petitioner with the offense of first degree burglary, it being charged in the indictment that on 29 August 1947, at midnight, he feloniously and burglariously broke and entered the dwelling house of Mary Hurt, then actually occupied by her, with the intent to steal and carry away her goods and chattels.

The evidence introduced by the petitioner at the hearing upon his petition for post conviction relief may be summarized as follows:

On 28 August 1947 (the day before the alleged burglary), he was arrested on another charge and put in jail, where he remained until brought to trial on the burglary charge. The warrant for his arrest on the charge of first degree burglary was not served upon him. He remained in jail three months and did not see an attorney until the day before he was tried, at which time he was seated in the courtroom and, in response to an inquiry from the judge or the solicitor as to how he would plead to the indictment, some man sitting beside him, not known to the petitioner, answered "Not guilty." Thereupon, the petitioner was carried back to jail immediately. The following day he was brought back to the courtroom, seated at a desk beside Mr. Mauney, and asked how he would plead. Mr. Mauney then arose and asked if the State would accept a plea of second degree burglary. The petitioner never discussed his case or the plea of second degree burglary with Mr. Mauney or with any other attorney. He did not give Mr. Mauney the names of any of his witnesses. He talked with Mr. Mauney for only about five minutes. Their entire conversation took place in the courtroom. He remained in prison from 1947 to 1954, at which time he escaped and was absent from the prison until September 1966, when he voluntarily went to the Police Department of the City of High Point and surrendered himself. In the meanwhile, he had gotten married and he wanted to get this matter taken care of as he knew he was not guilty and wanted to get it straightened out. At the time of his trial, he was 17 years of age and had completed the sixth grade. At that time he had never been in a superior court before, but had been sentenced in an inferior court to imprisonment for 90 days for breaking and entering a dwelling house. He did not know how to go about telling a presiding judge that he was not guilty. He did not go into the

house specified in the indictment in the nighttime or at any other time, being in jail at the time of the alleged offense. During the 12 years that he was absent from prison as an escapee, he was arrested two or three times for public drunkenness and fined in each case, but was not tried for or convicted of any other offense.

The State's evidence at the hearing upon the petition for post conviction relief consisted of the testimony of Mr. T. B. Mauney. His testimony, summarized, except as otherwise noted, was as follows:

He was a practicing attorney in Stanly County on 18 November 1947. He has no definite recollection concerning the details of the case of *State v. Carpenter,* but he remembers that Judge Rousseau told him that on the preceding day Carpenter had entered a plea of guilty when arraigned on a first degree burglary charge, and the judge was doubtful as to whether Carpenter realized what he was doing. Judge Rousseau asked Mr. Mauney to talk with Carpenter and explain the various pleas and what the results of each might be. At that time Carpenter was sitting in the courtroom at a table. Mr. Mauney went to the table and explained to Carpenter the differences in the various pleas. According to his recollection, Carpenter told him that on the previous day he had entered a plea of guilty to first degree burglary and would like to change it to a plea of guilty to second degree burglary. Mr. Mauney then asked the solicitor if he would accept such plea and the solicitor "finally agreed that he would do so." Mr. Mauney explained to Carpenter that a plea of guilty to first degree burglary would mean that he would be sentenced to death (this being in 1947), and that a plea of guilty to second degree burglary would mean that Carpenter "would get off at the discretion of the court and could not be sent to the chair." Carpenter said nothing to Mr. Mauney about being not guilty or about wanting any witnesses or not being ready for trial. Mr. Mauney talked with Carpenter about five minutes, nothing whatever being said about the facts of the case. He knew nothing of any order directing that a fee be paid to him for representing Carpenter and did not receive any fee therefor. Specifically, Mr. Mauney testified:

> "I had nothing further to do with the case. I didn't represent him at all, didn't know anything about the facts in the case; I didn't cross examine any witnesses. I had absolutely nothing to do with it except to explain the difference in the various pleas. * * * The judge asked me to do a certain job, and I tried to do what he asked me to do. * * * I wasn't his attorney. I didn't know the man; I had never seen him be-

fore; I wasn't here when he was arraigned the day before, but the judge told me."

Attorney General Bruton, Assistant Attorney General McDaniel and Eugene A. Smith, Trial Attorney, for the State.

Charles P. Brown for petitioner appellant.

PER CURIAM. It is apparent that the petitioner, then a 17 year old boy with a sixth grade education, was called upon to plead to an indictment charging him with a capital offense and that a plea of guilty to second degree burglary was entered on his behalf by an able attorney who had talked with the petitioner for only five minutes and for the sole purpose of explaining to him, at the request of the presiding judge, the difference between the various pleas which might be entered upon such an indictment. The attorney says positively that he was not appointed to represent the petitioner and did not consider himself the petitioner's counsel.

Under these circumstances, it must be deemed that the petitioner was denied the right to counsel guaranteed to him by Article I, § 11, of the Constitution of this State, as well as by the Fourteenth Amendment to the Constitution of the United States, as that amendment is now interpreted by the Supreme Court of the United States. *State v. Pearce,* 266 N.C. 234, 145 S.E. 2d 918; *State v. Simpson,* 243 N.C. 436, 90 S.E. 2d 708; *Hawk v. Olson,* 326 U.S. 271, 66 S. Ct. 116, 90 L. Ed. 61; *Avery v. Alabama,* 308 U.S. 444, 60 S. Ct. 321, 84 L. Ed. 377; *Powell v. Alabama,* 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527. Consequently, upon his petition for post conviction review of the judgment entered against him at the November 1947 Session of the Superior Court of Stanly County, the superior court should have vacated that judgment and the defendant's plea, and should have ordered a new trial of the petitioner upon the indictment charging him with burglary in the first degree.

The judgment of the superior court upon the hearing of the petition for post conviction relief is therefore reversed, and this cause is remanded to the superior court for the entry in the post conviction proceeding of a judgment in accordance with this opinion.

If, indeed, the warrant for the petitioner's arrest upon the charge of first degree burglary was not served upon him, he may nevertheless be tried upon the indictment for the offense charged therein. Neither the service of a warrant nor the preliminary hearing upon the charge is a prerequisite to a valid trial upon a bill of indictment properly returned. *State v. Hargett,* 255 N.C. 412, 121 S.E. 2d 589.

Reversed and remanded.

STATE OF NORTH CAROLINA v. SAM EDWARDS.

(Filed 22 November, 1967.)

1. Criminal Law § 74—

Testimony by a deputy sheriff as to statements made by the defendant, not amounting to a confession and exculpatory on their face, was not erroneously admitted into evidence, since there was uncontradicted evidence that defendant had been advised of his rights and had declined to consult a lawyer, although there may have been a possibility of prejudice in that the statements were at variance with the testimony of other witnesses for the State.

2. Criminal Law § 114—

A statement by the court, in reviewing the evidence in the charge to the jury, that "[i]t was elicited on cross examination that the defendant had been convicted of second degree murder, forgery, automobile larceny and one or more assaults", *held* not to constitute an expression of opinion.

APPEAL by defendant from *Clark, S.J.*, at the May Special Criminal Session of WAKE.

The defendant was indicted for common law robbery of Eddie Evans on 18 March 1967. He was found guilty as charged and sentenced to imprisonment in the State's Prison for a term of five to seven years.

The State introduced evidence tending to show that Eddie Evans, on 18 March 1967, sold and delivered some hogs to a man in Clayton, who paid him $90 in the presence of the defendant. The defendant was assisting Evans in the loading and delivery of the hogs. Evans already had approximately $100 in his pocket. Evans, the defendant and one Burt Wiggins got into the defendant's automobile and started toward Garner from Clayton. The defendant turned off onto a dirt road and told Evans to give him his billfold, which Evans refused to do. The defendant then jumped out of the automobile, picked up a piece of iron, two feet long, grabbed Evans by the collar, reached into his pocket and took his billfold, then containing $191 or $192. Thereupon, Evans was frightened and ran home through the woods and called the police. When the officers came, Evans had been drinking but told them the same story which he related upon the witness stand.

The defendant testified in his own behalf, denying his guilt. He also called as his witness Herman Ross, who testified that on 5 April 1967, while he was confined in the county jail, Evans was also confined therein and requested Ross to write for Evans' signature a note retracting the accusation against the defendant, which Ross wrote and Evans signed. This document was put in evidence. On cross examination, Ross testified that, shortly after writing this note, he

was convicted of forgery, but the charge against him had no relation to the present matter. He denied that he had forged the alleged note from Evans.

Evans, called by the State in rebuttal, denied signing the note to which the testimony of Ross related and, while upon the witness stand, wrote his name upon a piece of paper which was thereupon introduced in evidence.

The State also called in rebuttal Burt Wiggins, who testified that he was present at the alleged robbery and saw the defendant take the billfold from Evans. Wiggins also testified that prior to this action the defendant had not been drinking.

The State thereupon called as its witness the deputy sheriff who investigated this matter and arrested the defendant. Upon *voir dire* examination, in the absence of the jury, the deputy testified that he offered the defendant the use of a telephone to call a lawyer and advised the defendant of his right to remain silent, that anything he said could and would be used against him in court, that he had the right to talk to a lawyer and have an attorney present while he was being questioned, and that if he could not afford to hire a lawyer, one would be appointed to represent him before any questions were asked, whereupon the defendant replied that he understood those rights, that he wanted to talk to the officer and did not want an attorney. The defendant offered no evidence on these matters. The court found that the defendant had been fully advised of his constitutional rights by the deputy, that he understood them, and that his statement to the officer was voluntary, knowingly and intelligently made.

The jury then returned to the courtroom and the deputy sheriff testified, in the presence of the jury, over the defendant's objection, that the defendant "said he had nothing to hide and didn't mind talking" to the officers, that after getting off work on the day in question, about noon, he went to certain business establishments and transacted certain personal business and then went home, saying nothing about being with Evans or Wiggins on the day in question and "denied the whole thing."

Upon cross examination of the defendant, he testified that he had been convicted previously of second degree murder, larceny of his own automobile, forgery, and assault upon his wife. In reviewing the evidence in his charge to the jury, the court stated, "It was elicited on cross examination that the defendant had been convicted of second degree murder, forgery, automobile larceny and one or more assaults." To this the defendant excepts.

The only assignments of error are that the court erred in finding that the defendant was fully advised of his constitutional rights by

the arresting officer and that his statements to the officer were voluntary; that the court erred in admitting into evidence the statements by the defendant to the deputy sheriff and erred in the foregoing statement in the charge, the defendant contending that this amounted to an expression of an opinion by the court.

T. W. Bruton, Attorney General, Andrew McDaniel, Assistant Attorney General, and William F. Briley, Trial Attorney, for the State.

Liles & Merriman for defendant appellant.

PER CURIAM. The deputy sheriff did not testify to any confession by the defendant. On the contrary, he testified that the defendant, in his statement to the officer, denied the charge. However, the statements of the defendant, as to which the officer was permitted to testify, concerning the defendant's whereabouts on the afternoon of the alleged robbery, though on their face exculpatory, may have been prejudicial in the eyes of the jury since the defendant did not inform the officer that he had been with Evans or Wiggins on the day in question. In any event, there was uncontradicted testimony on the *voir dire* examination that, before the defendant made any statement, he was fully advised of his rights under the rule of *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, and, thereupon, the defendant stated that he did not want a lawyer. The defendant's own testimony shows that he was not unacquainted with the judicial proceedings in criminal matters. There was ample evidence to support the finding of the trial judge that the statements by the defendant to the deputy sheriff were voluntary and there was no error in permitting the deputy sheriff to testify as to such statements. See *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1.

The defendant's contention that the court expressed an opinion in the statement in the charge that it was "elicited" on cross examination that the defendant had been convicted previously of other offenses is without substance.

No error.

MARY WALKER SUMNER v. MARY BELL MISENHEIMER BARNES MARION.

(Filed 22 November, 1967.)

1. Judgments § 29; Automobiles § 43—

Where one has sued a principal for damages alleged to have been caused by the negligent acts and omissions of an agent in the operation of a motor vehicle, and judgment has been rendered in favor of the principal on the ground that plaintiff had failed to establish the negligence of the agent, such plaintiff is not prevented from thereafter suing and recovering from the agent upon identical allegations of damages and negligence, since the former judgment is not a bar, the agent not having been a party to the former action.

APPEAL by defendant from *Latham, S.J.*, at the 2 May 1967 Civil Session of RANDOLPH.

The plaintiff sues for personal injuries alleged to have been received when the automobile of her husband, which she was driving, was struck in the rear by an automobile driven by the defendant, the plaintiff alleging that the proximate cause of the collision, and of her resulting injuries, was the negligence of the defendant in certain specified respects. The defendant filed answer denying any negligence by her, pleading contributory negligence by the plaintiff, and alleging a counterclaim for damages to her car, the proximate cause of which she alleges to have been the negligence of the plaintiff in certain specified respects.

The plaintiff moved that the entire counterclaim be dismissed "for the reason that the matter has been heretofore adjudicated in the action entitled *'Farrell Bulla Sumner, Plaintiff, v. Mary Bell Misenheimer Barnes Marion, Defendant, S. D. 2295, C. I. 5133.'*" Attached to and made part of the motion were the pleadings and judgment in the former case, the plaintiff in that case being the husband of the plaintiff in the present case and the owner of the automobile which she was driving at the time of the collision out of which both suits arose.

Examination of the pleadings in the two cases discloses that the allegations concerning negligence and causation in the complaint filed by the husband in the former suit are identical with those in the complaint filed by the wife in the present action. Likewise, the allegations in the answer of the defendant, except for the minor variations due to the change in plaintiffs, are identical with the allegations contained in her answer to the former action brought by the plaintiff's husband. In that action, as here, the defendant filed a counterclaim for the damage to her automobile in the collision, the counterclaim in the husband's case containing the identical allegations as to negligence by the present plaintiff, his wife, as are now

set forth in the counterclaim against her. In the former action, the counterclaim against the husband, as amended, alleged that the present plaintiff, his wife, was his agent in the operation of his automobile, that allegation being immaterial to and omitted from the present pleading.

In the former action brought by the husband, a judgment of nonsuit was entered as to the counterclaim of the defendant against the husband. That case then went to the jury upon the issues of the negligence of the defendant, the contributory negligence of the husband by reason of the alleged acts and omissions of the present plaintiff, his wife, and the damages recoverable by the husband. All of those issues were determined by the jury in favor of the husband, and judgment in his favor was so entered. The defendant in the former action brought by the husband gave notice of appeal but that appeal was never perfected and was dismissed by order of the superior court.

The present matter coming on to be heard in the superior court upon the present plaintiff's motion to dismiss the counterclaim on the ground of the prior judgment in the husband's action, the motion was allowed and the counterclaim against the wife was dismissed on that ground. From this order the defendant appeals.

Miller, Beck & O'Briant for defendant appellant.
Ottway Burton for plaintiff appellee.

PER CURIAM. We are here concerned only with the counterclaims in the two actions. By way of counterclaim, the present defendant sued the plaintiff's husband in the former action for damages which she alleges she sustained by the negligence of his wife and agent, the present plaintiff. She was unsuccessful and judgment was entered establishing that the husband was not and is not liable to her by reason of the alleged acts and omissions of his wife, and alleged agent, the present plaintiff. Now, the defendant, by way of counterclaim, sues the wife for the same damages, alleging the same negligent acts and omissions of the wife, the present plaintiff.

It is immaterial that the owner and the driver, sued in succession by the present defendant, by way of counterclaim, are husband and wife. The important relationship between them, for the purposes of the question now before us, is that of principal and agent. While it does not clearly so appear from the record before us, there is no suggestion in the brief or oral argument that the reason for the husband's victory in his action was a failure by the defendant to prove that the wife was the husband's agent. We, therefore,

determine the present case on the assumption that the agency of the present plaintiff for her husband was either admitted or established in the former action brought by him against the present defendant.

The question now presented is: When one has sued a principal for damages alleged to have been caused by the negligent acts and omissions of the agent and judgment has been rendered in favor of the principal on the ground that such plaintiff has failed to establish negligence on the part of such agent, may such person thereafter sue and recover from the agent upon allegation of the same injury and the same acts and omissions of the agent? This question was fully considered and determined by us in *Kayler v. Gallimore*, 269 N.C. 405, 152 S.E. 2d 518. For the reason there explained, the answer is that the former judgment in favor of the principal is not a bar to the action against the agent, the agent not having been a party to the former action. A different rule prevails where the first suit is brought against the agent and the judgment therein establishes that the agent was not negligent and thereafter suit is brought against the principal on the ground of *respondeat superior*. *Leary v. Land Bank*, 215 N.C. 501, 2 S.E. 2d 570. The basis for the two rules, which appear at first glance to be inconsistent, was discussed in *Kayler v. Gallimore, supra.*

It was, therefore, error to dismiss the counterclaim on the motion of the plaintiff on the ground of the judgment previously rendered in the action brought by the plaintiff's husband against this defendant.

Reversed.

VASSIE DALLAS COOK v. COUNTY OF BURKE.

(Filed 22 November, 1967.)

1. Counties § 9—

Where a county is covered by a policy of liability insurance, the question of governmental immunity from suit from injuries caused by alleged negligence does not arise with reference to the validity of a judgment of nonsuit. G.S. 153-9(44).

2. Same—

The liability of a county for injuries sustained by a pedestrian falling on a public walk within the courthouse grounds is no more extensive than the liability of a city to a pedestrian falling upon a public sidewalk maintained by the city.

3. Same—

Plaintiff's evidence was to the effect that she fell to her injury when she slipped during a misty rain at a place on the courthouse walk where pigeon droppings had made the place slick. The evidence disclosed the county knew of the condition and had the walk periodically cleaned, and plaintiff offered no evidence as to how much time elapsed between the last cleaning of the walk and plaintiff's fall. *Held:* Nonsuit was properly entered, since reasonable care could not require the county to maintain a constant patrol of the walk.

APPEAL by plaintiff from *Campbell, J.*, at the May 1967 Civil Session of BURKE.

This is a suit for personal injuries alleged to have been received when the plaintiff slipped and fell upon a public walk controlled and maintained by the county in the Courthouse Square in the city of Morganton. The plaintiff alleges: She was walking upon the said walk on 15 June 1965, a light rain then falling; her foot slipped and she fell when she stepped upon an accumulation of pigeon droppings which had become slick and slippery due to the rain; the county was negligent in that its employees failed to use reasonable diligence in inspecting the walk, which would have disclosed its dangerous condition, and in failing to clean it; this negligence was the proximate cause of the plaintiff's fall and her resulting injuries; and the plaintiff presented her claim to the county commissioners but the county has refused to pay her for her injuries.

The answer denies all of the material allegations of the complaint and alleges, affirmatively, both that the plaintiff was guilty of contributory negligence, and that the county is immune from liability in that its alleged negligence was in the course of a governmental activity.

It is stipulated that at the time the plaintiff fell the county had in effect a policy of liability insurance.

At the close of the plaintiff's evidence, the defendant's motion for judgment of nonsuit was allowed. From this judgment the plaintiff appeals. The substance of her evidence is as follows:

At the time of her fall, she was 58 years of age. On 15 June 1965, she went to Morganton and to the courtroom with her husband, he being a witness in a case then on trial. Between 10 and 11 o'clock a.m., she left the courtroom and went out into the town on some business errands. Returning to the Courthouse Square, she went to a ladies' rest room maintained by the county. Intending to go from there to the courtroom, she walked upon the walkway in question. A light mist of rain was falling. It had been raining earlier that morning. Her foot slipped and she fell, injuring her knee. After falling, she observed that she had slipped upon pigeon droppings

which "covered a pretty good space" on the walk. Before she fell, "It just looked like trash and dirt, water standing there." The accumulation was the color of the pavement. Before she fell, "It looked like the pavement, looked like dirt on top of it. * * * It was brown, kind of like trash and leaves and dirt like mixed up, and covered over that manure." When she fell, she "could see it was mixed up in that dirt there." She "didn't notice the leaves and trash and other items on the pavement," but "just noticed what looked like pavement, brown looking, and it looked like trash and leaves." There were trash and leaves all along the walk. Before she fell, she could not see "whether there was anything else mixed up with it."

For many years pigeons have been flocking to the courthouse and roosting upon its ledges and under its eaves. At the place where the plaintiff fell, the pigeon droppings extend over an area about two feet square. At the time of her fall, there were puddles of water on the sidewalk and the wind was blowing leaves and debris onto the walk.

The commissioners had been aware of the problem presented by the pigeons roosting upon the courthouse and the resulting damage to the building. For several months they had tried various ways to keep the pigeons off of the building, but had not succeeded. They had instructed the custodian to keep the building as clean as possible and the chairman of the board felt that the custodian did as thorough a job of removing the pigeon droppings as he could. Prior to the day on which the plaintiff fell, the custodian of the building was instructed to clean the sidewalk regularly and he did so, sometimes more than once a day. The pigeons fly in and out all through the day.

Simpson & Simpson for plaintiff appellant.
Byrd, Byrd & Ervin for defendant appellee.

PER CURIAM. In view of the stipulation concerning liability insurance held by the county at the time of the plaintiff's fall, the question of governmental immunity from suit for such an occurrence does not arise with reference to the validity of the judgment of nonsuit. G.S. 153-9(44).

The liability of the county for injuries sustained by a pedestrian, falling upon a public walk within its courthouse grounds, would be no more extensive than that of a city to a pedestrian falling under similar circumstances upon a public sidewalk owned and maintained by the city. With reference to the liability of a city for such injuries, we recently said in *Waters v. Roanoke Rapids,* 270 N.C. 43, 153 S.E. 2d 783:

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

The plaintiff's evidence fails to show how much time elapsed between the last cleaning of the walk and the plaintiff's fall. There is no showing that the county knew or should have known of the presence upon the walk of the mixture of leaves, trash and pigeon droppings which caused the plaintiff to slip and fall. The county is not an insurer of the safety of the walks upon its courthouse grounds. It is not liable to one who falls thereon in the absence of a showing that it failed to use reasonable care to maintain the walk in a safe condition. Reasonable care does not require it to maintain a constant patrol of walkways outside its buildings in order to keep them free from bird droppings and windblown trash.

The plaintiff having failed to prove negligence by the county, the judgment of nonsuit was properly entered.

Affirmed.

STATE OF NORTH CAROLINA v. WADE F. MORGAN.

(Filed 22 November, 1967.)

1. Criminal Law § 161—

An appeal itself constitutes an exception to the judgment and presents for review the sole question whether error appears upon the face of the record proper.

2. Constitutional Law § 32—

An indigent defendant, who has been fully advised by the court that an attorney would be appointed to represent him if he so desired, has the right to reject the offer of such appointment and to represent himself in the trial of his case.

APPEAL by defendant from *Canaday, J.*, at the 2nd February 1967 Criminal Session of WAKE.

The defendant was brought to trial upon an indictment charging that on 10 October 1966, while he was lawfully confined in the North Carolina State Prison System in the custody of the superintendent of the Central Prison, pursuant to sentences for breaking and entering and for larceny, and while assigned to work outside the prison under the Work Release Program, he unlawfully, wilfully and feloniously failed to return to the custody of the superintendent of the Central Prison.

When brought to trial, the defendant, both in writing and orally in the presence of the court, expressly stated that he was unable to employ counsel but that he did not desire the appointment of counsel, expressly waived such appointment, and desired to appear in all respects in his own behalf. Being permitted so to appear in his own behalf, he entered a plea of guilty to the charge in the indictment.

Before accepting the plea, the presiding judge, in open court, caused the defendant to be sworn and examined as to the voluntary nature of the plea. Thereupon, the judge found that the defendant had waived the appointment of counsel, had been fully advised of his rights, of the charge against him and of the maximum punishment for such offense, and further found that the plea of guilty was made by the defendant freely, understandingly and voluntarily without undue influence, compulsion or duress and with no promise of leniency. The judge thereupon ordered that the plea of guilty be entered in the record.

The court then heard testimony of Sgt. Dupree of the North Carolina Prison Department, who testified that the defendant was in custody at the Central Prison on 10 October 1966, serving sentences for breaking and entering and larceny, that under the Work Release Program he was assigned on that date to work with the Raleigh Electric Company, that he was seen working on the job at about noon on that date and was not seen thereafter until two months and 19 days later, when he was recaptured by the sheriff of Lake County, Ohio. The court then gave the defendant an opportunity to make a statement, which he did, offering no explanation for his failure to return to the prison from his work release assignment.

The court entered judgment that the defendant be imprisoned in the State's Prison for 12 months, the sentence to begin at the expiration of any and all sentences then being served by the defendant in the North Carolina State Prison System.

The defendant did not give notice of appeal in open court. Four days after the entry of the judgment he mailed to the clerk of the Superior Court a notarized notice of appeal. For some reason, which does not appear in the record, this letter was not received in the

superior court until 13 days after it was mailed and 17 days after the entry of the judgment. The judge presiding at the March Term, to whose attention this notice of appeal was brought, found that the notice reached the superior court more than ten days after the time allowed by the law for the service thereof but, in his discretion, ordered that notice of appeal be docketed and that the defendant be allowed to perfect his appeal *in forma pauperis,* and appointed counsel to represent the defendant in the preparation and presentation of his appeal.

The defendant took no exception to any order or ruling of the superior court and the only assignment of error is to the entry of the judgment.

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

Alton W. Kornegay for defendant appellant.

PER CURIAM. The appeal to this Court is, itself, an exception to the entry of the judgment in the superior court and assigns such judgment as error. Such assignment presents for the consideration of this Court the sole question of whether error appears upon the face of the record proper, including the regularity of the judgment so entered. *State v. Mallory,* 266 N.C. 31, 145 S.E. 2d 335; *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330. No error appears upon the face of the record in this case. The indictment is proper in form and sufficiently alleges the offense of escape while serving a sentence for conviction of a felony. The sentence imposed is within the limits fixed by G.S. 148-45(a) for this offense. The judgment was regular in form. There is ample evidence to support the finding of the court that the plea of guilty was entered voluntarily and understandingly. The defendant does not contend otherwise. Having been fully advised by the court that an attorney would be appointed to represent him if he so desired, he had the right to reject the offer of such appointment and to represent himself in the trial and disposition of his case. *State v. Elliott, supra; State v. McNeil,* 263 N.C. 260, 139 S.E. 2d 667. There was no rejection by him of the appointment of counsel upon the appeal to this Court.

Affirmed.

STATE v. CLEVELAND COLON OWENS.

(Filed 22 November, 1967.)

Automobiles § 129—

In this prosecution for driving on a public highway while under the influence of intoxicating liquor, there was evidence that defendant, at the time of his arrest, had empty beer cans in his car, that his breath smelled of alcohol, and that the patrolman had to help defendant out of his car and into the patrol car. *Held:* Defendant may not complain of the failure of the court to instruct the jury that defendant should be acquitted if the jury should find that defendant was under the influence of anything other than an alcoholic beverage, notwithstanding defendant's testimony that on a trip terminating some two hours prior to the occasion in question he had taken a few pills to keep him awake.

APPEAL by defendant from *Armstrong, J.*, September 1967 Criminal Session of RANDOLPH.

Criminal prosecution on a warrant charging that defendant, on November 28, 1966, operated an automobile on N. C. Highway #22 in Randolph County, North Carolina, while under the influence of intoxicating liquor, a violation of G.S. 20-138. The case was tried *de novo* in the superior court after appeal by defendant from conviction and judgment in the Recorder's Court of Randolph County. The jury returned a verdict of guilty as charged. The court pronounced judgment imposing a sentence of "not less than twelve (12) months one day nor more than twenty-four (24) months" and suspended this sentence for two years upon conditions set forth in said judgment. Defendant excepted and appealed.

Attorney General Bruton, Assistant Attorney General Melvin and Staff Attorney Costen for the State.

Walker, Bell & Ogburn for defendant appellant.

PER CURIAM. Evidence offered by the State includes, *inter alia,* evidence tending to show the following: Defendant was operating a Pontiac car in Randolph County on N. C. Highway #22 about 10:00 or 10:30 p.m. on November 28, 1966, "with no lights on," at a speed of "about 20 miles an hour," from one side of the road to the other and "running clean off on both shoulders of the road, both left and right." After the State Highway Patrolman "turned on the blue light and siren," defendant "kept slowing down . . . and finally the car just choked and came to a stop in the highway." Thereupon, the State Highway Patrolman pulled his car in back of defendant and a police officer of the town of Ramseur, who had been driving behind the patrolman, pulled in front of defendant and

parked. Defendant explained "on numerous occasions," in response to inquiry as to why his lights were off, "that he had seen babies going up in the air in front of him, and that he cut his lights off so that he couldn't see them." The patrolman and police officer had to help defendant get out of his own car and into the patrol car. Defendant was unable to walk unassisted. There was a strong odor of alcohol on his breath and person. There were twelve or more cans of beer in defendant's car and two empty containers. In the opinion of the officers, defendant was under the influence of some intoxicant.

While there was other evidence tending to support the opinion of the officers, the foregoing is sufficient to show there was plenary evidence to support the verdict.

Defendant testified he had driven a tractor-trailer from New York to High Point, arriving in High Point about 8:30 p.m.; that between New York and High Point, at each of three stops, he "took a few pills, . . . the kind of pills that keep you awake"; that, after leaving the tractor-trailer at the terminal in High Point, he stopped at the VFW in Archdale for about thirty minutes and while there bought two cartons of beer; and that he did not know what he did after he left the VFW.

According to the patrolman, defendant stated on the occasion of his arrest that the last time he had taken tranquilizers, pills or medications of any kind was "(t)wo weeks ago." If pills were taken by defendant en route from New York to High Point, the evidence is silent as to the contents of such pills.

Defendant assigns as error the court's failure to charge, in accordance with defendant's request, "that should (the) jury find that defendant was under the influence of anything other than intoxicating beverage he should be acquitted or that verdict of not guilty be returned." This assignment is without merit. The court instructed the jury that, as a prerequisite to conviction, the State was required to satisfy the jury from the evidence beyond a reasonable doubt that defendant, while driving the car on a public highway, was *under the influence* of an intoxicant as correctly defined by the court. The court's charge, considered in its entirety, shows plainly that the word, intoxicant, as used in the phrase, "under the influence of an intoxicant," meant "any sort of intoxicating beverage, whether it be beer, wine, liquor, or vodka, or any other sort of intoxicating beverage."

Each of defendant's other assignments of error, which relate to rulings on evidence and excerpts from the charge, has been consid-

ered. None discloses prejudicial error or presents a question of sufficient substance to justify particular discussion thereof.

No error.

STATE v. JOE RAY DAVIS.

(Filed 22 November, 1967.)

1. Bastards § 7—

In a prosecution for wilful refusal to support an illegitimate child, it is error for the court to state, even as a contention, that defendant had introduced evidence of good character, saying in effect that she had loved unwisely and had to pay the penalty, that he had used her to satisfy his sexual desires, but that the State contended she ought not to have to bear the penalty alone and that the defendant was as guilty as she and should pay for his part of the indiscretion.

2. Criminal Law § 114—

It is prejudicial error for the court in any manner to convey to the jury his opinion on the evidence, since each defendant is entitled to a fair and impartial trial before a neutral and impartial judge and an equally unbiased mind of a properly instructed jury. G.S. 1-180.

3. Criminal Law § 118—

While ordinarily a misstatement of the contentions must be brought to the attention of the trial court in apt time, if a statement of the contentions contains legal inferences and deductions such as to mislead the jury and prejudice the cause of defendant, they must be held for prejudicial error on exception, notwithstanding absence of objection at the time.

4. Bastards § 7—

In a prosecution for wilful refusal to support an illegitimate child in which no mention of a blood test had been made prior to the charge, it is error for the court to read the provisions of G.S. 8-50.1 to the jury and state that any request for a blood test had to come from defendant.

APPEAL by defendant from *Burgwyn, E.J.*, 23 January 1967 Criminal Session of RANDOLPH.

Criminal prosecution on a warrant charging defendant with wilfully neglecting and refusing to support and maintain his illegitimate child, Tamatha Jane Powell, age five weeks, after demand had been made on him for maintenance and support, a violation of G.S. 49-2, heard *de novo* in the Superior Court upon an appeal from a conviction and adverse judgment in the recorder's court of Randolph County. Plea: Not guilty.

The State and the defendant offered evidence. The following issues were submitted to the jury and answered as indicated:

"1. Is the defendant the father of the child, Tamatha Jane Powell, begotten upon the body of Barbara Davis Powell, as alleged in the Warrant?

ANSWER: Yes.

"2. If so, is the defendant guilty of wilfully failing, refusing and neglecting to support and maintain the said Tamatha Jane Powell after due and lawful demand was made upon him prior to the warrant being sworn out and served, as alleged in the warrant?

ANSWER: Yes."

From a judgment on the verdict, defendant appeals.

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

John Randolph Ingram for defendant appellant.

PER CURIAM. Defendant assigns as error this part of the charge set forth in parentheses:

"The State contends that they have introduced this testimony of her good character and that you should see this as twofold evidence, first as corroborative evidence, and then as substantive evidence, and that she wouldn't tell a falsehood about her evidence in the case and that you should believe her and find that she has told you the truth about the matter, and is in effect saying to you, ('I have actually loved, unmiserly and not well, but unwisely,' and that she has to pay the penalty, but the State contends that she ought not to have to bear it alone. That the man ought to pay his part, and that he is as guilty as she is, and more so, probably, and that he should pay for his part of the indiscretion as well as she for hers.)"

It is manifest that the able, experienced, and humane judge by the language used tended to create sympathy for the mother, and the effect of his language was to weight the scales too heavily against defendant. *S. v. Woolard,* 227 N.C. 645, 44 S.E. 2d 29. The language assigned as error, although stated as a contention, constitutes a violation of the provisions of G.S. 1-180 forbidding a judge to express to the jury his opinion on the facts of the case being tried. Stacy, C.J., in *S. v. Simpson,* 233 N.C. 438, 64 S.E. 2d 568, said for the Court:

"It can make no difference in what way or manner or when the opinion of the judge is conveyed to the jury, whether di-

rectly or indirectly, by comment on the testimony of a witness, by arraying the evidence unequally in the charge, by imbalancing the contentions of the parties, by the choice of language in stating the contentions, or by the general tone and tenor of the trial. The statute forbids any intimation of his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury."

Error in stating the contentions of a party must ordinarily be brought to the trial court's attention in time to afford opportunity for correction, but here the prejudicial effect of this part of the charge assigned as error must be held prejudicial, notwithstanding the absence of timely objection. What Barnhill, J., said for the Court in *S. v. Pillow*, 234 N.C. 146, 66 S.E. 2d 657, is applicable here: "Though the statements were in the form of contentions, the legal inferences and deductions they suggested were such as to mislead the jury and prejudice the cause of the defendant." This assignment of error is good.

Defendant also assigns as error this part of the charge:

"She contends that this man had sexual intercourse with her time and again after her divorce and that he used her to suit himself and satisfy his sexual desires, and *that she being weak,* perhaps — yielded to him." (Italics ours.)

This assignment of error is good for the same reason that the above assignment of error is good.

Defendant assigns as error this part of the charge:

"Some question was asked by a juror, as I recall it, about a blood test in a case of this kind. In order that the jury may understand the law in regard to that particular phase of the case, I will read you the statute. 'In the trial of any criminal action or proceeding in which the question of paternity arises, the court, before whom the matter may be brought, upon the motion of the defendant, shall direct that the defendant, the mother and the child shall submit to a blood grouping test, provided that the court, in its discretion, may require the person requesting the test to pay the costs thereof. The result of such blood grouping test shall be admitted in evidence when offered by a duly licensed practitioner.' The motion to make the test has to come from the defendant and not from the State in matters of this kind. He contends that regardless of that he is not the father of this child and that you should not find beyond a reasonable doubt that he is."

Defendant contends that this instruction, including the reading of the provisions of G.S. 8-50.1 to the jury, "was prejudicial to the defendant and violated his constitutional right against self-incrimination and voided his decision not to testify in this case." No mention of a blood test had been made in this case prior to its injection into the charge of the court. This charge of the court in respect to a blood test under the circumstances here placed before the jury matters which they should not take into consideration in arriving at the verdict on the evidence in this case. It seems it would not have been proper for the solicitor to argue that the defendant had not made a motion for a blood test. G.S. 8-54. It was error for the judge in his charge to read this statute to the jury. Every suitor has a right to have his cause considered with the "cold neutrality of an impartial judge" (Edmund Burke, Preface to the Address of M. Brissot) and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged. *S. v. Chambers,* 238 N.C. 373, 78 S.E. 2d 209, referred to in the State's brief is factually distinguishable.

For errors in the charge, defendant is entitled to a

New trial.

GORDON P. HAMILTON v. ALVIN LEON JOSEY AND MAINTENANCE SUPPLY CO., INC.

(Filed 22 November, 1967.)

1. Automobiles § 88—

The evidence tended to show that defendant, traveling south and faced with a blinking red light, entered the intersection without stopping, and that plaintiff, traveling east and faced with a blinking yellow light, entered the intersection without stopping, and struck defendant's vehicle on the right side near the rear wheels, in the southwest quadrant of the intersection. *Held:* It was not error for the court to submit the issue of plaintiff's contributory negligence.

2. Automobiles § 19—

A motorist faced with a blinking yellow light has the right to enter the intersection with caution.

3. Automobiles § 90—

The court's instruction in this automobile intersection accident case *held* properly to have charged the jury on the questions arising on the evidence in regard to negligence, contributory negligence, the burden of proof, proximate cause and sudden emergency.

APPEAL by plaintiff from *Froneberger, J.,* May 15, 1967 Schedule "C" Civil Session, MECKLENBURG Superior Court.

The plaintiff instituted this civil action to recover for personal injuries and property damage he sustained as a result of a collision between the plaintiff's Plymouth automobile, driven by Jon C. Mullis, and a GMC truck, owned by Maintenance Supply Co., Inc., and driven by its agent, Alvin Leon Josey. The collision occurred at the intersection of West Ninth Street and North Smith Street in Charlotte.

The plaintiff approached the intersection from the West on Ninth Street. The truck approached the intersection from the North on Smith Street. At the intersection, a blinking yellow traffic light was in operation on Ninth Street. A blinking red traffic light was in operation on Smith Street. Both streets were hard surfaced.

The truck entered the intersection without stopping, and the Plymouth likewise failed to stop. The two vehicles collided at a point near the street corner in the Southwest quadrant of the intersection. The left front of the Plymouth struck the truck on its right side near the rear wheels. The two vehicles moved about 5 feet after the impact and stopped in contact with each other. The rear of the truck failed to clear the intersection by about 4 feet. Only the front of the Plymouth entered the intersection. Skidmarks extended backward from the Plymouth for several feet on Ninth Street.

Both parties introduced evidence. The plaintiff's witness, Roy E. Wilson, traffic investigator of the City Police Department, arrived at the scene of the accident shortly after it occurred, and before either vehicle had been removed. He prepared a chart depicting the physical conditions at the intersection which he used to illustrate his testimony. The chart was introduced by the plaintiff as his Exhibit A and is filed with the record on appeal.

The plaintiff alleged the defendant was negligent by entering the intersection without stopping as he was required to do by the blinking red light. The defendant alleged the plaintiff was contributorily negligent by driving too fast, by not keeping a proper lookout, by not having his vehicle under proper control, and in entering when the defendant's truck was already in the intersection. Each alleged the details of the other's negligent acts. The evidence was sufficient to raise jury questions on the issues of negligence and contributory negligence. The jury found the defendant was negligent and "the plaintiff, by his own negligence, contributed to his injuries and damages". From the judgment that the plaintiff recover nothing and his action be dismissed at his cost, the plaintiff appealed.

John D. Warren for plaintiff appellant.

Carpenter, Webb & Golding by John G. Golding for defendant appellee.

PER CURIAM. The evidence in the light of plaintiff's Exhibit A clearly discloses that the collision occurred in the Southwest quadrant of the intersection when the defendant's truck was leaving and the plaintiff's Plymouth was entering the intersection. The evidence warranted the jury in finding both drivers negligent. The record does not sustain plaintiff's contention the Court committed error in submitting the issue of contributory negligence.

The plaintiff's other assignments of error relate to the Court's charge on the issue of contributory negligence. The defendant had pleaded the plaintiff's speed, failure to keep a proper lookout, to have his vehicle under control, and to yield the right-of-way to the defendant's truck, which was already in the intersection before the plaintiff entered.

The Court charged the jury that the burden of proof on the contributory negligence issue rested on the defendant and an affirmative answer on that issue required the jury to find, by the greater weight of the evidence, that the plaintiff was guilty of one or more of the negligent acts specified in the further defense, and, in addition, should find, by the greater weight of the evidence, that such act or acts constituted a proximate cause of the accident. A failure so to find by the greater weight of the evidence required a negative answer. The Court charged that the yellow blinking light facing plaintiff's driver gave him the right to enter the intersection with caution. The Court charged on sudden emergency, instructing the jury that the plaintiff's driver had the right to proceed through the yellow light with caution and to rely on other motorists to stop at the red light, and if the defendant failed to stop at the red light, and the failure created a sudden emergency, the plaintiff's driver should be judged in the light of that emergency.

The issues in the case were the usual ones involving intersection collisions. Was the defendant negligent? Was the plaintiff contributorily negligent? Were both negligent? The jury, after hearing the evidence, argument of counsel, and the charge of the Court which, when considered contextually, is free from error, decided both drivers were at fault.

In the verdict and judgment thereon, we find.

No error.

STATE OF NORTH CAROLINA v. HUGH BEAM JONES.

(Filed 22 November, 1967.)

Burglary and Unlawful Breakings § 6—

In a prosecution under an indictment charging a felonious breaking and entering, an instruction to the effect that the breaking of a store window, with the intent to commit a felony, completes the offense even though the building is not actually entered, *held* without error. G.S. 14-54.

APPEAL by defendant from *Johnson, J.*, at the Regular September 1966 Mixed Session of PERSON.

By an indictment proper in form the defendant was charged with the offense of breaking and entering the store of W. L. Barton with intent to steal on 7 February 1966. The jury found him guilty as charged and he was sentenced to confinement in the State's Prison for a term of five to seven years.

The State introduced evidence tending to show: On the evening of 7 February 1966, a large plate glass window in the front of the W. L. Barton store was broken out. In the early part of that same evening, the defendant was driven to the vicinity of the Barton store by Willie Peppers in the latter's automobile. The defendant told Peppers he was going to collect some money owed to him, and if the man who owed it did not pay him, he was going to steal some shotguns. Peppers stopped the car 500 yards from the store and waited for the defendant. He heard gun shots and saw three men shooting. He started his automobile and drove away but then turned back, found the defendant, and picked him up. The defendant then told Peppers he had broken a glass at Barton's store and "a man tried to draw his picture up beside the barn with a shotgun." The sheriff of the county had a subsequent conversation with Peppers which approximately corroborated Peppers' statement.

The defendant testified denying his guilt and asserting that on the night in question he was at home and not in Person County. He testified that he knew of no reason for Peppers to tell a lie on him except that on one occasion he had stolen some dope pills from Peppers just because he wanted one and Peppers would not give it to him.

The only exception appearing in the record, and the defendant's only assignment of error, is to the following portion of the charge by the court to the jury:

> "Now, you have heard all your life of the offense of breaking and entering. I call your attention to the fact that our statute does not require both the breaking and entering before one can be found guilty of violating this statute. It is a viola-

tion of the statute to either break or enter if such, of course, is done with a felonious intent and under the circumstances I have outlined to you as the various degrees of the offense. So, members of the jury, in this case the fact that the State's evidence establishes that nobody entered this building; and further establishes that nothing was taken from the building would not of itself entitle the defendant to acquittal. In other words, if the State has satisfied you from the evidence and beyond a reasonable doubt that this defendant actually broke the glass out of this store building on the night in question; that he did so wrongfully and unlawfully, that is without any right, without any permission of the owner or anyone acting on behalf of the owner who had the authority to give it; if the State has also satisfied you from the evidence and beyond a reasonable doubt that the defendant broke this glass out with the felonious intent to take and steal and carry away some of the goods and merchandise situate in that building, and convert same to his own use; and if the State has also satisfied you from the evidence and beyond a reasonable doubt that at the very time he broke the window out, if you find that he did, that there were articles of merchandise, property of value, situate within said store building, then he would be guilty of a felony as charged in the Bill of Indictment and it would be your duty to so find."

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

Ramsey, Long & Jackson for defendant appellant.

PER CURIAM. The portion of the charge to which exception is taken is a correct statement of law and is free from error. The pertinent language of G.S. 14-54 is, "If any person, with intent to commit a felony or other infamous crime therein, shall break *or* enter * * * any storehouse, shop * * * or other building where any merchandise * * * or other personal property shall be * * * he shall be guilty of a felony * * *" (Emphasis added.) The breaking of the store window, with the requisite intent to commit a felony therein, completes the offense even though the defendant is interrupted or otherwise abandons his purpose without actually entering the building. *State v. Nichols,* 268 N.C. 152, 150 S.E. 2d 21; *State v. Smith,* 266 N.C. 747, 147 S.E. 2d 165. Although there is no exception to any other portion of the charge, we have considered it in its entirety. It contains a detailed summary of the evidence and of the contentions of the State and of the defendant,

to which no objection was entered, and with which defendant advised the trial court that he was content. The charge contains a full and accurate statement of the rules of law applicable to such evidence and contentions and to the offense with which the defendant was charged.

No error.

ALMETA SAUNDERS v. CHARLOTTE LIBERTY MUTUAL INSURANCE COMPANY.

(Filed 22 November, 1967.)

1. **Insurance § 3—**

An insurance company generally has the right to fix the conditions upon which it will become liable, and the patron the right to accept or refuse them.

2. **Insurance § 35—**

The policy in suit provided additional benefits if insured sustained visible bodily injuries solely through external, violent and accidental means, resulting directly and independently of all other causes in death. The evidence was to the effect that the five-month-old insured was found dead in his bed in which he had slept with his eight-year-old sister, and the only evidence as to the cause of death was that the child had smothered. *Held:* The evidence fails to bring insurer's liability within the additional coverage.

APPEAL by plaintiff from *Latham, S.J.*, and a jury at the 27 February 1967 Civil Session, Superior Court of RANDOLPH County.

A little five-months-old boy was insured by his mother, to the extent of $500.00, with defendant Insurance Company. The policy provided that if the insured "sustained . . . visible bodily injuries, solely through external, violent and accidental means, resulting, directly and independently of all other causes, in the death of the insured", the company would pay an additional benefit of $500.00.

Early in the morning of 29 July 1963, the little fellow was found dead in his bed by his mother. He had slept the night before with his eight-year-old sister. No signs of violence were found on his body, and no autopsy was performed.

The coroner, over the objection of defendant, gave it as his opinion that the baby died by smothering.

The defendant paid the beneficiary $500.00 under the policy, and returned some disputed premiums, but refused to pay double indemnity benefits. The plaintiff sued for them and, upon nonsuit, appealed.

Ottway Burton, Attorney for plaintiff appellant.
J. J. Shields, Attorney for defendant appellee.

PER CURIAM. The coroner, who was not qualified as an expert, opined that the child died by smothering. No signs of violence were found on the body. No other evidence of the cause of death or the condition of the body was offered.

An insurance company generally has the right to fix the conditions upon which it will become liable, and the patron has the right to accept or refuse them. Here the policy is explicit that the defendant will pay additional (double indemnity) benefits only upon conditions not here shown. There was no evidence of "visible bodily injuries" nor of "violent, external means" causing the death of the insured.

Under well stated opinions of this Court, as set forth in *Langley v. Insurance Co.*, 261 N.C. 459, 135 S.E. 2d 38, and *Henderson v. Indemnity Co.*, 268 N.C. 129, 150 S.E. 2d 17, the plaintiff cannot recover.

In the judgment of nonsuit, there was
No error.

STATE OF NORTH CAROLINA v. JIMMIE ELDON DAVIS.

(Filed 22 November, 1967.)

APPEAL by defendant from *Johnston, J.*, April, 1967 Criminal Session, MOORE Superior Court.

The record and the addendum thereto disclose that these prosecutions originated before the Recorder's Court of Moore County upon warrants which charged that at 10:10 p.m. on August 6, 1966: (1) the defendant did unlawfully and wilfully operate a Chevelle Automobile, N. C. License No. EF 9548 on N. C. Highway No. 27 near Robbins in a prearranged speed competition with another vehicle operated by Robert Milton White; and (2) did operate a motor vehicle at a greater rate of speed than was prudent; to wit, in excess of 120 m.p.h. against the form of the statute in such cases made and provided . . . contrary to the law and against the peace and dignity of the State.

At the trial in the Recorder's Court on October 16, 1966, the Recorder found probable cause on the racing charge, and bound the defendant to the Superior Court. The Recorder found the defendant guilty of speeding in excess of 120 m.p.h. in a 55 m.p.h. zone

and imposed a prison sentence of four months. The defendant appealed the conviction on this charge to the Superior Court.

In the Superior Court the case was remanded to the Recorder's Court for final adjudication on the prearranged racing charge. On December 12, 1966 the Recorder's Court found the defendant guilty of prearranged racing, and imposed a prison sentence of six months. The judgment provided the four months sentence for speeding should run concurrently with six months sentence for racing. The defendant again appealed both convictions to the Superior Court.

In the Superior Court the State offered evidence of patrolman T. S. Clark who testified that at 10:10 p.m. on August 6, 1966 the defendant Davis, in his Chevelle, lined up on the left side of Highway 27 and Robert Milton White, in a Ford Fairlane, lined up on the right, and at the word "go" spoken by someone present, both vehicles, running side by side, headed west, kept abreast for half a mile when Davis pulled out in front of White. The patrolman pursued the racers and, when they separated, he continued after Davis, whose speed reached 120 m.p.h. Davis escaped.

The defendant testified he was not at or near Robbins at the time testified to by the officer, but was in Asheboro from about 7:00 and on that night took Bonnie West to a dance at Perry's on the Guilford-Randolph line and did not leave the dance until 10:30 that night. He offered witnesses corroborating his story. He also offered evidence of his good character. He did admit, however, he owned a Chevelle automobile.

The jury returned a verdict of guilty. From the judgment, the defendant appealed.

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

Ottway Burton for defendant-appellant.

PER CURIAM. The evidence of the patrolman made out a clear case of pre-arranged racing and of speeding. However, in fairness to the defendant, it must be admitted his evidence, supported by a number of witnesses, tended strongly to show his presence elsewhere at the time of the offenses charged. The evidence was sharply conflicting with the testimony of the highway patrolman. The jury, as was its function, resolved the conflict against the defendant. Error of law in the trial does not appear.

No error.

EUGENE BENNETT SMITH v. FRED CLARENCE STONE AND COLORCRAFT OF CHARLOTTE, INC.

(Filed 22 November, 1967.)

APPEAL by defendants from *Fountain, J.*, February 26, 1967 Term, ANSON Superior Court.

Plaintiff instituted this civil action to recover for the personal injuries he received on December 24, 1964 as he was attempting to walk across Wade Street at its intersection with Greene Street in Wadesboro. His allegations and evidence disclose that at about 10:00 in the morning, as he was crossing within the boundaries of a marked crosswalk, in obedience to a green light for pedestrians, the defendant, Fred Clarence Stone, agent of Colorcraft of Charlotte, Inc., backed the corporation's Valiant automobile from its parked position at an angle to the curb, near the crosswalk, without seeing that the reverse movement could be made in safety. The rear bumper of the Valiant crashed into the plaintiff, inflicting serious and permanent injuries.

The defendants, by answer, denied negligence on the part of Stone and conditionally pleaded contributory negligence on the part of the plaintiff as a bar to his recovery.

Both parties introduced evidence. The Court submitted these issues, which the jury answered as here indicated:

"1. Was the plaintiff injured by the negligence of the defendants, as alleged in the Complaint?
ANSWER: Yes.

2. If so, did the plaintiff, by his own negligence, contribute to his own injury, as alleged in the Answer?
ANSWER: No.

3. What amount, if any, is the plaintiff entitled to recover of the defendants?
ANSWER: $48,000.00."

From judgment on the verdict, defendants appealed.

A. Paul Kitchin; Smith, Leach, Anderson & Dorsett by John H. Anderson for defendants appellants.

E. A. Hightower for plaintiff appellee.

PER CURIAM. All assignments of error discussed in the brief or in the oral argument here involve exceptions to the Court's charge. When the charge is considered contextually, as it must be,

it is clear, concise, and in accord with the decisions of this Court. It covers all essential elements of negligence, contributory negligence and damages.

The Court placed on the plaintiff the burden of proof on Issues 1 and 3 and on the defendants on Issue 2. The Court instructed that a negative answer to Issue 1 would end the case, or an affirmative answer to Issue 2 would likewise end the case. But, an affirmative answer to Issue 1 and a negative answer to Issue 2 would require the jury to answer Issue 3. The Court gave the jury the proper rules with respect to the quantum of proof necessary to require affirmative answers and further charged that a failure to carry the burden required a negative answer. The Court gave correct rules for the assessment of damages.

No error.

BRANCH, J., did not participate in the consideration or decision of this case.

STATE v. IVEY MANUEL CLARK.

(Filed 22 November, 1967.)

APPEAL by defendant from *Bickett, J.*, May 1967 Session of WARREN.

In a warrant issued by the Recorder's Court of Warrenton on 8 April 1967 defendant was charged with (1) driving 79 MPH in a 55 MPH speed zone on U. S. Highway No. 158, and (2) driving without an operator's license. The recorder found him guilty. Upon the first count, defendant was ordered to pay a fine of $10.00 and the costs; upon the second count, prayer for judgment was continued upon payment of the costs. Defendant appealed to the Superior Court, where he pled guilty to driving without a license and not guilty to speeding 79 MPH. The State's evidence tended to show:

On 8 April 1967, State Highway Patrolmen S. T. Webster and V. R. Vaughan were conducting a speed watch on that section of U. S. Highway 158 known as the Bypass around Warrenton, a 55 MPH speed zone. The two patrolmen had tested the speed clock (whammy), and it was working properly. At 7:25 p.m., Patrolman Webster observed defendant drive his white Lincoln automobile over the two tubes, which had been placed on the pavement 66 feet

apart and connected with the speed clock. The clock registered defendant's speed at 79 MPH and, in Webster's opinion, the Lincoln was traveling in excess of 75 MPH when he observed it cross the whammy. He followed defendant five-tenths of a mile to a rural paved road on which defendant made a right turn at a speed of 5-10 MPH. The patrolman stopped defendant after he had traveled about a half mile on this road at a speed of 25-30 MPH.

Defendant testified that at the time he crossed the whammy he was traveling 55-60 MPH and that he made the right turn into the crossroad at 10-15 MPH; that "running at 80 miles per hour, it would take half a mile to even slow down to apply brakes"; that he made a right turn in less than one-half mile from where he crossed the whammy. He also said, "If you apply the brakes very hard, it would require a couple of tenths of a mile to brake it down."

The court charged the jury that it might return one of four verdicts:

> "(1) Guilty of driving a motor vehicle upon the highways of North Carolina at a speed in excess of 75 MPH; (2) Guilty of driving a motor vehicle upon the highways of North Carolina in excess of 70 MPH; (3) Guilty of driving a motor vehicle upon the highways of North Carolina at a speed in excess of 55 MPH; or (4) not guilty."

The jury found defendant guilty of speeding in excess of 70 MPH. From the judgment that he pay a fine of $50.00 and the costs, defendant appealed.

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

John Kerr, Jr., for defendant.

PER CURIAM. The conflicting evidence presented a very simple issue for the jury's decision, which went against defendant. The record discloses no reasonable grounds to believe that any error prejudicial to defendant occurred during the trial. Each of defendant's assignments of error has been considered and overruled.

No error.

IN THE MATTER OF: FRANKLIN S. KINCHELOE, JR., M.D.'s APPLICATION FOR REVIEW OF ORDER OF BOARD OF MEDICAL EXAMINERS OF THE STATE OF NORTH CAROLINA.

(Filed 29 November, 1967.)

1. Appeal and Error § 48; Physicians and Surgeons § 1—

Where a physician himself injects into the hearing of charges for the revocation of his license previous misconduct which had resulted in the suspension of his license, he may not object that evidence relating to the prior suspension was introduced in evidence, even though such evidence be incompetent, since error in the admission of evidence is cured when evidence of substantially the same import is theretofore admitted without objection. Further, the admission of such evidence could not be prejudicial in view of the record disclosing that the members of the Board already had knowledge of the previous proceedings.

2. Evidence § 58; Physicians and Surgeons § 1—

Where a respondent, in a proceeding to determine whether his license as a physician should be revoked for unprofessional conduct, testifies in his own behalf, it is competent to cross-examine him as to prior misconduct as bearing upon his credibility.

3. Physicians and Surgeons § 1—

An acquittal of a physician on a charge of rape does not bar a subsequent proceeding by the Board of Medical Examiners to determine whether the physician's license should be revoked for unprofessional conduct in regard to the same incident upon which the charge of rape was founded, the nature and scope of the two proceedings being entirely disparate.

4. Same; Constitutional Law § 32—

It is not required that respondent be represented by counsel in a proceeding by the Board of Medical Examiners to determine whether his license should be revoked for unethical conduct. In the present case the physician waived counsel, saying he could not afford to employ counsel, but it appeared that his office had been so filled with patients that he had to decide whom he would see first, and it further appeared that he was represented by able counsel employed by him in the court proceedings without any showing of change of financial condition.

5. Administrative Law § 5; Physicians and Surgeons § 1—

The record in the present case *held* not to disclose that the Board of Medical Examiners permitted any incompetent prejudicial evidence in its hearing to determine whether respondent physician's license should be revoked, and it was error for the Superior Court to order the cause remanded to the Board for another hearing on the ground that the Board had considered prejudicial incompetent evidence in reaching its findings. G.S. 90-14.6.

6. Physicians and Surgeons § 1—

It is proper for a medical board to revoke the license of a physician or surgeon who is a deviate or who is prone to lascivious conduct in regard to persons of the opposite sex, since in either case he should not be

allowed to practice a profession which affords him the frequent opportunity, if not the temptation, to accede to his deviations or lasciviousness.

7. Physicians and Surgeons § 1— Evidence held sufficient to support order of Board revoking respondent's license for unprofessional conduct.

Evidence tending to show that respondent physician examined a young woman who had been brought to his office by her mother, took the young woman into another room where they were alone for 45 minutes or more, that he had her strip nude and gave her an injection which rendered her unconscious, that when she reappeared in the outer office she was dizzy and had to hold on to the wall, that after the occasion there was a laceration at the entrance to her vagina and her private parts were sore, etc., *held* amply sufficient to sustain the Board's findings of fact consonant with such evidence and to warrant the Board's order revoking the physician's license for unprofessional and dishonorable conduct.

APPEAL by Board of Medical Examiners of North Carolina and Licensee Franklin S. Kincheloe, Jr., M.D., from *Thornburg, S.J.*, September 1967 Session, WAKE County Superior Court.

On 1 November 1966 Dr. Kincheloe was served with notice from the Board of Medical Examiners of the State of North Carolina that certain charges and accusations were made against him and that a hearing on them would be held on 6 January 1967. The charges related to his alleged mistreatment of Deborah Edwards (Stanley), the respondent's patient, on 17 August 1966. In detail, they alleged that he caused Miss Edwards to remove all of her clothing without any medical reason or necessity, examined verious parts of her nude body while no other person was present, administered a hypodermic which rendered her unconscious; and while in that condition he acted in an unprofessional capacity and engaged in sexual intercourse with her. The notice also stated that the respondent's conduct was unprofessional and dishonorable and constituted grounds for the revocation of his license to practice medicine.

As a result of the 6 January hearing, the Board found Dr. Kincheloe guilty of unprofessional and dishonorable conduct and ordered that his license to practice medicine be revoked.

The respondent appealed to the Superior Court of Wake County, and thereafter the Court stayed the revocation of his license pending a hearing and remanded the cause to the Board of Medical Examiners for further findings and order. After several interlocutory motions and orders, the cause came again to the Superior Court upon the respondent's appeal and was heard before Hon. Lacy H. Thornburg, Judge Presiding in Wake County on 20 September 1967.

The stenographic record of the evidence presented before the Board was included in the respondent's case on appeal and was

given consideration by the Court. The respondent was also permitted to testify orally before the Court.

Summarized, except where quoted, the evidence against the respondent before the Board of Medical Examiners tended to show that on 16 August 1966 Mrs. Myrtle Edwards took her sixteen-year-old daughter Deborah Jean Edwards to Dr. Kincheloe's office for an examination and attention. After an hour or so, he took Deborah and her mother into his private office where the mother told the doctor that Deborah had been feeling bad, that she thought her kidneys were bad and that she wanted the doctor to check them. Deborah had been struck by the mirror of a truck the day before and had been suffering from a headache since then.

Dr. Kincheloe took Deborah into another room, leaving her mother in his office. He kept her there from about 3:30 p.m. until after 5:00 p.m. When Deborah came out she was holding onto the wall, steadying herself, staggering and was dizzy. Mrs. Edwards and Deborah then went to the home of another daughter, and later Deborah told two older sisters what had occurred while she was with Dr. Kincheloe. The sisters told the mother, and the next morning Deborah was examined by Dr. Leonard S. Woodall who testified that he made a pelvic examination to see if Deborah had had intercourse; that he found sperm and a laceration of the hymenal, and that in his opinion she had had intercourse.

Deborah testified that she had been hit by the mirror of a truck and received a blow on her right temple; that she had some bad headaches that night and the next day, and also that she had been in bed sick for about a week and "mother thought it was my kidneys." Upon being admitted to Dr. Kincheloe's private office, Mrs. Edwards told him that she wanted him to examine Deborah's head because the truck had hit her and to check her kidneys. The child was then taken to another room, and Dr. Kincheloe asked her to go into the bathroom and give him a specimen of her urine, which she did. The doctor told her to put it on the table, and it was still in the same place when she left the room over an hour later.

She then testified as to what further occurred, except for a period of unconsciousness caused by the injection of some drug in her arm. No good purpose would be served by relating the details of the hour-long treatment during which no nurse or other person was present.

She said she was required to completely disrobe, and after a more than complete examination was given an injection that rendered her unconscious. Her evidence offered a substantial base for the findings of the Board which were affirmed by the Court.

She was dizzy and had to hold onto the wall or chair to keep

from falling as she left the office. When she got to her sister's house she told her mother that the doctor had given her a shot and she passed out and "I was real dizzy and sleepy like I could sleep for three or four days. I was scared you know when I woke up I was real sore and it hurt me when I walked . . . but I was scared to say anything about it so I didn't mention it." The next day she told her sister Virginia about it, and Virginia told another sister, Becky. About an hour later the two sisters came over to Deborah's house, "and I told her about what I thought had happened and then Becky went and told mother she thought I ought to go to the hospital and be examined. . . . I was sore in my lower private parts and it hurt me to sit down. As soon as I awoke I was hurting, and sore but I didn't say anything about it to anybody. . . . I was sore all the next day. . . . There was some bleeding from my body that night when I came home. . . . I discovered a small amount in my pants and a lot of discharge."

Deborah testified that she had not engaged in sexual intercourse before the incident in Dr. Kincheloe's office.

Mrs. Rebecca Edwards Wheeler corroborated the testimony of her young sister Deborah, saying that after the other sister Virginia told her about talking with Deborah that she then questioned Deborah, who recounted the details of the experience with Dr. Kincheloe. Her testimony fully corroborated Deborah's testimony.

Mr. Robert D. Emerson, Special Agent of the State Bureau of Investigation, said that after his department has been called into the case, he interviewed Mrs. Myrtle Edwards and Deborah Jean Edwards, and that at the time of the interviews, E. L. Norton, another agent of the S.B.I., and a lady were present. In essence, he said that the statements made to him by Mrs. Edwards and her daughter were the same as contained in her testimony before the Board. He also said that he had investigated the reputations of Mrs. Edwards and Deborah and that they were good.

When the Board began its hearing on 6 January 1967, Dr. Kincheloe was present but was not represented by counsel. Before going into the hearing, he was asked if he had counsel and replied that he did not and said he didn't feel that it was necessary. Previously, the respondent had indicated that he did not wish to remain in the room during the testimony of witnesses, and he was then given an opportunity to make a statement regarding that subject. He then said:

> "Gentlemen, in brief, what I asked Mr. Anderson and Dr. Combs was to be excused from this, sitting through this story of the prosecution; I have sat through it in court and I frankly

do not care to hear it again; I assume that Bob Anderson will see to it that the story is told as it was told in court, and after you have dispersed with these witnesses, then I will be glad to give you a statement of what actually happened. During the trial we presented no defense, it was not assumed to be necessary; the prosecution presented their story and my version of what actually happened has not been told.

"DR. DAVIS: Well, if it is your preference, then we will excuse you from this part of the proceedings.

"DR. KINCHELOE: Thank you very much.

"(Dr. Kincheloe is excused.)"

During the examination of the witnesses, an attempt was made to locate Dr. Kincheloe, but he was not to be found in the building. Later he returned to the hearing room and was asked if he cared to examine any or all of the witnesses, to which he replied: "No sir, this has been done in court previously, and I am not an attorney. I don't feel qualified to cross examine the witnesses. . . . I would like simply to present my story telling you exactly what happened." He was then sworn and said:

"Gentlemen, I would like to have the privilege of telling my story without interruption if it is all right with you, and if you have any questions when I finish, feel free to ask them. Let me preface my remarks by saying that some three and a half years ago I was before this Board, at which time I was guilty of something I am quite deeply ashamed of, I was certainly in the wrong and the decision of this Board to revoke my license at that time I feel was entirely justified; I centainly bear no ill feeling against this Board. And had I been on the Board at the time myself I feel that my decision in that particular case would have been the same as yours, you had no choice but to do what you did at that time."

He then said that he was a changed man and was incapable of doing what he was charged with; that when Mrs. Edwards brought her daughter to his office she said she wanted him to give Deborah a complete examination, and he thought perhaps the mother suspected that her daughter was pregnant and assumed she wanted a pelvic examination. He testified he examined her urine while Deborah was getting undressed; that he did not watch her undress; that when he went back to the examining room "Deborah Jean was sitting on the edge of the table with the sheet pulled up over her . . . she did not wear a slip to the office that day, and so underneath she had nothing on, . . . I had her lie down and pulled out

the extension to the table . . . I did a routine examination of her chest while she was in the supine position, I had no nurse present but the door was open — the door was not locked certainly, to this office, the mother had indicated that she did not care to come back there with the daughter . . . she had free access to come in at any time and I felt that with the mother present there it was certainly not unethical to examine the girl when all the girl had to do if she wanted her mother was to ask for her and the girl certainly did not ask for her mother . . . I did not watch her undress . . . I did nothing to embarrass the girl, the entire course of the examination was routine and entirely ethical." He said he did not give her a shot in the arm which put her to sleep; that he did give her a shot of pencillin in the hip and had her roll slightly on the table, "the sheet was over her during this entire course of the examination except of course those parts that were being examined, and everything was done in a strictly doctor-patient relationship. . . . I certainly did not tell her that she was pretty, that she looked like a movie star . . . made no attempt to kiss her. . . . I gave her the shot of pencillin in her hip and I put her feet in stirrups and did a routine pelvic examination of her. I asked her at the time if I was hurting her in any way and she said no. There was no indication, I did not notice any break in the mucosa . . . She had a marital outlet, I had no difficulty in examining her. . . . [W]hen I finished doing the pelvic I turned around and went into the bathroom . . ., told Deborah Jean to get her clothes on and while I was washing the glove and the speculum . . . her mother knocked at the door . . . I opened the door, her mother came in, Deborah Jean was standing there, she was already dressed . . ."

He said he then did a hemoglobin, told the mother that he had found nothing wrong other than a mild sore throat and gave Deborah some B vitamin. He said the girl was in his office not over forty or forty-five minutes, during which time he was interrupted by at least three or four telephone calls; that he made no advances; that he was forty-five years of age and wouldn't think of doing anything like this in his office.

He also said that his lawyer had checked into Deborah's character; that she was "certainly not virginal and I have heard of other boys that she's been out with but there are three that I definitely know of that told me they had been out with her and had intercourse with her . . ."

Following his statement, several members of the Board, as well as Mr. Anderson, the attorney for the Board, asked him questions.

No new evidence was developed, and the questions were not of a harsh nature but constituted a repetition of his previous evidence. He said, "[It] was quite obvious when I put her up for a pelvic examination, that she was not virginal." He discovered no laceration and saw no indication of pregnancy. He further said that Deborah did not resent having to take her clothes off, did not ask for her mother to be present; that he closed the door because it is not good policy to examine any female patient with the door open where someone can come in unexpectedly. Mr. Anderson then said, "I will not ask you at this time about your last appearance, the Board can ask you about that . . . [Answer] Well, as I said, gentlemen, I have a deep sense of guilt about that appearance, as I told you I was in the wrong, I know I was in the wrong and I feel that what you did in that instance was completely justified, you had no other recourse than to do what you did."

In response to a question that didn't he think it was necessary to have another female present at the time of the examination, he said he wanted another female in the immediate vicinity where they can come in but did not require her to remain during the entire course of the examination; that if he had known the examination was going to involve the time it did or if he had known that she wanted a complete examination he would not have taken her back there.

The record shows that several members of the Board asked the respondent concerning his previous trial by the Board, and he repeatedly said that the Board did the right thing; that he had no criticism of it, that he would have done the same thing had he been a member of the Board and admitted that he had not been truthful in regard to the previous charge.

He was then asked about his attempted suicide following the present charge and his treatment at Dorothea Dix Hospital where he stayed for twenty days after the charge was filed against him. He replied that when he was charged with raping Deborah, his wife had said "that she was going to leave me, she was fed up with all this, that she was through with me, and I was depressed enough to think she meant it . . . I filled myself just as full of phenobarbital as I could. . . . More than a lethal dose. . . . This is the first time I've ever attempted suicide and it will certainly be the last time."

He said he had a gun in his pocket when he was taken to the State Hospital, and "I debated and couldn't decide whether to shoot myself, I decided that would be too messy."

George Eason testified for the defendant that he and several

other patients were in Dr. Kincheloe's office the day Deborah and her mother came there; that the latter were taken ahead of him; that they were "back there I don't know, forty to forty-five minutes . . . I heard the phone ring several times . . . The girl and her mother looked well when they left the office, seemed to be all right." Upon cross examination, the witness admitted that he had served time in several places for breaking and entering, fighting, and intoxicants.

At the conclusion of the evidence before the Board, the respondent expressed the hope that his testimony had been heard with an open mind and said, "I can only re-emphasize that I am not the same person that I was at the time I was here before this Board before, and this thing that has happened to me recently I am not guilty of, any facet of it."

On 10 January 1967, by unanimous vote, the Board found and concluded "that Franklin S. Kincheloe, Jr., M.D., in connection with his treatment of Deborah Jean Edwards on August 17th, 1966, was and is guilty of unprofessional and dishonorable conduct unworthy of, and affecting, the practice of his profession, and that grounds exist for the revocation of his license to practice medicine, and ordered that the license of said Franklin S. Kincheloe, Jr., M.D. to practice medicine in the State of North Carolina be revoked."

The respondent gave notice of appeal to the Superior Court and obtained a stay of the revocation of his license. At the April 1967 Session of Wake County Superior Court, the respondent moved that the Board of Medical Examiners "be required to either abandon the charges contained in paragraph No. 1 . . . or to pass upon the same before any hearing upon this notice of appeal." The Court allowed this motion and remanded the cause "to the Board of Medical Examiners . . . for disposition of the charges contained in paragraph 1 of the Charges and Accusations as shown in the record."

On 12 June 1967, the Board reviewed the testimony, considered and discussed each of the charges and accusations and then found (1) that the respondent "in connection with his treatment of Deborah Jean Edwards as a patient directed and caused her to enter a room in the rear of his office, excluded her mother from the room, and entered the room and closed the door"; (2) that he "then directed and caused her to remove all her clothing in his presence without any medical reason or necessity"; (3) that he "examined the various parts of the nude body . . . in a room, the door or doors to which were closed, and in which no other person was present"; (4) that he "administered to [her] a drug by hypodermic injection which rendered her unconscious for an appreciable period

of time without any medical reason or necessity"; (5) that "while [she] was unconscious and insensible to her surroundings and while no other person was present and while she was unclothed, examined, observed, touched, and otherwise came in contact with her body, all without medical reason or necessity"; (6) that he "attempted to kiss [her]"; (7) that he "placed his arms around [her] while she was unclothed, without any medical cause or necessity"; (8) that he "penetrated the vaginal cavity which caused a laceration at the entrance to the vagina . . . without medical reason or necessity, and without the presence of any other person"; (9) that "by his remarks and actions in his dealings and attendance of [her], displayed a lustful, lascivious, and unprofessional attitude and demeanor, and he did take unprofessional liberties with her"; (10) that "in connection with his treatment of Deborah Jean Edwards as a patient engaged in sexual intercourse with [her]"; (11) that he "was guilty of unprofessional and dishonorable conduct unworthy of and affecting his profession and that grounds exist for the revocation of his license to practice medicine . . ."

Following these findings, the order concluded:

> "Upon motion duly made, and seconded and unanimously adopted the Board ordered that the Order of the Board of January 10th, 1967, revoking the license of Franklin S. Kincheloe, Jr., M.D. to practice medicine in the State of North Carolina be reaffirmed and reiterated, and that his license to practice medicine be revoked."

This order was signed by Jos. J. Combs, M.D., Secretary of the Board, and the following day an order was signed by James E. Davis, M.D., President of the Board, confirming the findings of the previous day and ordered revocation of the respondent's license.

The respondent filed numerous exceptions to the foregoing orders, and the matter was heard on appeal before Judge Lacy H. Thornburg, Judge Presiding in the Superior Court of Wake County, in September 1967.

At the hearing before Judge Thornburg, the respondent was permitted to make a statement in which he said that he had expected the Board to take the transcript of his trial in the Superior Court "as these witnesses had been cross examined and then I felt they would take all this information available to them in the court proceedings." He further said that he did not take a lawyer with him to the Southern Pines hearing before the Board because he could not afford the services of a lawyer and did not have any money from any source with which he could have employed an attorney; that he had never cross examined any witnesses; that he

had requested that he not be present when the witnesses testified; that he be excused from this proceeding; that their testimony had been presented in the trial and he assumed they would go by that transcript.

Upon cross examination, the respondent said that he had received notice of the charges against him in October 1966 and had read them and understood them; that he was not under any mental disability then or at the time of the Board hearing; that he knew he would be permitted to appear in person or be represented by counsel; that he was asked to stay and hear the witnesses and declined to do so. He further said that he had employed lawyers in connection with the charges against him two or three times; that he voluntarily surrendered his narcotics license in 1952; that he employed counsel in connection with the charges preferred against him by the Board in 1963; that he had counsel at that hearing and two lawyers on appeal to the Superior Court and that one of them was the attorney now representing him.

Judge Thornburg in a complete order found the essential facts and made rulings of law. In summary, he found that the Board had authority to revoke Dr. Kincheloe's license; that there was no defect in the notice to him; that his right to be represented by counsel was knowingly and intelligently waived as was the right to confront witnesses; that his trial and acquittal of criminal charges was not *res judicata* nor a bar against the proceedings before the Board; that there was sufficient competent evidence to support revocation of his license and its conclusions that he was guilty of unprofessional and dishonorable conduct. (It was from these findings and rulings that the respondent appealed.) The Court then held that he did not receive a fair and impartial hearing by the Board; "[t]hat incompetent evidence outside the scope of his notice of charges and accusations was heard and most probably considered by the Board in reaching its decision"; and that the Board did not comply with the mandatory provisions of G.S. 90-14.6. (From these findings and rulings, the Board appealed.) The Court then remanded the case for hearing *de novo* before the Board and stayed the order of revocation pending further proceedings.

Both parties filed exceptions, which are discussed in the opinion.

Albert A. Corbett, Attorney for Franklin S. Kincheloe, Jr., M.D.

Smith, Leach, Anderson & Dorsett by John H. Anderson, Attorneys for The Board of Medical Examiners of the State of North Carolina.

PLESS, J. G.S. 90-14 provides that the Board of medical Examiners may revoke a physician's license, "when, after due notice and hearing, it shall find [he] . . . has been guilty of . . . any unprofessional or dishonorable conduct unworthy of, and affecting, the practice of his profession . . ." It further provides that its findings and actions shall be subject to review upon appeal to the Superior Court.

G.S. 90-14.10 says that upon the review, the case shall be heard by the judge without a jury, upon the record; that "[t]he court may affirm the decision of the Board or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the accused physician have been prejudiced because the findings or decisions of the Board are in violation of substantive or procedural law, or are not supported by competent, material, and substantial evidence admissible under this article, or are arbitrary or capricious."

G.S. 90-14.11 authorizes any party, including the Board, to appeal to the Supreme Court from the decision of the Superior Court.

The public generally has respect for the learned professions: medical, legal and divinity. If that confidence is to be maintained, it can only be because the ninety-nine per cent of the ethical, honorable members of their professions insist that the one per cent, or less, who violate their responsibilities and duties are promptly shorn of the opportunity to do so. Here, a group of eminent doctors of the very highest character and reputation have (and the record shows they did it reluctantly and regretfully) found their associate guilty, upon impressive evidence, of "lustful, lascivious and unprofessional conduct." The Court found that these findings were supported by the evidence, as was its order that his license to practice medicine be revoked.

However, the Court also found that Dr. Kincheloe did not receive a fair and impartial hearing in that "incompetent evidence outside the scope of his notice was heard and most probably considered by the Board." The finding does not specify this evidence, but upon consideration of the record, we can only construe it as holding improper the questions by the members of the Board regarding the respondent's previous violations, which had resulted in the suspension of his license. This ruling is fallible. (1) The respondent first interjected this feature when he referred to his hearing before the Board three and a half years earlier and said that he was ashamed of the matters then investigated. The admission of incompetent evidence is cured when substantially the same evidence is theretofore or thereafter admitted without objection. 1 Strong, N. C. Index 2d, Appeal and Error, § 48. Thus, if evidence regard-

ing his previous license revocation were incompetent, it had "theretofore been admitted without objection" in the form of respondent's voluntary statement. (2) The proceedings show that the previous charges were already known to the members of the Board so that information given in the present investigation added no new knowledge. (3) Examination of a defendant, or respondent, as to past misconduct is competent for the purpose of impeachment and may properly be considered by a jury (or a board) in weighing the value and credibility of his testimony. Stansbury, in his helpful work, N. C. Evidence, Witnesses, § 42, summarizes the law of cross examination with many citations to support the statement:

> "Cross-examination may be employed to test a witness's credibility in such an infinite variety of ways that an attempt to list them would be futile. 'The largest possible scope should be given,' and 'almost any question' may be put 'to test the value of his testimony . . . and to show his animus, feeling, or bias.' . . . [C]ross-examination is available to establish such well-recognized grounds of impeachment as bad moral character (including specific instances of misconduct), bias, self-contradiction, etc."

2 Strong, N. C. Index, Evidence, § 58, says:

> "The right to cross-examine an opposing witness is a substantial right. The latitude of cross-examination for the purpose of impeachment is wide. A witness may be asked questions on cross-examination which tend to test his accuracy, to show his interest or bias, or impeach his credibility. . . . Questions relating to crime and anti-social conduct are allowed."

The Doctor was questioned about his previous troubles with the Board, as well as other questionable activities, only after he had referred to them, or it was apparent from the questions that the members of the Board already had knowledge of these activities, and no new material information was thus elicited. While no objection was taken at the time, all of the questions asked were competent and would have been admitted by any court.

In its judgment, the Court found that the prosecution of the respondent upon the charge of rape which resulted in his acquittal was not *res judicata* and was not a bar against these proceedings. This was correct, and yet the learned judge implied that questions regarding that trial were improper. We cannot agree. Other factors must be considered. In a criminal trial, the guilt of a defendant must be shown beyond a reasonable doubt; here only a preponder-

ance of the evidence is required. In the criminal charge, the defendant was alleged to have committed rape — here he was charged with unethical and unprofessional conduct in having sexual relations with his patient — a vast difference. In the criminal prosecution, the penalty upon conviction is a death sentence or life imprisonment. In these proceedings, the maximum punishment is the loss of the respondent's license to practice medicine.

It is also implied that some disadvantage resulted to the respondent because he was not represented by counsel at the hearing, saying he could not afford to employ counsel. Also, it must be recalled that he said he didn't think this necessary and that he waived it. Even had he not done so, we know of no provision for the appointment, at public expense, of an attorney for a doctor whose office is so filled with patients that he has to decide whom he will see first. It would strain the credulity of the public to learn that, in these days, there is an indigent doctor!

No material change in the circumstances of the respondent has been shown, but we note that he is now represented by able (and not court-appointed) counsel.

The Court also found that the Board did not comply with G.S. 90-14.6. It is as follows:

> "In proceedings held pursuant to this article the Board shall admit and hear evidence in the same manner and form as prescribed by law for civil actions. A complete record of such evidence shall be made, together with the other proceedings incident to such hearing."

An examination of the lengthy record reveals no violation of this statute by the Board or its attorney. It does demonstrate a rather friendly and sorrowful feeling for the respondent, as in most of the questions he was addressed as "Frank". The only incompetent evidence we find is that the respondent was permitted to violate the hearsay evidence rule and testify to the alleged immoral conduct of Deborah, which he claims was related to him by three different boys.

The respondent admitted he was in the wrong and unfair to the Board in its previous hearing but claims that he did not commit the acts attributed to him here. In the former proceeding, the evidence indicates that the respondent was a deviate, and after the suspension of his license, it had been restored to him with a warning in regard to his future conduct. If he is an uncontrollable deviate, we must all sympathize with him. If he isn't, and his acts here were as the Board found, "lustful and lascivious", the result is the same.

In neither event should he be allowed to practice a profession which affords him the frequent opportunity — if not the temptation — to accede to his deviations or his laschiviousness — whichever it is.

In full and complete hearings, of which the respondent had notice, evidence has been submitted to the Board which fully sustains its findings and order as set out in the statement of facts. No reason appears to question the motives and veracity of Deborah Jean Edwards. If, for any reason, she were making a false charge against the doctor, she could have testified that while in a semi-conscious condition and unable to protect herself, the respondent had sexual relations with her. The fact that she did not so testify but that this was discovered only after she had spoken of her soreness to her sisters, followed by the examination by Dr. Woodall, gives credence to the charges. Upon all of the evidence, including that of the respondent, Deborah was in his office for a sufficient length of time for the incident to occur as found by the Board. Deborah's testimony is corroborated in many details by the testimony of her mother, her sister, Mr. Emerson of the S.B.I., and Dr. Woodall. In opposition to this, we have only the denial of the respondent and rather vague substantiation of part of his statement by the witness Eason.

Upon consideration of all the evidence, we are of the opinion that it was quite sufficient to sustain the findings of the Board and that, as a matter of law, the facts found support its order revoking the license of Dr. Kincheloe. We affirm it in its entirety and also affirm that part of the Judge's order consonate with this ruling.

Upon the appeal of the Board from the order remanding the cause for hearing *de novo,* we are of the opinion, for the reasons set forth above, that the order was not proper, and it is hereby set aside and reversed.

The cause is remanded to the Superior Court of Wake County for judgment revoking the medical license of Dr. Kincheloe in accordance with this opinion.

As to Respondent's appeal — No error.

As to Board's appeal — Reversed and remanded.

STATE v. TOMMY McNAIR.

(Filed 29 November, 1967.)

1. Criminal Law § 106—

Although the jury should receive and act upon such testimony with caution, the unsupported testimony of an accomplice is sufficient to sustain a conviction if it satisfies the jury beyond a reasonable doubt of the guilt of the accused.

2. Criminal Law § 9—

Where two or more persons aid and abet each other in the commission of a crime, all being present, each is a principal and equally guilty, regardless of any previous confederation or design.

3. Robbery § 4—

Evidence of the State tending to show that the defendant was present with two other people when they picked up a soldier and drove him to a deserted place where they all proceeded to beat him, and that the defendant shared in the division of money found in the soldier's wallet, *held* sufficient to be submitted to the jury on the issue of defendant's guilt of common law robbery, despite defendant's denial that he participated either in the planning or in the perpetration of the offense.

4. Criminal Law § 158—

Where the charge of the court is not set out in the record, it is presumed that the jury was correctly instructed on the law arising out of the evidence.

5. Criminal Law § 169—

A question propounded by the State to the defendant on cross-examination as to whether the defendant had been indicted for the larceny of an automobile, *held* not prejudicial in view of the defendant's unequivocal negative answer.

6. Same—

While ordinarily the *quantum* of punishment imposed upon the conviction of another offense is not admissible for purposes of impeachment, there was no prejudicial error in this case in allowing the State to show that the defendant had received a probationary sentence of eighteen months to an offense to which he had pleaded guilty, since such a sentence tended to place defendant in a more favorable light with regard to that particular offense.

APPEAL by defendant from *May, Special Judge,* June 26, 1967 Mixed Session of CUMBERLAND.

Defendant was indicted in a bill charging Tommy McNair, Robert Henry Cromedy and Raymond Cox with the armed robbery, as defined in G.S. 14-87, of one Mark Edwards on February 28, 1967.

Tommy McNair (18), an indigent, represented by W. Ritchie Smith, Jr., Esq., his court-appointed counsel, pleaded not guilty. In

his trial at said June 26, 1967 Session, Robert Henry Cromedy (19) and Raymond Cox (20) testified as witnesses for the State. They were then serving prison sentences, Cromedy at Harnett County Youth Center and Cox at Polk Youth Center. Prior to said June 26, 1967 Session, Cromedy and Cox had pleaded guilty to common law robbery; and each was then serving the sentence the court had pronounced on said plea.

Evidence was offered by the State and by defendant.

The State's evidence, summarized except where quoted, tends to show the facts narrated below.

McNair, Cromedy and Cox got together in a poolroom in Fayetteville, N. C., during the afternoon of February 28, 1967. They left about 8:00 p.m. in Cox's car. Cox testified that before they left the poolroom they "talked about what (they) were going to do" and "all three agreed that (they) needed some money as (they) didn't have any money." They "rode around trying to spot a soldier hitchhiking to pick up." On two occasions, they picked up a soldier, took him to Fort Bragg, but made no attempt to rob him. During this period, McNair, Cromedy and Cox had drinks of whiskey and beer. The third soldier to whom they offered a ride was Mark Edwards. Cox was driving. McNair and Cromedy were on the back seat. Edwards accepted their invitation, got in the car and sat on the front seat next to Cox. Cox drove to an unlighted place on a dirt road and stopped. McNair, pretending he was sick, got out and Cox joined him at the back of the car. McNair asked if Cox had any weapons and was informed that an iron lug wrench, about two feet long, was the only weapon he had. Following their conversation at the back of Cox's car, McNair went to the driver's side of the car and "leaned into the car with his left hand on the steering wheel and the tire tool in his right hand on the back of the front seat." Cox, on the right side of the front seat, touched Edwards on the shoulder; and when Edwards turned around Cox hit him in the jaw. From the back seat of the car, Cromedy grabbed Edwards under the chin with his right hand. McNair was standing at or near the steering wheel on the left side of the car. Under these circumstances, Cox took the wallet from Edward's pocket and removed the money. Observing the lights of an approaching car, both McNair and Cox got back in the car. McNair "got under the steering wheel and drove down to the hard surfaced road." There, Edwards was put out of the car. McNair, Cromedy and Cox returned to the poolroom and there Cox made a three-way division of $42.00, giving McNair $14.00, Cromedy $14.00 and retaining the balance.

Defendant testified in substance that he got with Cromedy and

Cox in the poolroom and later rode with them. He denied there was any discussion of a proposal to rob a hitchhiking soldier. He testified their purpose was simply to pick up a soldier with the expectation of receiving thirty cents or thereabouts for transporting him to Fort Bragg. He testified he was in fact sick on account of having imbibed whiskey and beer; and that he got out and went to the back of the car because he was sick. He testified he had the lug wrench in his hand because Cox had told him that Edwards had a knife; and that, although he had the lug wrench in his right hand as he approached the left side of Cox's car, he did not use it or display it, but rather held it and later placed it on the floor behind the front seat. He testified he drove the car a short distance from the scene of the alleged robbery simply because it was blocking the road and had to be moved. He admitted that he received $14.00 from Cox but denied having participated either in the planning or in the perpetration of the alleged robbery.

It is noted that Mark Edwards, the victim of the alleged robbery was "separated from the service" prior to the June 26, 1967 Session and did not testify.

The jury found Tommy McNair, referred to hereafter as defendant, guilty of common law robbery; and the court pronounced judgment that defendant "be confined in the State's Prison for a term of Ten Years and assigned to work under the Supervision of the State Prison Department." Defendant excepted and appealed.

Attorney General Bruton and Staff Attorney Vanore for the State.

W. Ritchie Smith, Jr., for defendant appellant.

PER CURIAM. "It is well settled in this jurisdiction that although the jury should receive and act upon such testimony with caution, the unsupported testimony of an accomplice is sufficient to sustain a conviction if it satisfies the jury beyond a reasonable doubt of the guilt of the accused." *State v. Tilley,* 239 N.C. 245, 249, 79 S.E. 2d 473, 476, and cases cited; *State v. Saunders,* 245 N.C. 338, 342, 95 S.E. 2d 876, 879; *State v. Terrell,* 256 N.C. 232, 236, 123 S.E. 2d 469, 472. Too, "(i)t is thoroughly established law in North Carolina that without regard to any previous confederation or design, when two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty." *State v. Spencer,* 239 N.C. 604, 611, 80 S.E. 2d 670, 675, and cases cited; *State v. Peeden,* 253 N.C. 562, 564, 117 S.E. 2d 398, 400.

Applying the legal principles stated above, there was evidence which, when considered in the light most favorable to the State, is sufficient to show defendant was an active participant in the robbery of Mark Edwards. It was amply sufficient to require submission to the jury and to support defendant's conviction of common law robbery. Hence, Assignment of Error No. 1 based on Exception No. 1, directed to the court's refusal to allow defendant's motion as in case of nonsuit, is without merit.

The charge of the trial court was not included in the record on appeal. Hence, it is presumed the jury was instructed correctly on every principle of law applicable to the facts. *State v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781; *State v. Hoover,* 252 N.C. 133, 140-141, 113 S.E. 2d 281, 287, and cases cited therein.

Defendant's Assignments of Error Nos. 2, 3 and 4, based on Exceptions Nos. 2, 3 and 4, refer to the portion of the record quoted below.

"Q. How many times have you been indicted by the grand jury for larceny?

"OBJECTION BY THE DEFENDANT OVERRULED.

"A. Never.

"Q. In May of 1966, were you indicted by the grand jury for larceny of a car and they let you plead guilty to the misdemeanor, isn't that right?

"OBJECTION BY DEFENDANT OVERRULED.

"A. Say what, now?

"Q. In May, 1966, May 25th, they let you plead . . .

"A. They let me plead guilty to larceny?

"Q. To the unauthorized use or misdemeanor"

"A. That is the only one.

EXCEPTION No. 2.

"Q. And gave you eighteen months' sentence and put you on probation and you are on probation now?

"OBJECTION BY DEFENDANT OVERRULED.

"A. That is correct.

EXCEPTION No. 3.

"Q. Then you were on probation at the time this thing happened?

"A. That is right.

EXCEPTION No. 4.

"Q. And in June of 1966 you were indicted by the grand jury for larceny of an automobile?

"OBJECTION BY DEFENDANT OVERRULED.

"A. No sir."

In Assignment of Error No. 2 based on Exception No. 2 defendant asserts the court erred in allowing the State to show, on cross-examination of defendant, "that the defendant had been previously indicted by the grand jury for larceny of a car when the evidence showed the defendant was never convicted of that offense." On this appeal, we need not reconsider whether the State should be permitted to cross-examine a defendant, for purposes of impeachment, with reference to whether he had been *indicted* for a specified criminal offense. See Stansbury, North Carolina Evidence, Second Edition, § 112, p. 255. Here, defendant testified he *had not been indicted* for larceny. In view of defendant's unequivocal negative answer, the solicitor's question cannot be deemed prejudicial to defendant.

In Assignments of Error Nos. 3 and 4, based on Exceptions Nos. 3 and 4, defendant asserts the court erred in allowing the State to introduce evidence that defendant had been given a sentence of eighteen months and was on probation at the time the alleged offense for which he was being tried was committed. It was permissible for the State to elicit on cross-examination of defendant, for purposes of impeachment, that defendant had pleaded guilty to a specific criminal offense, to wit, a misdemeanor. Stansbury, *op. cit.*, § 112, p. 254-255. Ordinarily the *quantum* of punishment imposed upon conviction or a plea of guilty of another criminal offense is not admissible for purposes of impeachment. However, the fact the court saw fit to pronounce a probationary judgment would seem to put defendant in a more favorable light with reference to the criminal offense to which he had pleaded guilty. Under these circumstances, the admission of this evidence cannot be considered prejudicial error.

Having reached the conclusion that the assignments set forth by defendant and discussed in his brief do not disclose prejudicial error, the verdict and judgment will not be disturbed.

No error.

MARTHA LAUGHLIN TEAGUE v. ROGER EDGAR TEAGUE.

(Filed 29 November, 1967.)

1. Divorce and Alimony § 1—

The rendition of absolute divorce does not oust the jurisdiction of a court in which a prior action for alimony without divorce was pending.

2. Divorce and Alimony §§ 23, 24—

The Superior Court has authority to modify an order affecting the custody and support of a minor child when changed circumstances so require, G.S. 50-13, G.S. 50-16, and the court's findings of fact, in modifying such order, are conclusive on appeal if supported by competent evidence.

3. Divorce and Alimony § 23—

The amount allowed by the court for the support of the children of the marriage will be disturbed on appeal only when there is a gross abuse of discretion, and the court has plenary authority to order the father to turn over to the plaintiff, for the use of the children, the home owned by the parties as tenants by the entireties.

APPEAL by defendant from *Hasty, J.*, 24 April 1967 Non-Jury Session of GUILFORD (Greensboro Division).

Plaintiff instituted this action against her husband on 9 March 1965 under G.S. 50-16 for alimony without divorce. She also sought custody of the two children of the marriage, Linda Jane Teague and Roger Darrell Teague, then aged 15 and 10 respectively, a reasonable subsistence for them, possession of the home, which the parties owned as tenants by the entirety, and counsel fees. On 5 April 1965, Gambill, J., entered an order directing defendant to pay plaintiff $40.00 a week for the support of herself and the children. The award included an allowance of $100.00 to plaintiff's counsel. We upheld this order in a decision filed 14 January 1966. *Teague v. Teague*, 266 N.C. 320, 146 S.E. 2d 87. Pending that appeal, on 18 October 1965, plaintiff had secured an absolute divorce from defendant.

On 16 March 1966, Armstrong, J., entered an order in which he awarded plaintiff the custody of the two children with visitation rights to defendant. Defendant's weekly payments, now solely for the support of the two children, were reduced to $25.00 a week, and defendant was ordered to pay plaintiff's attorney a fee of $300.00.

On 28 February 1967, plaintiff filed a verified motion that defendant be required to increase his payments for the children's support to $60.00 a week. She averred that since the entry of Judge Armstrong's order she and the children had moved from the home of her parents, where they had paid no rent or utility bills; that, exclusive of school expenses, medical and dental bills, it cost her $164.00 a month for the support of the two children; that she had requested defendant to turn over to her the homeplace, which she and defendant now owned as tenants in common, but he had refused.

After due notice to defendant, Judge Hasty heard plaintiff's motion on 26 April 1967. Both plaintiff and defendant testified.

Plaintiff's evidence tended to show: Her monthly expenses for rent, heat, lights, water, telephone, groceries, cleaning, and hospital insurance totaled $256.79. She allocated one-half of this amount, $128.40, to the children's expenses. In addition, Linda's school lunches and fees, transportation, dental and medical bills amounted to approximately $130.00 monthly. For Darrell, these expenditures totaled approximately $78.00. Defendant, who remarried in October 1966, resides alone in the 7-room, Greensboro home, which the parties now own in common. His wife resides in Durham. Defendant refuses to surrender this house, which has three bedrooms and two baths, to plaintiff and the two children. He also refuses to pay plaintiff any rent for the use of her one-half of the property.

Defendant's evidence tended to show: His net income, after taxes, was $5,262.81 in 1966. To meet his necessary living expenses, the mortgage payments on the home, and the payments for the support of the children, he has had to borrow money. His new wife resides in Durham, where she is gainfully employed. In 1966, he purchased a Buick LaSabre automobile and had the title registered in his father's name. He has not paid any of the attorney's fees ordered by the court. The furnishings, which plaintiff took from the home, exceed in value what was due her and her attorney under Judge Armstrong's order.

After hearing the evidence, Judge Hasty found facts in accordance with plaintiff's testimony and concluded that, as a result of a change in conditions since Judge Armstrong made his order, $25.00 a week "is an inadequate sum to provide for the needs and necessities of the two children", and that defendant's income is ample to provide for both his needs and those of the children. In order to eliminate rent and to provide adequate living quarters for the children, Judge Hasty ordered defendant to turn over the home to plaintiff and to pay to her $30.00 each week for the use and benefit of the children. In addition, defendant was required to pay plaintiff's counsel a fee of $100.00.

Defendant excepted to the court's findings of fact, and from the order based thereon he appealed.

B. Gordon Gentry; G. C. Hampton, Jr., for plaintiff appellee.
Cahoon & Swisher for defendant appellant.

PER CURIAM. The record does not disclose the county in which plaintiff and defendant were divorced. Presumably the divorce was secured in Guilford County. The place, however, is immaterial, for the court in which an action for alimony without divorce (G.S.

50-16) was instituted does not lose its custody jurisdiction to the court of another county in which an action for divorce is subsequently filed. *In re Custody of Sauls,* 270 N.C. 180, 154 S.E. 2d 327; *Blankenship v. Blankenship,* 256 N.C. 638, 124 S.E. 2d 857. Defendant's contention that Judge Hasty lacked jurisdiction of the motion is without merit.

A court order affecting the custody or support of a minor child may always be modified when changed circumstances so require. G.S. 50-13; G.S. 50-16; 2 Lee, N. C. Family Law § 153 (1963). The record discloses that since Judge Armstrong made his order on 16 March 1966, changed conditions have affected the welfare of the two children. That order was, therefore, subject to modification by Judge Hasty. The facts which he found are supported by competent evidence and are binding on this Court. *Williams v. Williams,* 261 N.C. 48, 134 S.E. 2d 227.

The amount which defendant should pay to plaintiff for the support of their two children was a matter for the trial judge's determination, reviewable only in case of an abuse of discretion. *Rowland v. Rowland,* 253 N.C. 328, 116 S.E. 2d 795. The court had plenary authority to order defendant to turn over to plaintiff, for the use of the children, the home which the parties owned. *Sguros v. Sguros,* 252 N.C. 408, 114 S.E. 2d 79; *Wright v. Wright,* 216 N.C. 693, 6 S.E. 2d 555. Under the facts here disclosed, the arrangement appears to have been appropriate. Even with shelter thus provided for them, the sum of $30.00 a week ($1,560.00 a year) for the support of two school children, aged 17 and 12 respectively, will provide only minimum sustenance. Under all the circumstances disclosed, defendant could not reasonably expect to pay less.

Plaintiff's application for a modification of Judge Armstrong's order was necessitated by defendant's refusal to consider plaintiff's request for additional support for the children. Having thus forced her to apply to the court to secure for his children the support to which they are entitled, defendant cannot justly complain at being required to assist in the payment of plaintiff's necessary counsel fees.

The order of Judge Hasty is in all respects

Affirmed.

BETTY ELLIOTT JOSEY v. JERRY ONVELL JOSEY.

(Filed 29 November, 1967.)

Divorce and Alimony § 18—

In an action for alimony without divorce, the refusal of the court to consider defendant's affidavit, filed before time for answer had expired, which affidavit related to his financial ability to make payments, denied defendant his right to be heard on the issue of his ability to pay *pendente* allowances, and the order awarding compensation to plaintiff is vacated and the cause remanded for further hearing.

APPEAL by defendant from *McLaughlin, J.*, from in-chambers orders of March 4 and 11, 1967.

The plaintiff wife instituted this civil action against the defendant husband for custody of their three children, aged 10, 8 and 4 years, for permanent alimony without divorce and an allowance for the children. The action was instituted and a verified complaint filed on February 24, 1967. On that day, notice was served on defendant that plaintiff would move before the Court on March 4, 1967 for *pendente* allowances.

The court's order recites:

> "Upon consideration of the verified complaint . . . and the affidavits filed by both the plaintiff and the defendant, the court announced . . . that the plaintiff was entitled to the temporary relief sought and suggested to counsel for plaintiff and defendant that they negotiate and see if an amount could be agreed upon . . . and that the matter would be left open until 10:00 o'clock a.m., Saturday, March 11, 1967. . . ."
>
> * * *
>
> And it appearing to the court on Saturday, March 11, 1967 . . . that they (counsel) had been unable to reach an agreement as to an amount to be entered as a temporary allowance . . ."

The Court refused to consider the defendant's affidavit filed on 3/10/67 (apparently bearing on his financial ability to make payments). The Court ordered the defendant to turn over the dwelling house to the plaintiff. The order required the defendant to pay $117 per month due on the house and to pay the plaintiff $200 per month for herself and the children, pending the final hearing.

The defendant gave notice of appeal. The Court ordered a *supersedeas* bond in the sum of $3,000, conditioned upon the defendant's making the payments according to the order. The defendant excepted and appealed.

Raymer, Raymer & Lewis by Douglas G. Eisele for defendant appellant.

Battley and Frank by Jay F. Frank for plaintiff appellee.

PER CURIAM. The defendant contends the Court committed error in refusing to consider his affidavit filed "3/10/67" bearing on his ability to pay alimony. When the hearing was held on March 4, the Court announced the plaintiff was entitled to relief and continued the hearing for one week for counsel to reach an agreement, if possible, as to the amount of temporary payments. The Court's order recited: ". . . (T)he matter will be left open until 10:00 o'clock a.m., . . . March 11, 1967." At that time the defendant had not filed answer. The attorneys were unable to agree. The defendant, on the day before the hearing, filed an affidavit apparently disclosing matters relating to his ability to pay alimony and support. The Court refused to consider the affidavit on the ground it was not before it on March 4, notwithstanding the Court's order that the matter should remain open until March 11.

In preparing the case on appeal, the defendant included his affidavit which the Court refused to consider. The plaintiff filed exception to the case on appeal and objection to the inclusion of the affidavit. In settling the case on appeal, the Court deleted the affidavit and the record comes here without it.

At the time of the hearing on March 4, the defendant had not answered. His time to answer had not expired. The order of that date left the matter "open" until March 11. On March 10, the defendant, still with time to answer, filed his affidavit which the Court refused to consider and which the Court ordered stricken from the case on appeal. This Court is denied the opportunity to consider the affidavit on the question whether the defendant is able to meet the payments required by the Court's order. We do not know what bearing it may have on that material question. The defendant is entitled to be heard on the issue of his ability to pay and it does not appear that he has been fully heard. In this state of the record, it becomes necessary for us to vacate the order awarding compensation and to remand the cause to the Superior Court for further hearing and the fixing of payments in accordance with the needs of the plaintiff and her children and the ability of the defendant to meet those needs.

The order from which this appeal is taken is vacated and the cause is remanded for further hearing.

Remanded with directions.

STATE OF NORTH CAROLINA v. MERRELL COX.

(Filed 29 November, 1967.)

1. Crime Against Nature § 2—

Evidence in this case *held* sufficient to be submitted to the jury on the issue of defendant's guilt of the offense of crime against nature with his stepson.

2. Criminal Law § 89—

Discrepancy in minor details between testimony of the prosecuting witness and testimony offered in corroboration thereof does not warrant a new trial.

3. Criminal Law § 169—

In this prosecution for crime against nature with his stepson, evidence elicited from defendant on cross-examination that he had been fined in a trespass case brought by his wife and ordered to stay out of the county, *held* not prejudicial in view of the fact that defendant's counsel, in failing to renew objection and moving to strike, apparently considered the disclosure helpful as showing a continuing effort, including the instant case, by the wife to get rid of the defendant.

ON *certiorari* to review judgment entered by *Bickett, J.* after trial and verdict of guilty returned by the jury at the November, 1964 Criminal Session, HOKE Superior Court.

The indictment contained two counts. The first charged that Merrell Cox, on August 17, 1964 and dates prior thereto, did unlawfully and feloniously commit the abominable and detestable crime against nature with one William Arthur Wright, age 12, in violation of G.S. 14-177. The second count charged the defendant Merrell Cox, on the same date and dates prior thereto, with intent to commit an unnatural sex act, did unlawfully and wilfully take improper and indecent liberties with William Arthur Wright, age 12 years, in violation of G.S. 14-202.1, etc.

The State's principal witness was William Arthur Wright, age 12, who testified his stepfather, the defendant, began in Florida when he was 7 years old to take indecent liberties with him, and on August 17, 1964 had an unnatural sex act with him. Further details, as testified, are omitted.

The Sheriff testified William Arthur Wright, in the presence of his mother, complained about the defendant's conduct, giving details. The Sheriff's evidence was offered to corroborate the boy's testimony. The defendant objected to the evidence, as going beyond corroboration. The Court instructed the jury to consider the Sheriff's testimony as corroborative, if it did in fact corroborate, which was for the jury to determine.

The defendant testified in his own behalf, denying *in toto* the

story told by his stepson. He testified about his having corrected William on a few occasions and one time struck him on the leg with a hammer handle. He called as a witness a neighbor who had known him for many years, who testified to his good character. The State, in rebuttal, called the Chief of Police of Raeford, who testified that for the past 6 years the defendant's character is bad. The jury returned a verdict of guilty. The Court imposed a prison sentence of 8 to 10 years. The defendant excepted and appealed.

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

W. Ritchie Smith, Jr., for defendant appellant.

PER CURIAM. The defendant insists a verdict of not guilty should have been entered at the close of the evidence, or if the Court should hold the evidence sufficient to go to the jury, then he contends he is entitled to a new trial because of errors by the Court: (1) in allowing Sheriff Barrington to go beyond the bounds of proper corroboration; and (2) by permitting the Solicitor to elicit from the defendant the fact he had been fined, and ordered to stay out of the County.

The evidence on the part of the state made out a case for the jury. We do not care to recite the details. The jury heard the stories of State's witnesses and the defendant's denial. The jury believed the State's evidence. The Sheriff's testimony in corroboration was substantially the same as the boy's evidence before the Court and jury. While there was some deviation in language, in essence there was harmony. There was consistency throughout as to the acts described by the witness to the jury and as told to the Sheriff and repeated by him to the jury. Discrepancy in minor details does not warrant a new trial. *State v. Brooks,* 260 N.C. 186, 132 S.E. 2d 354.

The defendant's final objection grows out of the Solicitor's question and the defendant's answer during cross-examination. "Q. Now, in the trespassing case, . . . in which you were tried and convicted on January 17, 1961, in which you were ordered to stay out of the County — (objection by defendant) — for a period of two years and pay the cost . . . is that correct? A. Yes, sir. That is when I financed an ice cream business up there and had it all paid for and they had no more use for me, just like now, and pushed me out." (The boy's mother was the complainant in the trespass case.) There was objection before the question was completed and before the answer was in. The Court, however, failed to rule on the objection.

There was no motion to strike and no further objection. Apparently counsel was willing for the question and answer to stay in since defendant stated that the wife was a prosecutor in a trespass case and that banishment was an effort to get rid of him. Banishment is unlawful. Evidence of it was incompetent unless it fitted into a planned effort on the part of the boy's mother to rid herself of the defendant. In that light, defense counsel appears to have been satisfied not to press the objection after the question was completed and the answer was in. He likewise could have moved to strike, but failed to do so. Counsel may well have considered the disclosure helpful as tending to show an effort to get rid of the defendant and that this present case is a continuation of that effort. Prejudice is not shown.

No error.

STATE OF NORTH CAROLINA v. J. M. PARKER.

(Filed 29 November, 1967.)

Assault and Battery §§ 5, 15—

In a prosecution for assault with a deadly weapon with intent to kill, an instruction that the jury might find an intent to kill if the defendant intended either to kill or inflict great bodily harm, *held* prejudicial error, since a finding by the jury that the defendant intended only to inflict bodily harm would be insufficient to sustain a conviction under the felony indictment.

APPEAL by defendant from *Crissman, J.*, 20 July 1967 Criminal Session of GUILFORD (High Point Division).

Defendant was convicted of felonious assault upon a bill of indictment which charged that he unlawfully and feloniously, with intent to kill, shot one Donald Riggs in the left chest with a deadly weapon, a 22-caliber revolver, thereby inflicting upon him serious injury not resulting in death. From a prison sentence of not less than 18 nor more than 30 months, defendant appealed.

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

Morgan, Byerly, Post & Keziah by David M. Watkins for defendant appellant.

PER CURIAM. Both the State and defendant offered evidence. The State's evidence, which the jury accepted, was sufficient to

establish defendant's guilt as charged in the indictment; defendant's evidence tended to show that defendant shot Riggs in defense of himself, his wife, and his habitation. Defendant does not contend that he was entitled to a nonsuit. As warranting a new trial, however, he assigns as error the following portion of the trial judge's charge to the jury:

". . . [A]nd, so, intent to kill is the intent which exists in the mind of a person at the time he commits the assault, or the criminal act, intentionally and without justification or excuse to kill his victim, or to inflict great bodily harm. . . ."

In *State v. Ferguson,* 261 N.C. 558, 135 S.E. 2d 626, an instruction identical with the above was held to be prejudicial error, "for it would allow the jury to find an intent to kill if the defendant intended either to kill or to inflict great bodily harm. But if the jury found only an intent to inflict great bodily harm, this would be insufficient to sustain the felony charge since the intent to kill is an essential element of such charge." *Id.* at 561, 135 S.E. 2d at 628.

For the error indicated, there must be a

New trial.

STATE OF NORTH CAROLINA v. EARL KIRKMAN.

(Filed 29 November, 1967.)

Escape § 1—

An indictment charging that the defendant unlawfully, wilfully, and feloniously harbored an escapee who was serving a sentence of imprisonment when he escaped, is fatally defective in omitting the words "knowing or having reasonable cause to believe that said person was an escapee", G.S. 14-259, and defendant's motion in arrest of judgment is allowed.

APPEAL by defendant from *Armstrong, J.,* May 29, 1967 Session, GUILFORD Superior Court, Greensboro Division.

The Grand Jury returned a bill of indictment which charged that Earl G. Kirkman, on January 20, 1967, "with force and arms, at and in the County aforesaid, did unlawfully, wilfully, and feloniously harbor an escapee, namely Tommy McBride, who, while serving a sentence for storebreaking and larceny, a felony, imposed at the August 3, 1965 term of Superior Court of Forsyth County, escaped on or about the 3rd day of January, 1967, from the Forsyth Prison Unit, Forsyth County, North Carolina, in that he, the said Earl G. Kirkman did harbor, offer aid and comfort to the said Tommy Mc-

Bride . . . in violation of the General Statutes, etc." The defendant entered a plea of not guilty. The jury returned a verdict of guilty. From a sentence of imprisonment for not less than 4 years nor more than 5 years, the defendant appealed.

T. W. Bruton, Attorney General; Ralph A. White, Jr., Staff Attorney, for the State.

Alston, Aelxander, Pell & Pell by E. L. Alston, Jr. and James E. Pell for defendant appellant.

PER CURIAM. The defendant entered a plea in abatement before this Court upon the ground the indictment fails to charge a criminal offense. The statute under which the indictment was drawn provides: "It shall be unlawful for any person knowing or having reasonable cause to believe, that any other person has escaped from any prison, jail, reformatory, or from the criminal insane department of any State hospital, or from the custody of any police officer who had such person in charge, or that such person is a convict or prisoner whose parole has been revoked, to conceal, hide, harbor, feed, clothe, or offer aid and comfort in any manner to any such person." The defect in the indictment is the failure to charge the defendant with "knowing or having reasonable cause to believe that Tommy McBride was an escapee" from one of the institutions mentioned in the statute. The Attorney General concedes (and we agree) the indictment is fatally defective. The defect appears on the face of the record. The motion in arrest of judgment is allowed. The Solicitor, if so advised, may send another bill.

Judgment arrested.

STATE v. WILLIAM C. HOWARD.

(Filed 29 November, 1967.)

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.

APPEAL by defendant from *Hall, J.*, June 12, 1967 Criminal Session of CUMBERLAND.

In separate bills, defendant was indicted at the May 15, 1967 Session (1) for the murder of Earl Baker on April 14, 1967, and (2) for felonious assault on Helen Rich on April 14, 1967.

On April 17, 1967, Judge Hall, based on defendant's affidavit of indigency, appointed Lacy S. Hair, Esq., a member of the Cumberland County Bar, to represent defendant.

At said June 12, 1967 Session, defendant, represented by his said counsel, tendered, and the State accepted, a plea of guilty of manslaughter to said murder indictment, and entered a plea of guilty as charged to said felonious assault indictment. Before these pleas were accepted, Judge Hall, after examination of defendant and after informing defendant of the nature of each of the charges and the possible consequences of each of said pleas, found that each plea "was freely and understandingly and voluntarily made without undue influence, compulsion or duress and without promise of leniency."

Upon defendant's said plea of guilty of manslaughter, judgment imposing a prison sentence of not less than sixteen years nor more than eighteen years was pronounced.

Upon defendant's said plea of guilty of felonious assault as charged, judgment imposing a prison sentence of not less than three years nor more than five years was pronounced.

Although no exception was noted or appeal taken when said judgments were pronounced, subsequently, defendant having advised Judge Hall by letter he desired to appeal, appeal entries were made in behalf of defendant; and, by order of Judge Hall, Mr. Hair was appointed to continue to serve as counsel for defendant in connection with his appeal and Cumberland County was ordered to pay the necessary costs of mimeographing the record and defendant's brief incident to such appeal.

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

Lacy S. Hair for defendant appellant.

PER CURIAM. Defendant assigns as error (1) that the sentences "were too harsh according to the evidence," and (2) that the court reviewed a record of defendant's involvement in prior criminal offenses before he pronounced the judgment.

The judgment for manslaughter is authorized by G.S. 14-18; and the judgment for felonious assault is authorized by G.S. 14-32. Each judgment is complete within itself; and, there being no order to the contrary, the two sentences run concurrently. *State v. Efird,* 271 N.C. 730, 157 S.E. 2d 538, and cases cited.

The record before us contains a summary of the State's evidence and also a record of defendant's involvement in prior criminal offenses. None of the facts in such summary or in such record were or are in any way disputed or challenged. It was proper for Judge Hall, before pronouncing judgment, to consider in open court all available information that might aid him in pronouncing appropriate judgments. *State v. Stansbury*, 230 N.C. 589, 55 S.E. 2d 185.

The State's acceptance of the plea of guilty of manslaughter, and the fact the sentences in the two cases will run concurrently, leave the impression that defendant was well represented by his court-appointed counsel. In any event, the record before us discloses no prejudicial error in the judgments from which defendant has appealed. Hence, the judgments are affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. ARTHUR FAISON.

(Filed 29 November, 1967.)

Criminal Law § 138—

A sentence of imprisonment which is within the limitation authorized by statute will not be disturbed on appeal.

APPEAL by defendant from *Clark, S.J.*, 13 February 1967 Regular Conflict Criminal Session of CUMBERLAND Superior Court.

The defendant was charged in a well-drawn bill of indictment with a third-offense escape. The Court appointed counsel to represent him, and a plea of not guilty was entered.

The evidence for the State tended to show that the defendant was serving prison sentences for non-burglarious breaking and two previous escapes. On 9 November 1966 he was working with other prisoners near Falcon. His maintenance foreman testified that about 1:00 p.m. he gave the defendant permission to go to the woods "to get out to himself", that defendant failed to return and an escape notice was put out. Bloodhounds were put on his trail, and he was captured that night.

The defendant offered no evidence, waived oral argument and was found guilty as charged.

From a sentence of eighteen (18) months' imprisonment, he appealed.

N. H. Person, Attorney for defendant appellant.

T. W. Bruton, Attorney General, and James F. Bullock, Deputy Attorney General, for the State.

PER CURIAM. The hope of escape has little merit. In these days of fast communication and transportation, less than one out of ten attempted escapes are successful — and the penalty for failure is severe, as this case demonstrates. The defendant has lost eighteen months out of his life for a few hours of frightened and terrified "freedom."

The defendant in his brief says: "The only exception brought forward is the defendant's assertion that it was error for the Court to have imposed a sentence of eighteen months' imprisonment upon him for the crime of escape, third offense."

Under the charge a sentence of three years could have been imposed. G.S. 148-45(a). He got just half that. A sentence within the statutory limits will not be disturbed. *State v. Robinson,* 271 N.C. 448, 156 S.E. 2d 854.

No error.

STATE OF NORTH CAROLINA v. GEORGIA WIGGINS, DONALD MARTIN COOPER, LEWIS CHERRY, ERVIN CHERRY, GOLDEN FRINKS, JAMES SPELLER, J. ALFRED CHERRY, CLIFTON JORDAN, DAVID BOND, HARVEY RANDOLPH SPELLER, JR., GEORGE L. ROUNTREE, TIM HAYES JORDAN, NATHANIEL LEE, JR.

(Filed 13 December, 1967)

1. Statutes § 5—

In the construction of a statute words are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise.

2. Schools § 15; Criminal Law § 1—

The statute, G.S. 14-273, making it unlawful wilfully to interrupt or disturb any school, is not void for vagueness in failing to define "interrupt" or "disturb", since the words, when read in conjunction with "school", convey to a person of ordinary intelligence the meaning of a substantial interference with, and the disruption of, the operation of a school in the instruction of pupils enrolled therein.

3. Schools § 15—

The elements of the offense punishable by G.S. 14-273 embrace some act or conduct by the defendant within or without the school, resulting in an

actual and material interference with part or all the program of the school, and with the intent by the defendant that his act or conduct have such result.

4. Criminal Law § 2—

A person who has reached the age of responsibility for his acts and who is not shown to be under mental disability is presumed to intend the natural consequences of his acts and conduct, and, nothing else appearing, the defendant's motive for wilfully doing an act forbidden by statute is no defense to the charge of violating such statute.

5. Schools § 15—

Warrants charging a violation of G.S. 14-273 held sufficiently specific in this case to protect the defendants from double jeopardy.

6. Same—

Evidence for the State tending to show that the defendants paraded back and forth in the front of a rural public school while classes were in progress therein, that the defendants carried signs with messages relating to some controversy with the school administration, that students left their classes to observe the picketing, and that a class held on the school grounds was terminated during the course of defendants' activities, *held* sufficient to be submitted to the jury on the issue of defendants' guilt in wilfully interrupting and disturbing a school.

7. Same; Criminal Law § 9—

Evidence of the State that the defendant transported other defendants to a public school where classes were in progress, that he passed out to the defendants signs bearing messages relating to a school controversy, that he directed the defendants in line for marching, and that classes were disrupted during the course of defendant's activities, *held* sufficient to go to the jury on the issue of defendant's guilt of aiding and abetting the other defendants in interfering with the classes of a public school.

8. Schools § 15—

In a prosecution for wilfully disturbing the classes of a public school, testimony that students left their classes and observed the picketing of the school by the defendants is clearly competent and properly admissible in evidence, since an essential element of the offense is the actual interruption and disturbance of the program of the school.

9. Jury § 2—

Upon a finding that a disproportionately small number of Negroes had been included in the jury box from which the jury panel had been drawn, an order by the trial court dismissing the regular panel and directing the sheriff to summon a special venire of fifty persons without regard to race, *held* expressly authorized by G.S. 9-11, it not being a requisite to the calling of the tales jurors under the statute that their use be restricted to supplement an insufficient number of regular jurors.

10. Same—

A special venire is not rendered invalid by reason that the sheriff who summoned it was subsequently a witness for the State in the case.

11. Schools §§ 1, 15; Constitutional Law § 18—

Freedom of speech and protest against the administration of public affairs is a fundamental right long cherished in this State, but it is not

an absolute freedom, and the State, in the protection of the freedom of others and of its own paramount interests, such as the education of its children, may impose reasonable restraints of time and place upon the exercise of both speech and movement.

12. Same—

Neither the enactment of G.S. 14-273, proscribing the wilful disruption of a public or private school, nor its enforcement against certain defendants who picketed a public school to the detriment of the instruction of students therein, constitutes censorship of speech or protest in violation of the First Amendment, U. S. Constitution, since the State may unquestionably control the hours and place of public discussion in the protection of its legitimate interest in the efficient operation of the schools.

13. Constitutional Law § 20; Schools § 15—

G.S. 14-273 is not discriminatory upon its face, since its penalty applies uniformly to all who violate its terms, and, since the statute does not confer upon any administrative official the discretionary authority to issue permits for demonstrations interrupting school programs, the question of discrimination does not arise. N. C. Constitution, Art. I, § 17; U. S. Constitution, Amendment XIV.

14. Schools § 15—

In a prosecution under G.S. 14-273, it is irrelevant that the defendants' motive in picketing a school was to improve the education process, since their wilful activities resulting in the disruption of classes are forbidden by the statute.

15. Same—

In a prosecution for wilfully interrupting a public school, G.S. 14-273, it is irrelevant that the defendants picketed silently, were not on the school grounds, and did not threaten or provoke violence, when their actions plainly sought to attract and to hold the attention of the students at a time when the school was engaged in instruction.

APPEAL by defendants from *Fountain, J.*, at the 6 February 1967 Session of BERTIE.

The defendants were tried on separate warrants, which were consolidated for trial. The warrants, as to all of the defendants except Frinks, charged that on or about 13 September 1966 the defendant named therein "did knowingly, wilfully and unlawfully interrupt and disturb the Southwestern High School, a public school in Bertie County, N. C., by picketing in front of the Southwestern High School," which picketing interfered with classes at the school in violation of G.S. 14-273. The warrant against Frinks charged him with aiding and abetting in such interruption and disturbance of the school.

Prior to pleading to the warrants, the defendants moved to quash each warrant on the ground that it shows upon its face that the defendant named therein was "in the peaceful and orderly exercise of

First Amendment rights of picketing and * * * of freedom of speech and protest," and on the further ground that G.S. 14-273 is unconstitutional, as applied to the alleged conduct of the defendants, "by reason of the obvious collision between the statute and the rights of peacefully picketing." The motion to quash was overruled as to each defendant.

Prior to pleading to the warrants, the defendants challenged the array of jurors summoned for that session of the superior court, the ground of the challenge being that Negroes had been systematically excluded from the jury list, and so from the jury box, from which the panel in question was drawn. All of the defendants are Negroes. The court conducted a hearing upon this motion, at which numerous witnesses, including county officials and others, were called by the defendants and examined. The presiding judge thereupon found as a fact that "there has been a disproportionate number of white persons to that of Negro persons whose names have been put in the jury box for the drawing of jurors" as compared with the proportion of Negro residents of the county to the total population, and as compared with the proportion of Negroes listing property for taxes with the total number of persons so doing, which disproportion he found to have been without any intention to discriminate on account of race in the selection of names to be placed in the jury box. The trial judge then ordered that "to assure each defendant that he and she will be tried by jurors who are selected without regard to race," no juror will be called into the box for the trial of these cases from the regular panel, but the sheriff would summon "fifty persons who are qualified to serve as jurors * * * without regard to race."

The sheriff so summoned a special venire and from it the trial jury was selected, six of its members being Negroes and six being white persons.

Thereupon, prior to entering their pleas to the warrants, the defendants objected to the special venire on the ground that they were entitled to be tried by jurors "selected by the Constitutional system that is provided by the State." The sheriff was called as a witness and examined by the defendants concerning the method used by him in selecting those comprising the special venire. The objection of the defendants to the special venire was overruled.

Thereupon, the defendants entered pleas of not guilty. The jury returned a verdict of guilty as to each defendant. The defendants, other than Frinks, were fined in varying amounts. Frinks was sentenced to confinement in the county jail for a term of 60 days. Each defendant appealed.

The State called as witnesses the principal of Southwestern High

School, the teacher of the class in bricklaying at the school, and the sheriff of the county. The defendants offered no evidence.

The school principal testified that on the date named in the several warrants the school was in session. It is located on Highway 308, some five miles from the Town of Windsor. Only two residences are in the vicinity of the school, the nearest being 100 yards away. The school building sits back from the highway approximately 500 feet. At the time of the alleged offense, the class in brick masonry was in progress, under the direction of its teacher, on the school grounds approximately 10 to 25 feet from the highway, the students in the class being engaged in the erection of certain brick structures as part of their class work. Other pupils were inside the building where classes were in progress. Frinks drove up to a point on the highway in front of the school, "unloaded some children and took out some signs with various wording * * * and gave each one a sign and they began to picket"; *i.e.*, to walk up and down the ditch separating the highway from the school campus. The school principal thereupon asked the sheriff, who was present, "if he could get those people away." Each of the defendants, other than Frinks, participated in the marching. (The principal did not name Lewis Cherry among the marchers, but he was so named by the sheriff.) This conduct by the defendants resulted in the pupils within the school building "looking and carrying on" to such an extent that the principal had "to get them back to their classes and walk up and down the hall * * * trying to keep them in class." When the principal went back into the building, he found pupils in the classes in progress in rooms facing the highway "looking out of the windows at what was going on," and pupils from classes in progress on the other side of the building corridor "running to the side that looked out on the marchers to see what was happening." These students "were talking among themselves * * * saying what they had seen." The brick masonry class, consisting of 15 or 16 students, was taken from its work on the school grounds back to the "shop" before the completion of its fully allotted class period. There was no problem in keeping order in the school except during the time "when these defendants were out in front" of the school.

The teacher of the class in bricklaying testified that he was conducting his class on the school grounds, the project in hand being the construction of some brick columns, some ten feet from the ditch in or along which the defendants, other than Frinks, marched. There were 15 students in the class. The marchers appeared some ten minutes after the class started. They arrived in an automobile, got out of it in front of the school grounds, passed out some signs and then marched along the ditch. The teacher tried to keep his students

busy but the marchers took their attention, and some of the students stopped what they were doing and watched the marchers. The teacher talked to his students but could not maintain control of the class, so he gathered up the tools and took the class back into the building two hours before they were scheduled to complete their assignment on the grounds. The marchers were not singing, clapping their hands, or doing anything except marching.

The sheriff testified that he had been at the school when it opened for the day's work, but after the school opened, he left in his automobile. Approximately four miles away he met Frinks with four or five other people in his car. The sheriff at once returned to the school. Upon his arrival there, he found Frinks' car parked on the shoulder of the highway, with several people standing around it, and Frinks handing out signs "to the students." (Apparently the marchers were students enrolled in the school but not in attendance upon classes that day.) The sheriff asked Frinks if he was aware of the statute of North Carolina forbidding the interruption of a public school. Frinks replied, "I don't care anything about what is in the Statute Books." (The court instructed the jury that the testimony of the sheriff concerning the remarks of Frinks was evidence as to Frinks only and not as to any other defendant.) The defendants, other than Frinks, together with some eight others who were "juveniles," then lined up and started marching. They were arrested after they had marched up and down two or three times. The sheriff observed several students standing and watching the demonstration and the marching. He also observed the teacher of the bricklaying class carry his class back into the "shop." After passing out the signs to the marchers and lining up the marchers, "Frinks got in his car and drove off, headed toward Windsor." Approximately 20 minutes elapsed from the arrival of the defendants at the site of the marching to the arrest of the marchers. Frinks was arrested two days later.

The various signs carried by the marchers read as follows:

"God set us free why should we be here as slaves."

"A change is going to come."

"Freedom, Yeah, Yeah, Yeah."

"We want to talk but you make us talk and we'll talk and you will walk."

"We want to be taught a free education."

"Let us be free and taught free."

"Searching, searching for a free Southwestern."

"Southwestern will overcome some day."

"What about our buttons, Mr. Singleton? Freedom!"

"Freedom in '67."
"We want to grow up free!"

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

Clayton & Ballance, J. LeVonne Chambers and Mitchell & Murphy for defendant appellants.

LAKE, J. The pertinent provisions of G.S. 14-273 are:

> "If any person shall wilfully interrupt or disturb any public or private school * * * either within or without the place where such * * * school is held * * * he shall be guilty of a misdemeanor, and shall, upon conviction, be fined or imprisoned or both in the discretion of the court."

The defendants argue in their brief that this statute is void because its prohibitions are uncertain, vague or indefinite, under the rule applied by this Court in *State v. Furio,* 267 N.C. 353, 148 S.E. 2d 275. They argue in their brief that the statute contains no definition of "interrupt" or of "disturb" and, consequently, men of common intelligence must necessarily guess at its meaning and thus be left in doubt as to what conduct is prohibited. It is difficult to believe that the defendants are as mystified as to the meaning of these ordinary English words as to they profess to be in their brief. Clearly, they have grossly underestimated the powers of comprehension possessed by "men of common intelligence." Nevertheless, we treat this contention as having been seriously made.

It is elementary that in the construction of a statute words are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise. *Cab Co. v. Charlotte,* 234 N.C. 572, 68 S.E. 2d 433; *In re Nissen's Estate,* 345 F. 2d 230. While the meaning of "interrupt" and of "disturb" is perhaps more easily understood than defined with precision, resort to Webster's Dictionary reveals that "interrupt" means "to break the uniformity or continuity of; to break in upon an action," and "disturb" means "to throw into disorder." For those who are unhappy without citation to authorities of the type customarily cited in judicial opinions, we refer to Black's Law Dictionary and to *Watkins v. Manufacturing Co.,* 131 N.C. 536, 42 S.E. 983, where this Court said that an allegation in a complaint for personal injury that the plaintiff had been "disturbed in body" must be understood to mean that "her body was thrown into a state of disorder, and thereby injured."

In *Kovacs v. Cooper,* 336 U.S. 77, 69 S. Ct. 448, 93 L. Ed. 513, the Supreme Court of the United States, speaking through Mr.

Justice Reed, in sustaining a conviction in the courts of the State of New Jersey for violation of an ordinance forbidding the use of sound trucks emitting "loud and raucous" sound, said:

> "The contention that the section is so vague, obscure and indefinite as to be unenforceable merits only a passing reference. This objection centers around the use of the words 'loud and raucous.' While these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden."

When the words "interrupt" and "disturb" are used in conjunction with the word "school," they mean to a person of ordinary intelligence a substantial interference with, disruption of and confusion of the operation of the school in its program of instruction and training of students there enrolled. We found no difficulty in applying this statute, in accordance with this construction, to the activities of a group of white defendants in *State v. Guthrie,* 265 N.C. 659, 144 S.E. 2d 891. Obviously, the statute applies in the same manner regardless of the race of the defendant. In *State v. Ramsay,* 78 N.C. 448, in affirming a conviction for the similar offense of disturbing public worship, this Court, speaking through Smith, C.J., said:

> "It is not open to dispute whether the acts of the defendant were a disturbance in the sense that subjects him to a criminal prosecution, and that the jury was warranted in so finding, when they had the admitted effect of breaking up the congregation and frustrating altogether the purposes for which it had convened."

Giving the words of G.S. 14-273 their plain and ordinary meaning, it is apparent that the elements of the offense punishable under this statute are: (1) Some act or course of conduct by the defendant, within or without the school; (2) an actual, material interference with, frustration of or confusion in, part or all of the program of a public or private school for the instruction or training of students enrolled therein and in attendance thereon, resulting from such act or conduct; and (3) the purpose or intent on the part of the defendant that his act or conduct have that effect. One, who has reached the age of responsibility for his acts and who is not shown to be under disability of mind, is presumed to intend the natural and normal consequences of his acts and conduct. *State v. Ramsay, supra.* Nothing else appearing, the defendant's motive for doing wilfully an act forbidden by statute is no defense to the charge of violation of such statute. *Cox v. Louisiana,* 379 U.S. 559, 85 S. Ct. 476,

13 L. Ed. 2d 487; *Commonwealth v. Anderson,* 272 Mass. 100, 172 N.E. 114, 69 A.L.R. 1097; 21 Am. Jur. 2d, Criminal Law, § 85.

Each warrant in the present case charges the defendant named therein in plain and precise language with each element of this statutory offense at the specified time and place by the specified conduct of picketing in front of the school, which picketing interfered with classes at the school. Each warrant is sufficiently specific to protect the defendant named therein from being placed again in jeopardy for the same offense. Consequently, the motion to quash the warrants was properly overruled unless the defendants had, as they contend they did have, a lawful right to engage in the specified conduct, notwithstanding the statute.

The uncontradicted evidence of the State, if true, as it must be deemed to be in passing upon a motion for judgment of nonsuit, is sufficient to show that the defendants, other than Frinks, intentionally paraded back and forth in front of the specified public school building and grounds in the immediate vicinity of a class then in progress on the school grounds. The evidence likewise shows that Frinks intentionally aided, abetted, directed and counseled the marching. The marchers carried placards or signs. These signs were utterly meaningless except on the assumption that they related to some controversy between the defendants and the administration of the school, specifically Principal Singleton. Presumably, they were deemed by the defendants sufficient to convey some idea to students or teachers in the school. The site was the edge of a rural road running in front of the school grounds, with only two residences in the vicinity. There is nothing to indicate that the marchers intended or desired to communicate any idea whatsoever to travelers along the highway, or to any person other than students and teachers in the Southwestern High School. As a direct result of their activities, the work of the class in bricklaying was terminated because the teacher could not retain the attention of his students, and disorder was created in the classrooms and hallways of the school building itself. Consequently, the motion for nonsuit was properly overruled unless the defendants had, as they contend, the lawful right so to interrupt and disturb this public school, notwithstanding the provisions of the statute.

The contention of the defendants that the court committed error in admitting evidence as to the conduct of the students in the bricklaying class and in the school building in response to the marching of the defendants must be deemed frivolous. An essential element of the offense charged in the warrants is the actual interruption and disturbance of the program of the school. Obviously, this can be shown only by evidence of the effect of the defendants' conduct upon

the activities of the teachers and students of the school. The witnesses, who testified concerning this, related their own observations of what happened upon the school grounds and within the school building while the conduct of the defendants was in progress, as contrasted with the good order which prevailed prior to the commencement of the marching and after the departure of the defendants. Such evidence was clearly material and competent.

When the defendants challenged the array of regular jurors summoned for the term, on the ground of unconstitutional discrimination against members of their race in the selection of names to go into the jury box from which the panel was drawn, the trial judge conducted a hearing and heard all of their evidence upon that matter. Upon this evidence, he found that a disproportionately small number of names of Negroes had been included in the box. He thereupon ordered that no member of the regular jury panel be called as a juror for the trial of these cases and directed the sheriff to summon a special venire of fifty persons "without regard to race." This was done and from that panel the jury which tried and convicted the defendants was chosen, six of those jurors being Negroes. The contention of the defendants that it was error to order such special venire is without merit. The procedure so followed by the trial judge is expressly authorized by G.S. 9-11, and the contention of the defendants that tales jurors can be called only to supplement an insufficient number of regular jurors is refuted by the very case they cite in their own brief, *State v. Manship*, 174 N.C. 798, 94 S.E. 2, in which this Court, speaking through Clark, C.J., said:

> "It has never been controverted that the judge in his discretion has the power to excuse any juror and to discharge any jury that he thinks proper. It seems that in this case the regular jury had been discharged under the impression that the business of the court was over. This case coming up, the defendant asked for a continuance. But, there being no other ground suggested therefor, the court, in the exercise of its discretion, directed tales jurors to be summoned, under the above statute [G.S. 9-11], which was passed for this very purpose, that 'there may not be a defect of jurors.' There was long a practice, under the former statute, that the judge should reserve one juror of the regular panel to 'build to,' based upon the technical idea that the tales jurors should be *other* jurors, as if they would not be 'other' jurors even if that one juror had also been discharged. It was no prejudice to this defendant that one regular juror was not retained. Twelve jurors, freeholders, to whom he entered no exception, sat upon his case, and he was duly convicted."

There is nothing in this record to indicate that any juror who sat upon the case and convicted the defendants was challenged by any of the defendants. The record does show that the defendant Wiggins, having exhausted her peremptory challenges, attempted to challenge peremptorily a seventh juror and her challenge to that juror was disallowed. However, the record shows that the juror so challenged by her was removed from the jury upon the peremptory challenge of another defendant.

The record does not indicate that any other case was tried at this term of court or that any regular juror, or any other juror drawn from the jury box, participated in any way whatever in any proceeding before the court at this term or at any other term. The objection of these defendants to trial by jurors drawn from the jury box having been sustained, and they having been tried by a jury summoned and selected pursuant to the statute, and without discrimination on account of race or otherwise, the defendants may not attack the judgment entered against them because of a defect in the composition of the jury box from which the regular panel was drawn.

We have no information as to what action has or has not been taken with reference to the jury box since the trial of these cases, and that question is not now before us.

The special venire was not rendered invalid by reason of the fact that the sheriff who summoned it, pursuant to the orders of the court, was a witness for the State in these cases. *State v. Yoes,* 271 N.C. 616, 157 S.E. 2d 386; *Noonan v. State,* 117 Neb. 520, 221 N.W. 434, 60 A.L.R. 1118; 31 Am. Jur., Jury § 108; Anderson on Sheriffs, § 280.

We are, therefore, brought to the principal contention of the defendants, which, in effect, is that they had a lawful right wilfully to interrupt and disturb the operation of this public school for the reason that they were carrying signs bearing the above quoted words thereon, and the purpose of their marching was to convey to someone (obviously, students or teachers in the school) some idea. That is, the defendants assert that the Constitution of this State, Article 1, § 17, and the Fourteenth Amendment to the Constitution of the United States, permit them, with immunity from prosecution, to disrupt the operation of a public school so long as the means used by them for that purpose is marching back and forth in front of the school while carrying banners and placards on which words appear.

Freedom of speech and protest against the administration of public affairs, including public schools, is a fundamental right which has been cherished in this State since long before the adoption of the Fourteenth Amendment to the United States Constitution. It has, however, never been doubted that this is not an absolute freedom or

that the State, in the protection of the freedom of others and of its own paramount interests, such as its interest in the education of its children, may impose reasonable restraints of time and place upon the exercise of both speech and movement. Thus, in *State v. Ramsay, supra,* a former member of a religious congregation, who had been expelled therefrom for reasons or pursuant to a procedure which he deemed insufficient and unjust, was convicted and punished for disturbing public worship when he persisted in breaking into a worship service of the church and rearguing the supposed merits of his case. Neither the enactment of G.S. 14-273 nor its enforcement against these defendants in this case violated the Law of the Land Clause of Article I, § 17, of the Constitution of North Carolina.

The Fourteenth Amendment to the Constitution of the United States grants to the defendants no license wilfully to disturb the operation of a public or private school in this State.

G.S. 14-273 is not discriminatory upon its face. It is universal in its application. Anyone who does that which is prohibited by the statute is subject to its penalty. It does not confer upon an administrative official the authority to issue, in his discretion, permits to disturb public schools and, therefore, does not invite or permit that type of administrative discrimination against the disseminators of unpopular ideas which was condemned in *Saia v. New York,* 334 U.S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574.

Neither the statute nor its application in this case has the slightest relation to State approval or disapproval of the ideas expressed on the signs carried by the defendants, or of the position taken by the defendants in their controversy, whatever it may have been, with the principal of the school. Like the ordinance involved in *Kovacs v. Cooper, supra,* this statute does not undertake censorship of speech or protest. As the Court said in the *Kovacs* case: "City streets are recognized as a normal place for the exchange of ideas by speech or paper. But this does not mean the freedom is beyond all control." Again in *Schneider v. State,* 308 U.S. 147, 60 S. Ct. 146, 84 L. Ed. 155, the Court, recognizing the authority of a municipality, as trustee for the public, to keep its streets open and available for the movement of people and property, said, by way of illustration, a person could not exercise his liberty of speech "by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic * * *" G.S. 14-273 does not have "the objectionable quality of vagueness and overbreadth" thought by the United States Supreme Court to render void the Virginia statue under examination in *NAACP v. Button,* 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405. G.S. 14-273 is not "susceptible of sweeping and improper application" so as to pre-

vent the advocacy of unpopular ideas and criticisms of public schools or public officials.

Unquestionably, "the hours and place of public discussion can be controlled" by the State in the protection of its legitimate and vital public interest in the efficient operation of schools, public or private. See *Saia v. New York, supra; Kovacs v. Cooper, supra.* The classic statement by Mr. Justice Holmes in *Schenck v. United States,* 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic," is still regarded by the Supreme Court of the United States as a correct interpretation of the First Amendment. The education of children in schools, public or private, is a matter of major importance to the State, at least as significant as the free flow of traffic upon a city street.

In *Cox v. Louisiana, supra,* the Court recognized that picketing and parading are subject to state regulation, even though intertwined with expression and association. There, the Court, quoting from *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 69 S. Ct. 684, 93 L. Ed. 834, said, "[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed. Accordingly, the Court there held valid on its face a state statute prohibiting picketing and parading in or near a building housing a state court, with the intent of obstructing or impeding the administration of justice. The Court said, "Placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from State control." It deemed "irrelevant" the fact that "by their lights," the marchers in that case were seeking justice. Similarly, it is irrelevant here that the defendants may have been "by their lights" seeking the improvement of the educational processes at Southwestern High School. Whatever their motives, the result of their wilful activities was the disruption of those processes at that school. That is what the statute forbids and, in so doing, it does not violate limitations imposed upon the State by the First Amendment to the Constitution of the United States, now deemed by the Supreme Court of the United States to be made applicable to the states by the Fourteenth Amendment.

It is also irrelevant that the defendants marched silently, were not on the school grounds, and neither threatened nor provoked violence. Their actions can admit of no interpretation other than that they were planned and carried out for the sole purpose of attracting and holding the attention of students or teachers in the South-

western High School at a time when the program of the school required those students and teachers to be engaged in its instructional and training activities. There can also be no doubt that they succeeded in this purpose. The uncontradicted evidence as to the defendant Frinks is that, before the marching began, this statute was called to his attention and explained to him in substance, to which he replied, "I don't care anything about what is in the Statute Books." In the light of the uncontradicted evidence, the sentences imposed by the presiding judge were lenient.

As the Supreme Court of the United States said in *Cox v. Louisiana, supra,* "There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations." The defendants wilfully ignored this elementary principle of sound government under the Constitution of our country.

We have carefully examined each assignment of error and the authorities cited by the defendants in their brief. We find nothing in the statute, or in the proceedings in the court below, which entitles the defendants to a new trial or to the reversal or arrest of the judgments of the court below.

No error.

STATE v. RODNEY CRADDOCK, WILLIAM M. BRYAN, ALLEN E. LUNSDEN AND VERNON JORDAN.

(Filed 13 December, 1967)

1. Criminal Law § 92—

Each defendant was charged with possession, without lawful excuse, of implements of housebreaking and burglary discovered in a car, with out-of-state license plates, in which the four were riding. *Held:* Order consolidating the indictments was within the discretion of the trial court, G.S. 15-152, since the State's case rested upon the same set of facts at the same time and place against each defendant.

2. Criminal Law § 169—

It will not be held for prejudicial error that an officer was allowed to testify that he stopped the car in which defendants were riding because he was looking for a car of such description in response to a bulletin from the State Bureau of Investigation, incriminating statements in the bulletin not being disclosed to the jury and defendants having brought out the same matter on cross-examination of a State's witness.

3. Criminal Law § 71—

Statement of a witness that an object which he saw on the floorboard of defendants' car in plain view was a "burglary lock pick" will not be

held for prejudicial error, the statement being competent as a shorthand statement of collective fact, and a lock pick being denominated in the statute as a burglary tool. G.S. 14-55.

4. Searches and Seizures § 1—

No search warrant is required to render competent in evidence an object seen through the glass window of a car with the aid of a flashlight without opening the door of the car, since in such instance no search is required.

5. Same—

A car was stopped by officers of the law who, having ascertained that the driver and his companions were unarmed, had holstered their revolvers, and the driver then voluntarily gave his consent to a search of the automobile and, upon request, took the keys out of the ignition switch and came back to the trunk of the automobile and unlocked it. *Held:* The search was by consent. In this case the court found on the *voir dire* that there was no duress used at the time of the alleged consent.

6. Same—

Immunity to unreasonable searches and seizures is a personal privilege which may be waived, and such waiver is not against public policy.

7. Same—

Where the driver of an automobile gives voluntary assent to a search of the vehicle by officers, other occupants of the car have no right to object.

8. Same—

Articles found under authority of a valid search warrant are competent in evidence.

9. Same; Constitutional Law § 32—

It is not required that the driver of a vehicle in giving consent to the search of the vehicle at the request of police officers be represented by counsel.

10. Burglary and Unlawful Breakings § 10—

In a prosecution under G.S. 14-55 the burden is upon the State to show that the person charged had in his possession implements of housebreaking within the purview of the statute and that the possession of such implements was without lawful excuse.

11. Same—Evidence held sufficient for jury on question of defendant's guilt of unlawful possession of burglary tools.

Evidence that defendants were apprehended driving around in a car with out-of-state license plates at 4:30 a.m., that the automobile contained coins amounting to $484.65, a lockpick with a homemade telephone box key attached to it, two ball peen hammers, assorted wrenches, flashlight, drills and bits, in addition to suitcases filled with articles of clothing, etc., *held* sufficient to sustain a finding that defendants were on a joint enterprise and in joint possession of the objects found in the automobile and to sustain a conviction of each of defendants of possession of implements

of housebreaking and burglary tools, without lawful excuse, in violation of G.S. 14-55.

12. Criminal Law § 9—

When two or more persons aid or abet each other in the commission of a crime, all being present, all are principals and equally guilty without regard to any previous confederation or design.

13. Criminal Law § 31—

The courts will take judicial notice that many coin telephone instruments are within buildings and some are on the street in telephone booths.

14. Burglary and Unlawful Breakings § 1—

There is a "forcible breaking" within the meaning of the statute when a person enters by unlocking or unlatching a door when the entry is with the requisite intent to commit a felony therein.

15. Criminal Law § 168—

The court's instruction to the jury will be construed contextually, and objections thereto will not be sustained when the charge, so construed, adequately charges the law on each material aspect of the case arising on the evidence and applies the law fairly to the various factual situations presented by the evidence.

APPEAL by defendants from *Burgwyn, E.J.*, April 1967 Special Session of EDGECOMBE.

Criminal prosecution upon four separate indictments which were consolidated for trial. Each indictment was drawn in identical language, and each indictment charged that each one of the defendants of 14 February 1967 did unlawfully, wilfully, intentionally, and feloniously have in his possession without lawful excuse implements of housebreaking and burglary tools, to wit, a lock pick, two ball peen hammers, one telephone coin box key, assorted wrenches, flashlight, files, and bits, contrary to law, a violation of G.S. 14-55.

When the case was called for trial, each of the four defendants who had been found by the court to be indigent appeared with their court-appointed counsel, J. Phil Carlton, who entered a plea for each of them of not guilty.

The State offered evidence tending to show the following facts: In the early morning hours of 14 February 1967, F. K. Simmons, Jr., and G. W. Griffin, both patrolmen with the Rocky Mount police department, observed a 1959 red and white Ford automobile bearing Florida license No. 2-W-42973 traveling south on Franklin Street directly behind Sears, Roebuck & Company. They had been looking for this particular car in response to a State Bureau of Investigation bulletin concerning it which was issued on 7 February 1967. They followed the automobile on various business and residential streets within the city of Rocky Mount and saw it drive through a

red traffic light at a street intersection. The car they were following was being operated at a speed of 30 to 35 miles per hour. They radioed for help. When this Ford automobile passed Stokes Street, that left them only one avenue of escape which was east on Highway #64. They established a roadblock by radio. The officers turned the patrol car's blue light on and blew the siren, and the Ford automobile stopped about 300 feet inside the city limits on Highway #64. It was then approximately 4:30 a.m. Officers Simmons and Griffin approached the stopped automobile with their revolvers drawn. The two officers whose patrol car was used to block the highway walked to within about two car lengths of the vehicle which had been apprehended. They did not draw their weapons. Officer Simmons instructed the persons inside to step out. Defendant Craddock was driving, defendant Jordan was sitting on the passenger side, and the other two defendants were lying in the back asleep. All four defendants got out of the vehicle. After ascertaining that the defendants were unarmed, the officers holstered their weapons. The two officers made a visual observation of the inside of the car from the outside without opening any doors to the car but simply looked through the windows with a flashlight. The officers saw a lock pick in plain view in the front portion of the car about four inches in front of the seats on top of the transmission housing hump. Attached to the lock pick by a rubber band was a makeshift homemade key to a telephone coin box. Both officers also visually observed in the automobile a coin sack and coin wrappers on the floorboard on the passenger side. The officers asked Craddock if he had anything of an illegal nature in the car, and Craddock stated that he did not believe he did. They asked Craddock if he had any objection to their looking in the trunk, and he stated that he had none whatsoever. They asked him to open the trunk of the automobile. Craddock went to his automobile, took out the ignition key, came back to the trunk of the automobile, and unlocked the trunk. They made no thorough or extensive search of the car at that time. They saw assorted tools in the trunk — hammers, chisels, a portable grinder with a small narrow emery wheel on it, and things of that nature. They also removed from the trunk of the automobile a small file. They found several hundred coin wrappers in the automobile. Some were loose, and the majority of them were in boxes. They also saw in the trunk of the automobile three or four suitcases and several assorted items of clothing.

At 11 a.m., some six and one-half hours later, in order to accommodate the working schedule of the clerk of the court, they obtained from the clerk of the court a search warrant in proper form to make a thorough search of the automobile, and the items in the trunk were removed. These included chisels, ball peen hammers,

screw drivers, files, a portable grinder, and the suitcases. On the back seat of the automobile there was a brown paper bag which contained quarters, dimes, and nickels. In the glove compartment was a shaving kit which contained rolls of coins and miscellaneous coins consisting of nickels, dimes, and quarters. The lock pick that the officers saw through the window in the automobile was introduced in evidence and marked State's Exhibit No. 1.

J. P. Thomas, a witness for the State, is a special agent with the State Bureau of Investigation. He has been with the State Bureau of Investigation about 14 years and a police officer for 19 years. In his experience he has had occasion to come in contact with and has received training relating to the device known as a lock pick. He attended a three-day school in Raleigh conducted by Jim Bradshaw pertaining to locking devices, combination and key locks. That was immediately after he had returned from attending a course in locks. He testified:

"State's Exhibit No. 1 consists of one piece which is a leverage bar for inserting into a keyhole to keep tension on the inner cylinder which turns inside the outside cylinder. This particular item here is a probe used for reaching inside a key lock pushing the pin tumblers up so that they can all be secured in an up position. They are pushed down by springs. This little gadget operates each one separately until they can be lined up and something such as this article right here, the leverage bar, slipped under the pins all simultaneously. At that time with the tension on the lock when it turns will open.

"I saw State's Exhibit No. 1 some time ago at the police department in Rocky Mount. This lock pick will open a cylinder type lock, such as you normally find on doors, filing cabinets, where you have an inner cylinder which turns inside of an outer cylinder. There are four or five, various numbered pin tumblers inside locks of that type, and any one pin will secure the lock. To release it, one must get all of the pins up at one time, simultaneously, keep them in an up position and keep leverage on the inner cylinder as it turns to the left or the right, whichever the case may be. I have seen these lock picks sold on the public market in other states but not in this state."

F. K. Simmons, Jr., testified on redirect examination as follows:

"The key which is on the lock pick was on the lock pick when I first found it. This is the very same rubber band that was wrapped around it. We broke it when we removed the key. This is a makeshift key to a telephone coin box, a homemade job."

He testified on recross-examination as follows:

"The part of the telephone we opened with the key was the little latch. You slip the coin box out from the outside cover to get to the little box that contains the coins. I could not reach in there and pick up the coins after I used the key but I could remove the box that had the coins in it. This appears to be a makeshift homemade job."

R. E. Dixon is public telephone manager for the Carolina Telephone Company in Rocky Mount. He identified the key attached to the lock pick, which is State's Exhibit No. 1, as a coin telephone instrument which is used for opening a pay station.

Horace Winstead is a detective with the Rocky Mount police department who has been with that department 15 years. About 3 p.m. on 14 February 1967 he took each defendant to his office and read to him his rights as follows: "You have the right to remain silent. Anything you say can be used against you in court. You have a right to the presence of a lawyer. If you cannot afford a lawyer one will be appointed for you before any questioning, if you so desire. If at any time before or during questioning you wish to remain silent you may do so." He asked each defendant if he would read over the statement that he read to them and sign it. Each dedefendant refused to sign it, saying they were not signing "a damn thing." He explained to them that it was no confession but was merely to show that he had advised them of their rights, and each one still said he did not intend to sign anything. He then asked them if they would talk with him, and they said they would talk with him but they would not sign any paper. He testified as follows:

"I asked them if they would talk with me and they said yes, they would talk with me but they would not sign any paper. I said all right, that I would like to talk with them and they said what did I want to talk about. I said I would like to talk with them about this $484.65 in silver that they had in their possession and where it came from. They said they were coin collectors and that it was not any of my business where it came from. I asked them to tell me one bank they had been to and they said they did not remember which bank they got it from. I asked them their occupation and they said they were coin collectors. I asked them what route they took in coming to Rocky Mount and they said they did not know how they got to Rocky Mount; that all they knew was they were in Rocky Mount, had not done anything, and got put in jail. I asked them if they were in Rocky Mount on the 7th day of that month. I

asked them the purpose of these two little articles here, State's Exhibit 1, and they told me they did not know anything about them, had never seen them before. They said if they were in their car they had never seen them. I advised the defendants that State's Exhibit 1 was lying in the foot of their car in plain view and they said they still had never seen it. All of them had several suitcases. In going through the suitcase of each defendant while he was present we found this key in a suitcase belonging to Craddock. There were three or four hanger type clothes containers that were stuffed full of clothes, some clean and some dirty, and three regular suitcases, average size, all of them packed full of clothes. I talked with all of them about where the money came from and I did not get any answers. I did not examine the red tool box."

Defendants offered no evidence.

The jury found by their verdict that each defendant was guilty. From separate prison sentences imposed upon each defendant, each defendant appealed to the Supreme Court.

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

J. Phil Carlton and Marvin V. Horton for defendant appellants.

PARKER, C.J. The trial court having found that all the defendants were indigent entered an order allowing them to perfect their appeal *in forma pauperis* and appointed J. Phil Carlton, their trial attorney, and Marvin V. Horton to represent them in this Court. The court's order further directed that the County of Edgecombe should furnish defendants with a transcript of the evidence in the case and the charge of the court and that the record and the briefs of defendants should be mimeographed according to the rules of this Court under the direction of its Clerk at the expense of Edgecombe County, thus giving these indigent defendants the opportunity to perfect their appeal and present their case to this Court in the same fashion as if they were each fully solvent.

Defendants assign as error the order by the court consolidating the four indictments for trial. The four defendants were charged in four separate indictments with participating in the same crime as principals. The State relied upon the same set of facts at the same time and place as against each defendant. The consolidation was proper and was authorized by the provisions of G.S. 15-152. It prevented four trials involving the same facts. *S. v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670. Under the provisions of G.S. 15-152, the order

of consolidation, upon motion of the solicitor, was within the discretionary power of the court, and no abuse of discretion appears. *S. v. Truelove,* 224 N.C. 147, 29 S.E. 2d 460. This assignment of error is overruled. It would seem that the solicitor for the State would have drawn one indictment charging all four defendants with the crime. The drawing of four separate indictments served no purpose, except to increase the court costs.

F. K. Simmons, Jr., a Rocky Mount police officer, after first testifying that at 4:30 a.m. on 14 February 1967 in the city limits of Rocky Mount he saw a 1959 red and white Ford automobile bearing Florida license No. 2-W-42973, was asked: "How long had you been looking for the car?" Over the objection and exception of defendants, he was permitted to answer: "Since the 7th of February when the State Bureau of Investigation bulletin came out." Police officer G. W. Griffin, who was with officer Simmons, was asked: "For what reason did you pay particular attention to this 1959 Ford?" Over defendants' objection and exception he replied: "Prior knowledge from a bulletin we had received from other law enforcement authorities —" Whereupon the solicitor asked him: "Do you recall which law enforcement authority you had received information from?" Officer Griffin replied: "Yes, sir, the North Carolina State Bureau of Investigation." Defendants assign the admission of this testimony as error. The statements were in connection with the automobile and not the defendants. Nothing in the witnesses' reply referred to defendants, or any one of them. The reply of the witnesses does not support defendants' contention that it was designed to influence the minds of the jurors against the defendants as being notorious criminals before the relevant facts of the case were presented. Even if we concede that this evidence was irrelevant, we think it was not so prejudicial as to cause a new trial. This assignment of error is overruled. If statements in the bulletin were prejudicial, the defendants brought it out on cross-examination of the witness Horace Winstead, who testified on cross-examination:

> "When I came to work at 3 o'clock I was told by Captain Godwin that these four subjects listed on the police bulletin out of the State Bureau of Investigation office in Raleigh, Rodney Craddock, Michael Bryan, Vernon Jordan and Allen Lunsden, were in jail, that they had been put in jail by the third shift, and that he would like for me to talk with them. As result of that, I took each one out and talked with him."

Damaging testimony as to what the State Bureau of Investigation bulletin contained appears on page 33 of the record, but this was introduced in evidence after the jury had been excused on motion of

defendants. It was not heard by the jury and could not have been prejudicial.

F. K. Simmons, Jr., testified that when the defendants got out of the car, the officers saw a lock pick in plain view in the front portion of the car about four inches in front of the seats on top of the transmission housing hump, and attached to the lock pick by a rubber band was a makeshift homemade key. The witness was asked: "Just tell what it is." Over defendants' objection and exception, he was permitted to answer: "This is a burglary lock pick. I am not a locksmith and therefore I couldn't go into details on how it is used but I do recognize it as a burglary lock pick." Defendants assign the admission of this evidence as error for two reasons: (1) This permitted the witness to give an opinion on one of the very questions the jury had to decide, and (2) the instrument which the witness was describing was certainly not a complicated mechanism and the jury was as well qualified as the witness to form and express an opinion with regard to it. G.S. 14-55, the statute under which the indictments were drawn, prohibits the possession, without lawful excuse, of any picklock, and it would seem that the statute contemplates it as being a burglary tool when it is in the possession of someone without lawful excuse. It would seem that a "lock pick" and a "picklock" are the same thing. Webster's New International Dictionary, Second Edition, defines "picklock" as follows: "(1) One who picks locks, specif. a thief; also, a tool for picking locks." "Justice does not require that courts profess to be more ignorant than the rest of mankind." *S. v. Vick,* 213 N.C. 235, 195 S.E. 779. The testimony of the witness that this is a burglary lock pick is competent as a "shorthand" statement of collective fact. 2 Strong's N.C. Index 2d, Criminal Law, § 71. This assignment of error is overruled.

Defendants assign as error the admission in evidence of all the objects found in the automobile and in the refusal of the court to suppress the evidence of the witnesses who testified as to what was found in the automobile. These assignments of error are overruled. (1) The picklock and the key attached to it, the coins, and what the officers saw through the windows of the car by the aid of a flashlight without opening the doors of the car to search were competent in evidence. This is said in 47 Am. Jur., Searches and Seizures, § 20, p. 516:

> "Where no search is required, the constitutional guaranty is not applicable. The guaranty applies only in those instances where the seizure is assisted by a necessary search. It does not prohibit a seizure without a warrant where there is no need of a search, and where the contraband subject matter is fully disclosed and open to the eye and hand."

This is quoted with approval in *S. v. Giles,* 254 N.C. 499, 119 S.E. 2d 394, and in *S. v. Kinley,* 270 N.C. 296, 154 S.E. 2d 95. (2) Defendant Craddock, who was driving the automobile, freely and voluntarily gave his consent to the search of the automobile. The State's evidence shows that after ascertaining that the defendants were unarmed the two officers who stopped the automobile put their pistols away. The two officers who had blocked the road with their automobile did not take their pistols in their hands. The officers asked Craddock to open the trunk of the automobile. Craddock went to his automobile, took out the ignition key, came back to the trunk of the automobile, and unlocked the trunk. On the *voir dire* the court found as a fact that there was no duress used at the time of the alleged consent of the owner and operator of the car that it could be searched by one or more of the officers, and that the consent was freely made upon request. This finding of fact of the trial judge is amply supported by the testimony. No search warrant is required where the owner or person in charge voluntarily and freely consents to the search. Where the owner or person in charge of an automobile voluntarily consents to the search, he cannot be heard to complain that his constitutional and statutory rights were violated. *S. v. Bell,* 270 N.C. 25, 153 S.E. 2d 741; *S. v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736; *S. v. McPeak,* 243 N.C. 243, 90 S.E. 2d 501. The immunity to unreasonable searches and seizures is a privilege personal to those whose rights thereunder have been infringed. They alone may invoke it against illegal searches and seizures. The rights of the defendants other than Craddock were not invaded by the search of Craddock's car, and they had no legal right to object thereto. *S. v. McPeak, supra.* No rule or public policy forbids a person to waive his right to be free from unreasonable searches and seizures. *Manchester Press Club v. State Liquor Commission,* 89 N.H. 442, 200 A. 407, 116 A.L.R. 1093. (3) The officers made a cursory examination of this car and six and one-half hours later obtained a valid search warrant to search this particular Ford automobile bearing the Florida license aforesaid for burglary tools or instruments, screw drivers, chisels, or other tools used to commit a felony. What was found under the authority of this valid search warrant was thoroughly competent in evidence.

Defendants assign as error the admission of the testimony of police officers Simmons and Griffin that the defendant consented to the search of the automobile he was driving. They contend that the admission of this evidence is prohibited by *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 10 A.L.R. 3d 974. The *Miranda* case refers to custodial interrogation by law enforcement officers after a person has been taken into custody or otherwise deprived of his

freedom of action in any significant way. Merely asking a defendant for consent to search the automobile is not prohibited by the *Miranda* decision. This assignment of error is overruled.

Defendants introduced no evidence. At the close of the State's evidence defendants made a motion for judgment of compulsory nonsuit which the court denied. This denial is assigned as error. The indictments were drawn under the provisions of this part of G.S. 14-55: "If any person . . . shall be found having in his possession, without lawful excuse, any pick-lock, key, bit or other implement of housebreaking; . . . such person shall be guilty of a felony and punished by fine or imprisonment in the State's prison, or both, in the discretion of the court."

In a prosecution under the provisions of G.S. 14-55 quoted above, the burden is on the State to show two things: "(1) That the person charged was found having in his possession an implement or implements of housebreaking enumerated in, or which come within the meaning of the statute; and (2) that such possession was without lawful excuse." *S. v. Boyd,* 223 N.C. 79, 25 S.E. 2d 456; *S. v. Morgan,* 268 N.C. 214, 150 S.E. 2d 377. Obviously, the picklock and the homemade key attached to the picklock found in the automobile may be used for lawful purposes, but it is also manifest that they can be used for purposes of burglary. Considering the State's evidence in the light most favorable to it and giving the State the benefit of every reasonable inference to be drawn therefrom, it would permit a jury to find the following facts: (1) That at about 4:30 a.m. on 14 February 1967 all four defendants were riding together in a Ford automobile bearing a Florida license tag on the streets of the city of Rocky Mount; (2) that in this automobile was a picklock with a homemade key attached to it and a quantity of coins amounting to $484.65, and in the trunk of the car quite a number of clothes and wearing apparel; (3) that the picklock in the possession of the defendants was an implement of housebreaking enumerated in, or which comes within the meaning of the statute, G.S. 14-55; (4) that the coins were scattered inside the car and in the trunk, and that the defendants, after having properly been warned of their constitutional rights, said they were coin collectors and that it was not any business of the police where the coins came from; (5) that they said they did not remember what bank they got the coins from; (6) that they did not know how they got to Rocky Mount, that all they knew was that they were in Rocky Mount; (7) that in the automobile were three or four hanger-type clothes containers stuffed full of clothes, some clean and some dirty, and three regular suitcases, all of them packed full of clothes; and (8) that all the defendants were on a joint enterprise and in joint possession of the objects found in the

automobile; that the defendants unlawfully, wilfully, intentionally, and feloniously did have in their possession, without lawful excuse, implements of housebreaking and burglary tools, to wit, a lock pick, two ball peen hammers, assorted wrenches, flashlight, files and bits; and that all were principals and all were equally guilty.

It is thoroughly established law in this State that, without regard to any previous confederation or design, when two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty. *S. v. Taft,* 256 N.C. 441, 124 S.E. 2d 169. The court properly submitted the case to the jury.

We take judicial notice of the fact that many coin telephone instruments are within buildings and some are on the street. "There is a sufficient breaking at common law, and a 'forcible breaking' within the meaning of a statute, where a person enters by unlocking or unlatching a door. . . ." 12 C.J.S., Burglary, § 3(b), p. 670. To the same effect, 2 Wharton's Criminal Law and Procedure (Anderson Ed. 1957), § 413. Of course, the unlocking and entry of a building must be with the requisite intent to commit a felony therein.

We have carefully examined all the other assignments of error to the admission of evidence and all are overruled.

We have carefully examined all assignments of error to the charge. Reading and construing the charge contextually as a whole, it adequately charges the law on every material aspect of the case arising on the evidence and applies the law fairly to the various factual situations presented by the evidence; *e.g.,* Judge Burgwyn charged the jury as follows:

> "The defendants contend, Ladies and Gentlemen of the jury, that if you should find that they had the pick lock in there for the sole purpose of picking the telephone booths along the highways or the streets which they were traveling, and not for the purpose of burglarizing any of the homes, that you should find them not guilty.
>
> "It is a question of fact for you to determine whether or not they had the pick lock in there, and if they did have it in there, for what purpose they had it, whether they had it to rob telephone booths or homes. If you are satisfied beyond a reasonable doubt that they had it in there for the purpose of robbing homes or places of business, picking the locks and entering the homes, you will find them guilty. If you have a reasonable doubt about it, you will find them not guilty."

While certain expressions in the charge detached from its context may be the subject of criticism, yet reading the charge contextually

it leaves no reasonable cause to believe that the jury was misled or misinformed. 4 Strong's N. C. Index, p. 336. All assignments of error to the charge are overruled.

In the trial below we find

No error.

DIXIELAND REALTY COMPANY, A CORPORATION, PETITIONER, v. JOE R. WYSOR AND WIFE, ALICE WYSOR; HAWTHORNE SALES COMPANY, INC., A CORPORATION; SAM WARE; QUENTIN BOLLINGER T/A BOLLINGER ELECTRIC COMPANY; NOLEN CONCRETE SUPPLY COMPANY; BESS BROTHERS, INC., RAINBOW PAINT STORE, J. A. BROWN, WITTEN SUPPLY COMPANY, AND NIXON EXTERMINATING COMPANY, B. B. BANNER, JR., DEFENDANTS.

(Filed 13 December, 1967)

1. Mortgages and Deeds of Trust § 28—

The grantor in a deed of trust may purchase the property at the foreclosure sale conducted by the trustee.

2. Mortgages and Deeds of Trust § 41—

Ordinarily, the purchaser at the foreclosure sale of a deed of trust acquires title free from subsequent encumbrances.

3. Mortgages and Deeds of Trust § 33—

Surplus remaining in the hands of the trustee after payment of the debt secured by the deed of trust and costs may be turned over by the trustee to the clerk of the Superior Court. G.S. 45-21.31(b).

4. Estoppel § 1—

Estoppel by deed is recognized in this State when the grantor intends to convey and the grantee expects to acquire a particular estate, even though the deed contains no technical covenants or warranties.

5. Estoppel § 2; Mortgages and Deeds of Trust § 41—

The owners of land executed a deed of trust thereon to secure a debt and executed another deed of trust, subsequently recorded, to their vendor. The deed of trust first registered was foreclosed and the land was purchased by the trustors. *Held:* The after acquired title enures to the benefit of the cestui in the secondly recorded deed of trust.

6. Marshalling—

The doctrine of marshalling of assets ordinarily applies when a common debtor holds separate funds and one creditor has a lien on both, while the other has a lien on one only; the doctrine does not apply if the holder of the superior lien would be forced to expose himself to the possibility of costly litigation or suspend his immediate right to proceed against the fund subject to his lien.

7. Same; Mortgages and Deeds of Trust § 33— Where trustor purchases at foreclosure of first recorded deed of trust, cestui in a second deed of trust is entitled to payment of his debt out of surplus.

The owners of land executed a deed of trust securing a debt to third parties, which deed of trust was first recorded. The owners also executed a deed of trust to their vendor, which deed of trust was subsequently recorded. Subsequently liens were filed against the parties by laborers and materialmen. The deed of trust first recorded was foreclosed and bought in by the original owners in an amount exceeding the debt secured by that instrument, and the trustee paid the surplus into the hands of the clerk. *Held:* The doctrine of marshalling does not apply, and the cestui in the second recorded deed of trust is entitled to the amount of its debt secured by its deed of trust before payment of any sums to the lien holders.

APPEAL by defendants Ware and Bollinger from *Jackson, J.*, 26 June 1967 Civil Session of GASTON.

Petition under G.S. 45-21.32 for order determining disposition of surplus funds arising from a foreclosure sale.

The facts pertinent to a decision in this case may be summarized as follows:

Joe R. Wysor and wife entered into a written agreement with B. B. Banner, Jr., on 21 February 1964 by the terms of which Banner agreed to construct a house on the hereinafter described property for the agreed sum of $18,500.00.

By deed recorded 2 April 1964, at 11:53 A.M., in the Gaston County Registry, petitioner conveyed to Joe R. Wysor and wife the following described lot:

> Being the full contents of Lot No. 10 in Block A of the Southwood Subdivision as shown on map or plat of same recorded in Plat Book 14 at page 107.

Wysor and wife executed a deed of trust conveying the above described property as security for a note to First-Citizens Bank and Trust Company in the amount of $14,800.00, which note and deed of trust were dated 1 April 1964 and were recorded on 2 April 1964 in the Gaston County Public Registry at 11:54 A.M.

Petitioner claims a portion of the surplus funds by virtue of a note in the amount of $2,000.00, which is secured by a deed of trust on the above-described property executed in its favor by Wysor and wife, and recorded on 2 April 1964 at 11:55 A.M. in the Gaston County Registry.

Petitioner alleged that no material or labor had been furnished or performed upon the above-described property at the time of the execution of the deed of trust and note in its favor.

The parties, other than petitioner and the contractor, had claims

by virtue of labor or materials furnished, including the following who had filed claims of lien, to-wit: (1) Hawthorne Sales Company by virtue of a claim of lien filed 17 February 1965 in the amount of $198.96; (2) Sam Ware by virtue of a lien filed 8 May 1965, in the amount of $537.00; (3) Quentin Bollinger, trading as Bollinger Electric Company, by claim of lien filed on 2 June 1965 in the amount of $550.00.

Upon default in payment of note, the deed of trust executed to secure the note of First-Citizens Bank & Trust Company was foreclosed. At the foreclosure sale under said deed of trust, Joe R. Wysor and his wife became the last and highest bidders in the amount of $18,500.00, and thereafter the trustee in said deed of trust executed a trustee's deed to Joe R. Wysor and his wife for the property described in said deed of trust. (Prior to foreclosure, Carl J. Stewart was substituted as trustee in place of Henry M. Whitesides in the deed of trust recuring the note to First-Citizens Bank & Trust Company.)

After payment of the note secured by the deed of trust to First-Citizens Bank & Trust Company and the expenses of the sale, the substituted trustee paid to the Clerk of Superior Court a surplus in the amount of $2,380.65 under authority of G.S. 45-21.31.

Respondents Ware and Bollinger, who had furnished labor, materials and services in the construction of the house on the property herein described pursuant to contract with the general contractor, filed a motion to marshal assets. Respondents alleged in the motion that the surplus paid into court is insufficient to pay the balance due on petitioner's mortgage, including the costs and expenses of the proceeding, but is sufficient to pay the claims of respondents. The respondents further allege that Wysor and wife have not paid the purchase price of the land on which the house is built and that petitioner, by asserting a claim against the surplus funds held by the Clerk of Superior Court arising from the sale of said property, is prejudicing the rights of the respondent lien claimants, and that petitioner has a valid and subsisting first lien upon the property by virtue of its deed of trust, which is in default and subject to foreclosure by its terms.

Judge Jackson heard respondents' motion, found facts, and concluded as a matter of law that petitioner had only one source from which to collect its obligation, since the foreclosure of the deed of trust securing the note of First-Citizens Bank & Trust Company had the effect of extinguishing all junior encumbrances, particularly the deed of trust of petitioner, and transformed and transferred the lien of petitioner's deed of trust to the proceeds or surplus of the sale, if any were left after satisfying the lien of the senior deed of

trust. Further, that the doctrine of marshaling of assets did not apply to these facts. Upon these conclusions of law he thereupon entered an order denying the motion to marshal the assets.

Respondents Ware and Bollinger appealed.

Horace M. Dubose, III, for defendant appellants Ware and Bollinger.

Joseph B. Roberts, III, for B. B. Banner, Jr.

Garland, Alala, Bradley and Gray for Nolen Concrete Co. and Witten Supply Company.

No Counsel contra.

BRANCH, J. The question presented for decision by this appeal is whether the trial court erred in entering order denying motion of respondents Bollinger and Ware to marshal assets.

Appellants contend that the foreclosure of the senior deed of trust did not extinguish the lien of the junior deed of trust.

It is recognized in this jurisdiction that both equity and law permit the grantor in a deed of trust to purchase his own property at foreclosure sale. *In re Sale of Land of Sharpe,* 230 N.C. 412, 53 S.E. 2d 302; *Wilson v. Vreeland,* 176 N.C. 504, 97 S.E. 427.

Ordinarily, all encumbrances and liens which the mortgagor or trustor imposed on the property subsequent to the execution and recording of the senior mortgage or deed of trust will be extinguished by sale under foreclosure of the senior instrument. *Trust Co. v. Foster,* 211 N.C. 331, 190 S.E. 522.

In event there is any surplus after satisfaction of the debt of the senior lien, the trustee should pay it to the owner of equity of redemption or to the discharge of the junior liens, as the facts require. If adverse claims are asserted or there is doubt as to who is entitled thereto, the trustee may be discharged of liability by paying any surplus in his hands to the clerk of superior court pursuant to G.S. 45-21.31(b). *Military Academy v. Dockery,* 244 N.C. 427, 94 S.E. 2d 352; *Bobbitt v. Stanton,* 120 N.C. 253, 26 S.E. 817.

Accepting these principles of law, we must, however, consider the effect upon the junior liens when the trustor purchases his own property from the trustee upon the foreclosure under power of sale in the senior deed of trust.

The authorities in this State are understandably meager since the question presented in this case grows out of the very unusual situation of a trustor who is in default on his obligation appearing at the trustee's sale with a sufficient sum to pay the full debt secured by the senior lien plus the accrued costs of the sale.

There is a sharp divergence of opinion on this question in the several jurisdictions.

In 59 C.J.S., Mortgages, § 577, p. 973, it is stated:

> "The mortgagor or grantor of a deed of trust may always purchase at a sale of his own property by the mortgagee or trustee, but he cannot by such purchase defeat the right of recovery under subsequent encumbrances, . . ."

One line of authorities is represented by the case of *Huzzey v. Heffernan*, 143 Mass. 232, 9 N.E. 570, where a second mortgagee claimed that when property was reconveyed to the mortgagor by a third person who purchased it upon foreclosure sale under power of the first mortgage, the second mortgage revived and attached to the property on the ground that mortgagor was estopped by his warranty to deny the second mortgagee's title. The Court held that the foreclosure sale terminated the second mortgagee's interest, noting that the covenant in the second mortgage "is that the grantor will warrant and defend the premises against the lawful claims and demands of all persons except those claiming under the prior mortgage," which is not a general warranty. By asserting title acquired under foreclosure of the first mortgage, the mortgagor does not allege anything inconsistent with his assertions in his deed. The mortgagor asserts in his deed that the prior mortgage is a paramount title. To give the doctrine of estoppel the operation which the second mortgagee claims would be to enlarge the mortgagor's covenant to a general covenant of warranty.

Plum v. Studebaker, 89 Mo. 162, 1 S.W. 217, is in accord with the view of *Huzzey v. Heffernan, supra.* Here, H. C. Bettes and wife, Amanda, gave a deed of trust in 1879 to secure a debt due from W. H. Bettes & Co. to Mary Atherton. The firm was composed of W. H. and J. J. Bettes and they and their wives also joined in the deed which conveyed the land owned by Amanda and other property not owned by her. In 1881, the same grantors made another deed of trust on the same property to secure a debt of H. C. Bettes & Sons to defendants, Studebaker Bros. The latter deed of trust was made subject to the prior one. Thereafter W. H. Atherton, who represented the Mary Atherton debt, purchased the property at a trustee's sale under the first deed of trust and subsequently conveyed it by warranty deed to Amanda, who conveyed to plaintiff. The Court, in holding that plaintiff took title free from any lien of the second deed of trust, stated:

> ". . . under our system of deeds of trust, the trustee's sale operated as a complete foreclosure, and cut off the second

deed of trust as completely as if there had been a decree of foreclosure with all the parties before the court. Atherton got a perfect title as against the defendants, and it was entirely competent for Amanda Bettes to acquire that title, for she owed no duty inconsistent therewith."

A divergent view is stated in the case of *Jensen v. Duke,* 71 Cal. App. 210, 234 P. 876, where one Jensen executed a deed of trust to Abbott and then sold the property conveyed in the deed of trust, and subject thereto, to Duke. Duke executed a mortgage to Jensen. The first deed of trust was foreclosed and the purchaser at the foreclosure sale conveyed the property back to Duke. The case was brought to court by an action to foreclose the Jensen mortgage. Section 2930 of California Civil Code provides:

"Title acquired by the mortgagor subsequent to the execution of the mortgage, inures to the mortgagee as security for the debt in like manner as if acquired before the execution."

Holding that the Jensen deed of trust was revived by inurement and that the ruling in *Plum v. Studebaker, supra,* was not the correct law in the State of California, the Court said:

". . . the reason of the rule which absolutely extinsuishes junior mortgage lien following foreclosure of senior lien, the purchaser at foreclosure sale and his successors in interest being other than the mortgagor, would seem not to apply as to the mortgagor acquiring the title from foreclosure of the first mortgage, whether he acquired title directly under foreclosure deed or indirectly and as the grantee of a third party foreclosure-purchaser."

In accord with the view expressed by *Jensen v. Duke, supra,* is the case of *Martin v. Raleigh State Bank,* 146 Miss. 1, 111 So. 448. There Martin executed a deed of trust to the Bank which, in the body of the instrument, stated it was a second deed of trust, and further expressly stated that the second deed of trust was subject to the first deed of trust. The first deed of trust was foreclosed and title later was revested in Martin. The second deed of trust was then foreclosed and the beneficiary in the deed of trust bought in at the sale and brought this action for possession. The Court held, upon the ground of estoppel, that the trustor's title, acquired from a third person who purchased at the foreclosure of the first mortgage, was subject to the second mortgage.

Jones v. Kingsley, 55 N.C. 463, is the only North Carolina case which we find directly on the question under consideration. In that

case defendant, being indebted to plaintiff in the sum of $1136.00, executed a mortgage-deed to plaintiff to secure payment thereof. Upon default in payment, this bill was filed for foreclosure of the equity of redemption or, in the alternative, for a sale of the mortgaged premises. Defendant alleged that shortly after execution of the mortgage-deed he discovered that there was a judgment and execution outstanding wherein defendant was surety for another person, forming a prior lien to the mortgage-deed, of which he was not aware at the time of executing the deed. Plaintiff was advised of the situation, and he promised to advance the necessary funds to remove the prior encumbrance and to look to the mortgage-deed as security for this further sum. Plaintiff failed to perform this promise and permitted the property to be sold under execution. One Francis became the purchaser of the premises and thereafter conveyed to defendant. The surplus of $400, after satisfaction of the execution, was paid to plaintiff on his debt. The headnote in this case accurately states the holding of the Court as follows: "Where the mortgaged premises were sold under a prior lien, and bought by a third person, who sold again to the mortgagor, the rights of the mortgagee are not impaired by this transaction; so far from it, it will be regarded only as the removal of an incumbrance, which it was the duty of the mortagor to effect."

The result in *Jones v. Kingsley, supra,* is recognized and approved by many textwriters. It is stated in 2 Wiltsie on Mortgage Foreclosure § 835 (5th ed. 1939):

> "Where the owner of mortgaged premises, who has given a junior mortgage thereon, purchases the property upon a sale under a senior mortgage, the rule is that his purchase will not defeat the junior mortgage but will operate for the benefit of it in the same way as a discharge or transfer of the mortgage to himself would have done."

See also 3 Jones on Mortgages § 1887 (8th ed. 1928).

In those jurisdictions which hold that the junior lien is not extinguished when the trustor purchases at foreclosure sale under a senior deed of trust, the great majority of the decisions are based on the principle of estoppel created by the covenants of warranty and title in the junior encumbrance.

In North Carolina, whether a quitclaim deed or a deed of bargain and sale without technical covenants creates an estoppel depends upon its language, *Harrell v. Powell,* 251 N.C. 636, 112 S.E. 2d 81; and there is substantial authority in this jurisdiction for the position that the principle of estoppel will apply when the deed shows that the grantor intended to convey and the grantee expected

to acquire a particular estate, although the deed contains no technical covenants. *Keel v. Bailey,* 224 N.C. 447, 31 S.E. 2d 362; *Capps v. Massey,* 199 N.C. 196, 154 S.E. 52; *Willis v. Willis,* 203 N.C. 517, 166 S.E. 398; *Weeks v. Wilkins,* 139 N.C. 215, 51 S.E. 909; *Crawley v. Stearns,* 194 N.C. 15, 138 S.E. 403; *Williams v. R. R.,* 200 N.C. 771, 158 S.E. 473; *Woody v. Cates,* 213 N.C. 792, 197 S.E. 561.

In the case of *Crawley v. Stearns, supra,* the facts show that on 26 September 1918 one Brown and wife executed a written instrument, evidently intended as a deed of trust but designated as a second mortgage, purporting to convey title to property to secure bonds held by one Capehart. Capehart, the bondholder, was named as the grantee in the premises of the instrument and in its habendum, where the trustee is ordinarily named. However, the instrument provided that upon default Capehart could call upon the trustee, Barwick, to foreclose.

In July 1924 Barwick, as trustee, exposed the property described in the instrument to sale at public auction and later executed a trustee's deed for the property described in the instrument to R. W. Winston, Jr., who had become the last and highest bidder at the foreclosure sale. Winston entered into possession and subsequently conveyed said property to one Johnson by warranty deed. Plaintiffs claimed title under Johnson through *mesne* deeds containing covenants of warranty. Plaintiffs contracted to sell the property to defendant, who refused to accept plaintiffs' deed on the ground that the original deed of trust which Barwick, Trustee, purported to foreclose vested in Capehart the legal title, and that the legal title was not divested by the trustee's deed to the purchaser at the foreclosure sale. On 27 April 1927, Capehart and wife executed to Barwick, trustee, a deed "conveying all their right, title and interest" in and to the lot in question and reciting satisfaction of the secured debt and ratification of the trustee's sale. Holding that the trustee's deed to the purchaser at the sale made under the deed of trust was a deed of bargain and sale and that the trustee was estopped to deny his after-acquired title, the Court said:

> "At common law a covenant of warranty was necessary to preclude the grantor from asserting an after-acquired title; but there is authority for the position that if a deed shows that the grantor intended to convey and the grantee expected to acquire the particular estate the deed may found an estoppel, although it contains no technical covenants. (Citing authorities).
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> "'. . . The consensus of all the authorities is to the effect that where the deed bears upon its face evidence that the entire estate and title in the land was intended to be conveyed, and

that the grantee expected to become vested with such estate as the deed purports to convey, then, although the deed may not contain technical covenants of title, still the legal operation and effect of the deed is binding on the grantors and those claiming under them, and they will be estopped from denying that the grantee became seized of the estate the deed purports to vest in him.' "

" '. . . The true principle is that the estoppel works upon the estate which the deed purports to convey and binds an after-acquired title as between parties and privies.' "

"The conveyance executed by the trustee to the purchaser at the sale made under the deed of trust is a deed of bargain and sale which has been duly registered. The seizin is deemed to have passed because the maker is estopped, and the registration puts the deed on the footing of a feoffment."

See also *Woody v. Cates,* 213 N.C. 792, 197 S.E. 561.

In the instant case the conveying clause stated, in part, that "the parties of the first part have bargained, sold, given, granted and conveyed, and by these presents do bargain, sell, give, grant and convey to the said party of the second part and his heirs and assigns, that certain lot, tract, or parcel of land. . . ." It is clear that the grantor intended to convey and the grantee expected to acquire as security for his debt the land described in the junior deed of trust. When trustor purchased the legal title at the foreclosure sale of the senior mortgage and duly recorded the deed received from the trustee, the title so acquired "fed the estoppel" and by operation of law vested the title so acquired in Shives, the trustee in the junior deed of trust.

In reviewing the cases from other jurisdictions we concede that a strong argument may be placed against the rule holding that the purchase by the trustor at the mortgage sale inures to the benefit of the junior lien, on the ground that the junior lienholder generally knows of the prior lien and has opportunity to protect himself by bidding at the sale or by taking judgment on the debt when the property is repurchased by the trustor. However, the stronger reasoning is that to allow the trustor to purchase his own property at the trustee's sale under the senior lien is one that is open to and conducive to fraudulent dealings under circumstances which would make the detection and proof of fraud very difficult.

We hold that the purchase by trustor at the senior mortgage sale did not extinguish the lien of the junior deed of trust.

The respondents Sam Ware and Quentin Bollinger, t/a Bollinger

Electric Company, nevertheless, are not entitled to invoke the equitable remedy of marshaling the assets.

In the case of *Trust Co. v. Godwin,* 190 N.C. 512, 130 S.E. 323, it is stated:

> "'. . . As a general rule, before the doctrine of marshaling assets will be applied, there must be two funds or properties, at the time the equitable relief is sought, belonging to the common debtor of both creditors, on both of which funds one party has a claim or lien, and on one only of which the other party has a claim or lien.'"

In the instant case there is no separate fund or properties upon which one party has a claim of lien on both and the other has a claim of lien on only one. The surplus paid into the hands of the clerk of superior court must be used to discharge the junior liens in the same priority as if resort were made to the land. For the purpose of satisfying the junior liens, and thus for the purpose of this decision, the fund in the hands of the clerk of Superior Court and the land described in the deeds of trust are one and the same.

It is not denied that the lien of the petitioner is superior to the liens of respondents.

55 C.J.S., Marshaling Assets and Securities, § 4, p. 962, states:

> "The doctrine of marshaling applies only when it can be applied with justice to the paramount, or doubly secured, creditor, and without prejudicing or injuring him, or trenching on his rights. Such relief will not be given if it will hinder or impose hardships on the paramount creditor, or inconvenience him in the collection of his debt, or deprive him of his rights under his contract, by displacing or impairing a prior acquired lien or contract right; nor will it be given on any other terms than giving him complete satisfaction. The doctrine is never enforced where it will operate to suspend or put in peril the claim of the paramount creditor, or cause him risk of loss, or where the fund to be resorted to is *one which may involve such creditor in litigation,* especially if final satisfaction is somewhat uncertain, or where the effect of applying *the doctrine would be to compel him to proceed by an independent action, such as one for the foreclosure of a mortgage,* since that would place an additional burden on him. (*Greenwich Trust Co. v. Tyson,* 27 A. 2d 166, 129 Conn. 211). . . . the paramount creditor will not be compelled to collect his debt from the singly charged fund or property where such fund is of uncertain value, especially where long delay will necessarily ensue in converting it into money,

or where that fund consists of property in the possession of third persons who claim title thereto, while the doubly charged fund is money in court."

A pertinent statement is also found in 3 Jones on Mortgages § 2174 (8th ed. 1928), as follows:

"Application of doctrine of Marshaling Securities. — In a proceeding for the distribution of surplus moneys, there is no room for the application of the doctrine of marshaling securities, whereby a creditor who has a double fund to which he may resort for satisfaction of his debt, and another creditor has only one of these funds, the first creditor will be required primarily to resort to that fund for the satisfaction of his debt over which he has the exclusive control. That rule of course implies the right of the creditor with the double fund or security to appropriate both funds if necessary. Therefore, a second mortgagee, applying for surplus moneys arising from a sale on foreclosure of the first mortgage will not be compelled to release his lien in favor of subsequent mortgages, on proof merely that his debt is amply secured by other property on which his mortgage is a lien, no matter how strong or apparently conclusive the evidence may be that such other property is sufficient to pay his claim. The court can not release a lien without actual payment, merely because witnesses testify and the referee finds that the holder of the lien has other property of his debtor to which he can resort for the satisfaction of his debt."

To allow the relief respondents seek would be to force the holder of the superior lien to institute foreclosure proceedings, expose himself to the possibility of costly litigation, and thereby suspend his immediate right to proceed against the fund in the hands of the clerk of superior court. Moreover, estoppel by deed or mortgage binds only parties and privies. *Brittain v. Daniels,* 94 N.C. 781. Respondents are not parties or privies to the parties named in either of the deeds of trust executed by the trustor. Thus, they have no rights arising out of estoppel by reason of the execution of the deeds of trust and trustor's purchase at the foreclosure sale under the senior deed of trust.

Although the trial court erroneously concluded that as a matter of law the foreclosure of the senior deed of trust had the effect of extinguishing the liens of all junior encumbrances, the correct result was reached in denying respondents' motion to marshal the assets, and the judgment of the court below is

Affirmed.

NORMAN GENE WILSON v. HARTFORD ACCIDENT AND INDEMNITY COMPANY.

(Filed 13 December, 1967)

1. Evidence § 33—

Evidence of a statement, oral or written, made by a person other than the witness and offered for the purpose of establishing the truth of the matter contained in the statement, is hearsay.

2. Evidence §§ 17, 33—

The rule relating to the admissibility of hearsay evidence is not applicable to testimony that a particular statement was made by some person other than the witness when the fact sought to be established is the making of the statement itself.

3. Evidence § 33; Insurance § 57—

Testimony of a witness that she was in a position to hear and did hear her father ask the owner of an automobile if he could use the car and that she heard the owner reply "Okay," is properly admitted in evidence, since it is competent to show that the statements were made.

4. Evidence § 17—

A witness, shown to have been in a position to see or hear what occurred, may testify not only to what he saw and heard but also to what he did not see or hear.

5. Same; Insurance § 57—

Testimony of plaintiff's witness that he failed to hear the owner of an automobile impose a limitation upon the bailee's use of the vehicle is properly excluded where such testimony clearly establishes the possibility that such witness did not hear the entire conversation relating to the grant of permission to use the automobile.

6. Appeal and Error § 49—

The exclusion of testimony cannot be held prejudicial when the same witness is thereafter allowed to testify to the same import.

7. Evidence § 17; Insurance § 57—

There is no inconsistency in allowing an owner of an automobile to testify as to statements made by him to the bailee of the car imposing limitations upon the use of the car, and in excluding testimony by other witnesses that they did not hear such a statement, where the testimony of such other witnesses establishes that they did not hear the entire conversation.

8. Insurance § 57—

The bailee of an automobile is covered under the "omnibus clause" of an automobile liability policy only where his use of the vehicle at the time of the accident is within the scope of the permission granted to him, and a material deviation from the grant of permission by the bailee is not a permitted use within the meaning of the omnibus clause.

9. Same—

In an action to recover under the omnibus clause of an automobile liability policy, the plaintiff has the burden to show that the bailee's use of

the automobile at the time of the accident was within the scope of the permission.

10. Same—

Permission to use an automobile may be express or implied, and evidence of strong social relationships between the owner and the bailee is relevant to show the extent of an implied permission, but the proof of such relationships cannot overcome the effect of limitations expressly imposed by the owner of the car upon the bailee.

11. Same—

In an action to recover under an omnibus clause of an automobile liability policy, evidence that the bailee of an automobile was given permission by the owner to use the car, but was told to return it by one o'clock so that the owner could return to work, and that the bailee had an accident with the car some ten hours after the expiration of the time limit imposed, is sufficient to support an instruction to the jury that, assuming the evidence to be true, the bailee's conduct was a material deviation from the grant of permission.

APPEAL by plaintiff *from Harry Martin, S.J.*, at the 26 June 1967 Regular Civil Session of GUILFORD, High Point Division.

In a former action the present plaintiff, Wilson, recovered judgment against the then defendant, Harvey Lee Perdue, for $5,392.20 on account of injuries received by Wilson when the automobile, in which he was riding as a passenger, collided with a utility pole due to the negligence of Perdue, the driver. This judgment has not been paid.

Wayne Edward Benson was the owner of the automobile. The collision and injury occurred at 11 p.m., 23 January 1965. There was then in effect a policy of automobile liability insurance issued by the present defendant, Hartford, to Benson covering this automobile. Hartford agreed "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury * * * sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile." The policy defined the term "insured" to include not only Benson, the named insured, but also "any person while using the automobile * * * provided the actual use of the automobile is by the named insured or [his] spouse or with the permission of either." The limit of liability of Hartford under the policy for injuries sustained by one person is $5,000. The policy provides that any person who has secured judgment against "the insured" after actual trial "shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy." Accordingly, in the present action, Wilson sues Hartford for $5,000 with interest from the date of the judgment obtained by him against Perdue. Hartford's defense is that Perdue was not driving the automobile

with the permission of Benson at the time of the collision and, therefore, Perdue was not an "insured" under this policy.

The following issue was submitted to the jury: "Was Harvey Lee Perdue, at the time of the collision, driving the insured 1965 Mustang with the permission, express or implied, of Wayne Edward Benson?" The jury answered this issue "No." From judgment entered in favor of the defendant in accordance with the verdict, the plaintiff appeals.

It is undisputed that Benson, 23 or 24 years of age, was and for several years had been a good friend of Harvey Lee Perdue and his family, visiting frequently in the Perdue home, being a contemporary of Perdue's son and daughters. Perdue was a long distance truck driver. Benson was employed at a furniture factory. Shortly before noon on 23 January 1965, Benson drove to the Perdue home in his Mustang automobile, went into the house and conversed with Mr. and Mrs. Perdue and other members of the family. A few minutes later Perdue drove away alone in Benson's automobile with Benson's permission. Neither he nor the automobile was seen again by Benson, or the other members of the Perdue family, until after the collision, which occurred at 11 p.m.

The plaintiff's only witnesses were Mrs. Perdue and Miss Delores Perdue, Harvey Lee Perdue being out of the State on a truck-driving assignment at the time of the trial.

Mrs. Perdue testified that her husband had driven Benson's Mustang automobile prior to this occasion, but she did not know how many times he had so driven it. Before Perdue left the house in Benson's car, the conversation in the group was general and Mrs. Perdue does not remember "everything that was said" nor "what the conversation was about." She testified, "It has been so long I can't remember two or three years back exactly what all was said that day."

The plaintiff assigns as error the sustaining of the defendant's objections to questions directed to Mrs. Perdue by the plaintiff, which, had she been permitted to answer them, would have elicited her testimony that she did not hear Benson tell her husband how long he could use the car or when to bring it back.

Miss Delores Perdue testified that, prior to the occasion in question, her father had driven automobiles belonging to Benson "a couple of times," and "on some occasions" Benson had driven automobiles belonging to Perdue. On 23 January 1965, when Benson came to the Perdue home, she "was present during some conversations" between her father and Benson. She does not remember where Benson was when her father drove away, except that he was in the house. Benson remained at the Perdue home until after dark. She

and Benson went to the police station after the collision at 11 p.m. and there saw her father. She does not remember seeing Benson give the keys to the automobile to her father. She did not actually see her father drive away in the car.

The plaintiff assigns as error the sustaining of objections by the defendant to questions by the plaintiff to Miss Perdue on direct examination, concerning what she heard said by her father and Benson about her father's use of the automobile. However, when Miss Perdue was recalled by the plaintiff as a rebuttal witness, she was permitted to testify with reference to these conversations as follows:

> "As to whether from the time Mr. Benson was there in our living room on January 23, 1965, I heard any conversation he had with my father before my father left with the automobile, he just asked if he could use the car. My father asked. As to whether I heard Benson's reply, 'Okay.' 'Okay' is all I heard; but I wouldn't say there wasn't more. That is when my father went outside. * * * I don't know what conversation he may have had with my father there on the porch about the use of the car, not if they had one on the porch; I don't know.
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> "During the conversation that my father and Mr. Benson were having there in my presence, I didn't hear my father tell Mr. Benson anything about what he wanted to use the car for. As to whether I heard Mr. Benson make any statement about having to be back at work at one o'clock, I didn't hear anything but what I told you about the use of the car; and that is all. If they talked, I didn't hear them. The conversation I heard took place right at the door. I didn't see my father leave after the conversation. I wasn't paying attention. As to whether Wayne Benson was in my presence at all times thereafter, or whether he left, he was with us, in the living room. As to whether he ever went out of the living room after he started this conversation with my father that I know of, now that I don't know. It has been several years ago that it happened."

Benson was the only witness called by the defendant. He testified that on 23 January 1965 he got off work for his lunch hour and went to the Perdue home. He had to be back at work at 1 p.m. He parked his car at the Perdue home and went into the house. Perdue asked him if he could use Benson's car for 15 or 20 minutes to run up to the service station to see if his (Perdue's) truck was ready for him to leave. Benson told Perdue he could use the car, telling him 'to come back at one o'clock because I had to go to work." The next time he saw Perdue was after the collision when he saw him at the

police station between 11:00 and 11:30 p.m. In the meantime, he remained at the Perdue home and "worried." He did not go back to work that afternoon. On prior occasions Perdue had driven Benson's car with Benson's permission, "but just to the store * * * to pick up bread or pick up something like that," and Benson was with him on those occasions.. The conversation concerning Perdue's use of the automobile on the occasion in question took place on the front porch of the Perdue home, not in the living room where Miss Delores Perdue was.

The plaintiff assigns as error the overruling of his objection to the testimony of Benson concerning his conversation with Perdue.

The court instructed the jury, in part, as follows:

> "A material deviation from the permission given constitutes a use without permission, but a slight deviation is not sufficient to exclude coverage under the omnibus clause. * * *
>
> "Now, material deviation is a substantial deviation, a deviation to such an extent that had the owner known that this was going to happen, that he was going to use the car in that fashion, that he would not have granted the permission, either expressly or impliedly, in the first instance. * * *
>
> ("Now, I instruct you, members of the jury, that if you find the facts to be in the case that Benson told Perdue that he could take his car to see if the truck was repaired, and bring the car back in time for Benson to go back to work that afternoon, then the court instructs you that there would be a material deviation by Perdue from the permission and it would be your duty to answer the issue 'No'.")

The plaintiff assigns as error the foregoing portion of the charge in parentheses, and also assigns as error the court's alleged failure to state in plain and correct manner the evidence given in the case and to declare and explain the law arising thereon with reference to the extent of the permission granted to Perdue by Benson.

Schoch, Schoch and Schoch for plaintiff appellant.
Morgan, Byerly, Post & Keziah for defendant appellee.

LAKE, J. There is no merit in the assignments of error relating to the admission and exclusion of testimony concerning the extent of the permission granted by Benson to Perdue for the use by Perdue of Benson's automobile.

The questions addressed to the plaintiff's witness, to which objections were sustained, were designed to elicit from the witness what statements she heard, or did not hear, Benson and Perdue

make to each other concerning the purpose for which Perdue was permitted to use the automobile and when he was to return it. For example, Mrs. Perdue, if permitted to answer the question, would have testified that she did not hear Benson tell Perdue when, where, how or how long Perdue could use the automobile or specify the time when Perdue was to bring it back. Such testimony was properly excluded not because of the hearsay rule, which the plaintiff, in argument, appears to consider the basis of the ruling, but because the prior testimony of this witness disclosed that she did not purport to know all that Benson and Perdue said to each other on this occasion.

Hearsay evidence consists of the offering into evidence of a statement, oral or written, made by a person other than the witness for the purpose of establishing the truth of the matter so stated. The hearsay rule does not apply to testimony that a particular statement was made by some person other than the witness when the fact sought to be established is the making of the statement itself, as distinguished from the truth of the matter so stated. *In re Will of Duke,* 241 N.C. 344, 85 S.E. 2d 332; Stansbury, North Carolina Evidence, 2d Ed., § 138; Wigmore on Evidence, 3d Ed., §§ 1766, 1770; 29 Am. Jur. 2d, Evidence, § 497. Thus, in *Hunt v. Casualty Co.,* 212 N.C. 28, 192 S.E. 843, where, as here, the question at issue was whether the driver of an automobile was, at the time of the accident, driving with the permission of the insured owner, Schenck, J., speaking for the Court, said:

> "The objection and exception to the testimony of the plaintiff's witness, Frank Coxe, as to what Richardson said to him at the time Coxe gave Richardson permission to use the automobile, upon the ground that such testimony was hearsay, cannot be sustained, since such testimony was competent to show the purpose for which Coxe permitted Richardson to use the automobile, and the terms of the bailment."

Thus, the testimony of Miss Delores Perdue, to the effect that she was in a position to hear and did hear her father ask Benson if he could use the automobile and did hear Benson reply "Okay," was competent upon the question of the grant of permission to use the car. It is equally well settled that a witness, whose testimony, if true, establishes that she was in a position to hear the entire conversation, may testify that a certain statement was not made therein. That is, a witness, shown to have been in a position to see or hear what occurred, may testify not only to what she saw and heard but also to what she did not see and did not hear. Strong, N. C. Index 2d, Evidence, § 17; Wigmore on Evidence, 3d Ed., § 664; 29 Am.

Jur. 2d, Evidence, § 258. However, such evidence is not competent unless it has first been shown that the witness was in a position to hear all that was said. As Ervin, J., speaking for the Court, said in *Ballard v. Ballard,* 230 N.C. 629, 55 S.E. 2d 316, "[A] witness cannot be allowed to testify to the nonexistence of a fact, where his situation with respect to the matter is such that the fact might well have existed without his being aware of it." Accord: *State v. Tedder,* 258 N.C. 64, 127 S.E. 2d 786; *Carruthers v. R. R.,* 215 N.C. 675, 2 S.E. 2d 878; *Johnson & Sons, Inc., v. R. R.,* 214 N.C. 484, 199 S.E. 704; Strong, N. C. Index 2d, Evidence, § 17; Wigmore on Evidence, 3d Ed., § 659.

The testimony of each of the plaintiff's witnesses established clearly the possibility that such witness did not hear the entire conversation between Benson and Perdue with reference to the grant of permission to use the automobile on this occasion. Consequently, there was no error in refusing to permit these witnesses to testify as to their failure to hear Benson impose a time limitation upon the use of the automobile.

In any event, any error committed in sustaining objections to questions propounded to Miss Delores Perdue, concerning what she heard or did not hear of the conversation, would not be the basis for a new trial. When this witness was recalled to rebut testimony of Benson on this point, she was permitted to testify to the same things which the record shows she would have said had she been permitted to answer the questions previously propounded to her. "The exclusion of testimony cannot be held prejudicial when the same witness is thereafter allowed to testify to the same import * * *" Strong, N. C. Index 2d, Appeal and Error, § 49; Accord: *In re Will of* Pridgen, 249 N.C. 509, 107 S.E. 2d 160.

Obviously, Benson was a competent witness to testify as to the statements he, himself, made to Perdue imposing limitations of time upon Perdue's permission to use the car. There was no inconsistency in the court's permitting Benson to testify as to the express limitations so placed by him upon the permission so granted by him and its refusal to permit the plaintiff's witnesses to testify that they did not hear such statement, in view of their testimony that they may not have heard the entire conversation.

The omnibus clause in the policy issued by the defendant to Benson conforms to the requirements of G.S. 20-279.21(b)(2). Under this clause, the coverage of the policy extends to the liability of a bailee of the automobile for an accident only where the bailee's use of the vehicle at the time of the accident is within the scope of the permission granted to him, the burden being upon the plaintiff to show that such use was within the scope of the permission.

Hawley v. Insurance Co., 257 N.C. 381, 126 S.E. 2d 161. Of course, a permission to use an automobile may be implied, and strong social relationships and ties between the owner and the bailee are relevant upon the question of the extent of such implied permission. *Bailey v. Insurance Co,*. 265 N.C. 675, 144 S.E. 2d 898. However, proof of friendly relations, which might otherwise imply permission, cannot overcome the effect of a limitation as to time, purpose or locality expressly imposed by the owner upon the bailee at the time of the delivery of the automobile to the bailee by the owner on the occasion in question. Appleman, Insurance Law and Practice, § 4370. It is well established in this State that when the bailee deviates in a material respect from the grant of permission his use of the vehicle, while such deviation continues, is not a permitted use within the meaning of the omnibus clause of this policy. *Bailey v. Insurance Co., supra; Fehl v. Surety Co.*, 260 N.C. 440, 133 S.E. 2d 68; *Hawley v. Insurance Co., supra.*

The testimony of Benson was to the effect that Perdue, at about noon, asked for permission to use the car "for 15 or 20 minutes to run up to see if his truck was ready," and Benson told him he could use the car but "to come back at one o'clock because I had to go to work." The accident occurred ten hours after the expiration of the time limit thus expressly imposed, assuming this testimony to be true. Such disregard of the time limitation expressly imposed was a material deviation from the grant of permission. *Fehl v. Surety Co., supra.* The charge of the court below to the jury contained a fair and complete summary of the evidence and a clear and full statement of the principles of law applicable thereto upon this issue. We find no error therein.

No error.

LEOLA TUCKER McCALL, ADMINISTRATRIX OF THE ESTATE OF LUTHER L. McCALL, DECEASED, v. DIXIE CARTAGE & WAREHOUSING INC., AND EARL T. STONE.

(Filed 13 December, 1967)

1. Appeal and Error § 53—

Even though the evidence is insufficient to raise the issue of contributory negligence, the submission of such issue cannot be prejudicial when the jury answers such issue in the negative.

2. Automobiles § 75— Evidence of negligence in leaving tractor on incline without setting hand brake or chocking wheels held for jury.

The evidence tended to show that the individual defendant backed his tractor-trailer to the loading ramp at the place where intestate was an

employee, that the air brakes were set on the trailer, that the individual defendant was unable to disengage the tractor and, in his further attempts to do so, put the tractor in reverse for the purpose of loosening the connecting pin, that, without waiting to ascertain the effect of this movement, he left the tractor with the gear set in reverse, and without setting the emergency brake on the tractor or chocking its wheels, that the reverse gear had become worn and would slip into the out-of-gear position, notwithstanding the position of the gear lever in reverse, that intestate was working where he had a right to be, and that the individual defendant knew of intestate's position down an incline from the tractor, and that within minutes after the individual defendant left, the tractor disengaged from the trailer, rolled forward down the incline, and ran over plaintiff's intestate, inflicting mortal injury. *Held:* The evidence was sufficient to be submitted to the jury on the issue of negligence of defendants.

3. Automobiles § 10—

Failure to set the emergency brake on a motor vehicle parked on an incline where its unattended movement may involve danger to persons or property, is or may be evidence of negligence, depending upon the circumstances.

4. Automobiles § 8—

The driver of a motor vehicle must exercise the care which a reasonable man would use in like circumstances to avoid injury to persons or property, regardless of whether the vehicle is being operated on a public highway or elsewhere. G.S. 20-140.1.

5. Automobiles § 90—

An instruction in an automobile accident case which charges that if the jury should find defendant negligent in any one of the specific acts of negligence alleged in the complaint and supported by evidence, to answer the issue of negligence in the affirmative, *held* without error when no prejudicial error appears therein when the charge is read contextually.

APPEAL by defendants from *Clarkson, J.*, April 17, 1967 "A" Session, MECKLENBURG Superior Court.

The plaintiff, Leola Tucker McCall, Administratrix of her husband, Luther L. McCall, instituted this civil action against Dixie Cartage & Warehousing, Inc., and its agent, Earl T. Stone, to recover damages for having negligently and wrongfully caused the injury and death of Luther L. McCall.

On September 24, 1964, plaintiff's intestate was a yard foreman at work for Charlotte Pipe and Foundry Company. The plaintiff alleged, and offered evidence supporting the allegations, that the defendants drove their tractor-trailer unit to the loading ramps of the Charlotte Pipe and Foundry Company's plant in Charlotte for the purpose of receiving, transporting, and delivering a trailer load of the Pipe Company's manufactured products. The defendant Stone, agent of the corporate defendant, backed the trailer unit into the

loading area in such manner as to place the rear of the trailer against the loading ramp. The large van-type trailer occupied practically all the level space in front of which there was a slope downward toward the outside packing and working area. Stone sought to disengage the tractor from the trailer. The coupling mechanism consisted, in part, of a rod, or pin, which passed through a slot (in the fifth wheel) and was held by claws, or grabs, from the other unit. Ordinarily, the claws could be manually released, the pin permitted to drop out, and the two units disengaged. On this particular occasion, the claws failed to release and the pin could not be removed, leaving the tractor on the incline but still engaged to the trailer. The air brakes on the trailer were set — holding it securely against movement. So long as this connection held, the trailer, with its air brakes set, would prevent any forward movement of the tractor.

Stone, the driver, sought to uncouple the units, but discovered the pin could not be removed. He attempted to loosen the pin by starting the engine of the tractor, placing the gears in reverse, and forcing the unit backward. This attempt apparently failed to permit the pin to drop out. Without returning to examine the effect of his reverse movement, Stone left the tractor to telephone a report to his company, trusting to the reverse gear and the attachment to the trailer to hold the tractor. Within minutes after he left, the tractor disengaged from the trailer, rolled forward down the incline, and ran over the plaintiff's intestate. After intensive care in the hospital for 9 days, attended by many doctors, plaintiff's intestate died as a result of his injuries.

The plaintiff alleged the defendants were negligent in that Stone failed to set the hand, or emergency, brake, though available on the tractor, and failed to use chocking devices consisting of wooden blocks, likewise available for the purpose of preventing movement of vehicles on the incline. He trusted to the coupling mechanism and the reverse gear to hold the tractor. The reverse movement, apparently, had disengaged the pin, or left it in such condition as permitted it to fall out. The reverse gear proved insufficient to hold the tractor on the incline. The reverse gear had become worn and the gear lever would slip out of adjustment and the "assist linkage" would remain in the out-of-gear position, notwithstanding the position of the gear lever in reverse.

The plaintiff alleged two causes of action, the first for wrongful death, and the second for pain, suffering, medical expenses and care incident to treatment after the accident, and before death.

The defendants filed answer denying negligence and pleading the contributory negligence of McCall. However, the defendants did not

offer evidence. The Court submitted issues which the jury answered as here indicated:

"1. Was plaintiff's intestate, Luther L. McCall, injured and his death caused by the negligence of the defendants as alleged in the complaint?
ANSWER: Yes.

2. Did plaintiff's intestate, Luther L. McCall, by his own negligence, contribute to his injury and death as alleged in defendant's *(sic)* further answer and defense?
ANSWER: No.

3. What amount, if any, is plaintiff entitled to recover of the defendants:
A. For alleged pain and suffering and reasonable medical expenses suffered and incurred by the plaintiff's intestate, Luther L. McCall?
ANSWER: $15,523.

B. For the alleged wrongful death of plaintiff's intestate, Luther L. McCall?
ANSWER: $50,000."

From the judgment on the verdicts, the defendants appealed.

Kennedy, Covington, Lobdell & Hickman by Hugh L. Lobdell; Charles V. Tompkins, Jr., for defendant appellants.

Hedrick, McKnight & Parham by Philip R. Hedrick for plaintiff appellee.

HIGGINS, J. The defendants, by proper motions, challenged the sufficiency of the evidence to go to the jury on plaintiff's specifications of negligence. The defendants conditionally pleaded plaintiff's contributory negligence. However, the defendants did not offer evidence. The plaintiff's evidence does not establish contributory negligence as a matter of law. Doubtful it is whether the evidence was sufficient to permit the jury to consider contributory negligence. However, since plaintiff was successful before the jury, the submission of the issue was not prejudicial.

The evidence disclosed that plaintiff's intestate was at work where he had a right to be. The defendant Stone knew of intestate's position down the incline from the tractor where its unguarded movement would be likely to result in death or serious injury. Without taking precaution to set the hand, or emergency, brakes on the tractor, and without placing in front of its wheels blocks of wood

(chocks) provided by the Pipe Company for that purpose, Stone left the tractor with the gear lever apparently in reverse, without taking the trouble to ascertain the condition of the coupling mechanism as a result of his efforts to break it loose by the rear movement of the tractor. He must have anticipated the movement would or might uncouple the vehicles. He assumed, negligently we think, they were still securely joined together. It was his duty, in view of the danger, to investigate and see if the clamps, or claws, still held the pin securely in place, or if the pin was out, or was hanging by a thread. *Bennett v. Young,* 266 N.C. 164, 145 S.E. 2d 853; *Short v. Chapman,* 261 N.C. 674, 136 S.E. 2d 40.

Failure to set the emergency brakes on a motor vehicle parked on an incline, where its unattended movement may involve danger to persons or property, is or may be evidence of negligence, depending upon the circumstances. *Arnett v. Yeago,* 247 N.C. 356, 100 S.E. 2d 855; *National Spinning Co. v. McLean Trucking Co.,* 263 N.C. 807, 140 S.E. 2d 534. The evidence is plenary the vehicle started of its own motion from the exact position in which Stone left it. According to Stone's admission, on his adverse examination, the air brakes were cut off. He did not remember setting the emergency brake. He admitted he did not place blocks under the wheels. "Whether the vehicle is being operated on a public highway or elsewhere, the driver must use the care which a reasonable man would use in like circumstances to avoid injury to another." *Bennett v. Young, supra; Stephens v. Southern Oil Co. of North Carolina, Inc.,* 259 N.C. 456, 131 S.E. 2d 39.

One who fails to take safety precautions in parking a vehicle on a highway is guilty of a criminal offense. G.S. 20-124(b); G.S. 20-126; G.S. 20-163. The violation of these and other safety statutes is negligence, *per se,* unless the statute expressly provides otherwise. G.S. 20-140.1 provides: "Any person who shall operate a motor vehicle over any driveway . . . or upon grounds or premises . . . providing parking space for customers . . . without due caution . . . or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving." The section is cited for the purpose of indicating that care must be exercised in places of danger otherwise than upon the public highway.

Finally, the defendants contend the Court should award a new trial for errors in the charge, if it should conclude the evidence is sufficient to survive the motion for nonsuit. The parts of the charge to which the defendants take exception are designed and are included and bracketed A to A, B to B, C to C, and D to D. We quote the part of the charge out of which the exceptions are taken:

". . . If the plaintiff, that is, Mrs. McCall, the Administratrix of Mr. McCall, the deceased, has satisfied you, the jury, from the evidence and by its greater weight, that the defendant, Earl T. Stone, one of the defendants and agent of the corporate defendant, parked the tractor-trailer in the dock on the property of the Charlotte Pipe and Foundry Company, and then after attempting to disengage the tractor from the trailer and failing to do so, (A) left the tractor-trailer with the tractor on an incline without setting the handbrake (A)

* * *

or (B) taking such reasonable precautions as an ordinarily prudent person would do under similar circumstances to prevent the rolling of the tractor down the incline; (B)

* * *

or (C) if the plaintiff has satisfied you by the evidence and by its greater weight that the defendant, Earl T. Stone, at the time and place in question failed to operate this motor vehicle in such a manner, as an ordinarily prudent person would do under the same or similar circumstances and when charged with a like duty; (C)

* * *

or (D) if she has satisfied you from the evidence and by its greater weight, that Mr. Stone, one of the defendants and agent of the corporate defendant, at the time knew, that is, had actual knowledge of some defect or defects in the tractor which might cause it to become disengaged and roll down; or if in the exercise of ordinary care he knew, or should have known of such defects and failed to correct them, and went off and left the tractor and it later rolled down the incline; (D)

* * *

the court instructs you that if the plaintiff has satisfied you by the evidence and by its greater weight of any one or more of these stated facts, that would constitute negligence on the part of these defendants. . . ."

The objection to the charge involved only alleged acts of negligence. Otherwise, there was no objection. The charge followed the theory of the trial. The allegations of the complaint raised the issues. The evidence was sufficient to go to the jury, to require the charge on them, and to support the findings. When read contextually, as it must be, it is unobjectionable. *Griffin v. Watkins,* 269 N.C. 650, 153 S.E. 2d 356.

We have examined all the cases cited in the appellants' carefully

prepared and documented brief. The cases cited and relied on are distinguishable from the case at bar. Especially, the appellants insist the failure to set the handbrakes and the failure to chock the wheels of the tractor are not sufficient acts of negligence to permit the Court to submit them to the jury. Under the circumstances detailed by the evidence in this case, and for the reason heretofore assigned, we think the evidence of negligent acts was amply sufficient to go to the jury and sustain the finding of negligence. *Fuller v. Magatti,* 231 Mich. 213, 203 N.W. 868; *Fone v. Ellison,* 297 Mass. 139, 7 N.E. 2d 737; *Glaser v. Schroeder,* 269 Mass. 337, 168 N.E. 809.

The exceptive assignments do not disclose any reason why the verdict and judgment should be disturbed.

No error.

ALLIED MORTGAGE AND DEVELOPMENT COMPANY, INC., v. THOMAS PITTS, JOHN W. RUSH AND WIFE, VYSTIA B. RUSH.

(Filed 13 December, 1967)

1. Pleadings § 12—

In passing upon a demurrer, the facts properly alleged in the complaint must be accepted as true.

2. Same—

If a complaint, liberally construed, alleges facts sufficient to constitute a cause of action, demurrer thereto must be overruled, but if the complaint is deficient in factual averments sufficient to sustain its legal conclusions, the demurrer must be sustained, since a demurrer does not admit legal conclusions.

3. Mortgages and Deeds of Trust § 19—

If a note secured by a deed of trust is in default, the *cestui* is entitled to demand foreclosure notwithstanding that the balance due on the note is small, and it is the legal duty of the trustee, upon such demand, to advertise and sell.

4. Mortgages and Deeds of Trust § 29—

The trustee may, after advertisement and before sale, hold a bid by a third person, and this is proper procedure so long as the trustee is not acting as agent for such third person but is performing the duties of his trust, and the trustee, in the absence of bids at the sale may, declare such third person the purchaser.

5. Mortgages and Deeds of Trust § 39—

Where the *cestui* in the second deed of trust does not allege any misconduct on the part of the trustee in the foreclosure of a prior deed of trust on the land, and alleges that such trustee sold after default of the note secured by the prior instrument upon demand by the *cestui* therein, the

foreclosure may not be set aside without allegations of fact permitting a legitimate inference that the sale and deed made pursuant thereto were fraudulent and that the trustors were parties to the fraud.

6. Same— Complaint held insufficient to state cause of action attacking foreclosure sale under prior deed of trust.

Plaintiffs alleged that they were the assignees of a note secured by a second deed of trust, that the land was foreclosed under a prior deed of trust, that the balance due on the note secured by the prior deed of trust was extremely small, and that the purchaser at the foreclosure sale was a friend of trustor. There was no allegation of fact permitting the legitimate inference that the purchaser at the foreclosure sale bought for trustor and not himself, and it further appeared that plaintiffs acquired the note by assignment more than two and a half years after the records had given notice that the land had been sold under the prior lien. *Held:* Demurrer was properly sustained in an action attacking the foreclosure.

7. Same—

Inadequacy of consideration, standing alone, is not sufficient to justify setting aside a foreclosure sale.

APPEAL by plaintiff from *Latham, S.J.*, May, 1967 Civil Session, RANDOLPH Superior Court.

The plaintiff, Allied Mortgage and Development Company, Inc., a Tennessee corporation with its principal office in Mississippi, instituted this civil action on December 2, 1966 against Thomas Pitts, a resident of Guilford County, and John W. Rush and wife, Vystia B. Rush, residents of Randolph County. The plaintiff, on information and belief, alleged the defendants conspired to defraud the plaintiff of its security for payment of a note for $10,800 executed by Rush and wife and secured by a second deed of trust on four lots in Randolph County. The complaint alleged the defendants procured the assignment of a note secured by a senior deed of trust and the sale of lots under the senior instrument. The further allegations are here summarized:

On April 25, 1961 John W. Rush and wife, Vystia B. Rush, executed a deed of trust to James R. Mattocks, Trustee, conveying four specifically described lots in Randolph County as security for the payment of a $700 note due John A. Reavis and wife. The deed of trust was recorded on March 29, 1962 in Randolph County. On November 20, 1962 Rush and wife executed another deed of trust on the same lots to George Kirzinger, Trustee, as security for the payment of a note for $10,800 due to Homes Beautiful, Inc. The second deed of trust was recorded on January 7, 1963. On February 5, 1963 Homes Beautiful, Inc. assigned the note to Kemwall Financial Corporation, which apparently was merged with Allied Mortgage and Development Company, Inc. On November 5, 1965 Allied Mortgage and Development Company assigned the note to Allied

Investment Company. The latter, on February 8, 1967, reassigned the note to the plaintiff. The plaintiff became the owner of the note after the suit was instituted but before the complaint was filed.

Prior to April, 1964 (date not given) John A. Reavis and wife transferred the $700 note to the defendant, Thomas Pitts, who, on account of default in payment of the balance due on the note, made demand on Mattocks, Trustee, to foreclose under the first lien. The Trustee advertised as required by the trust instrument and provided by statute. Prior to the day of sale, Pitts placed with the Trustee a bid of $91.52, apparently the amount of the balance due on the note. At the sale on April 10, 1964, though Pitts was not present, the Trustee announced his bid. There were no other bids. Pitts was declared the purchaser and on April 27, 1964, in the absence of any objection or advance bid, the Trustee executed a deed to the defendant Pitts covering the four lots. This deed was recorded in Randolph County on April 27, 1964.

The plaintiff further alleged that Thomas Pitts and John W. Rush and wife were close friends and that they intended, by the sale, to deprive the plaintiff of the security under the junior lien. The plaintiff seeks, in the alternative, this relief: (1) The first sale be declared void as fraudulent and the Trustee's deed to the defendant Pitts be set aside, and that the plaintiff be permitted to pay off the first lien and redeem the property; (2) A resale be ordered under the power of the senior deed of trust; (3) That Thomas Pitts be declared a Trustee for the benefit of the plaintiff; (4) That plaintiff recover of John W. Rush and wife the sum of $9,044.42, balance due on the note.

Thomas Pitts filed a demurrer to all alleged causes of action which the plaintiff attempted to assert in the complaint. John W. Rush and wife filed a demurrer to all except No. 4, to which they filed answer admitting they executed the $10,800 note and that it is unpaid. The Court entered judgment sustaining the demurrers. Plaintiff excepted and appealed.

Miller, Beck and O'Briant and Steve Glass by Adam W. Beck for plaintiff appellant.

Morgan, Byerly, Post & Keziah by David M. Watkins for defendant Thomas Pitts.

C. Richard Tate, Jr., for defendant appellees Rush.

HIGGINS, J. The demurrers were sustained because of failure of the complaint to allege facts sufficient to constitute any cause of action. In passing on a demurrer, the trial court in the first instance, and this Court upon appeal, must accept as true all facts properly

pleaded. *Kuykendall v. Proctor,* 270 N.C. 510, 155 S.E. 2d 293. If, when liberally construed, a complaint alleges facts sufficient to constitute a cause of action, it may not be upset by demurrer. *Belmany v. Overton,* 270 N.C. 400, 154 S.E. 2d 538. A demurrer does not admit the legal conclusions of the pleader, and if such conclusions are required to make out a case, the complaint is deficient in factual averments and the demurrer should be sustained. *Wright v. Casualty Co.,* 270 N.C. 577, 155 S.E. 2d 100; *Freel v. Center, Inc.,* 255 N.C. 345, 121 S.E. 2d 562; *Broadway v. Asheboro,* 250 N.C. 232, 108 S.E. 2d 441.

The complaint before us alleges the defendants conspired to defraud the plaintiff and to defeat the collection of its debts by causing the sale of its security under a prior deed of trust on which was due only $67. The defendant Pitts, who bought the note secured by the first deed of trust, and the makers of that note, were good friends. The complaint alleges there was a balance due. The Trustee advertised and at the sale announced a bid of $91.42 made by Pitts. No other bids were made. Seventeen days elapsed and no advance bid was filed and no objections were made. The Trustee executed a deed to Pitts as purchaser. The deed was recorded in Randolph County where the lots are situated. This occurred 2 years and 9 months before the plaintiff acquired the note from the Allied Investment Company according to the plaintiff's allegations.

Admittedly, the amount due on the Reavis note was small. Nevertheless, full payment was in default. This gave Pitts, the holder of the note, the legal right to demand foreclosure. Upon demand, it became the legal duty of the Trustee, Mattocks, to advertise and sell. After advertisement and before sale, Pitts filed with the Trustee a bid of $91.42. This was proper procedure so long as the Trustee was not acting as the agent of Pitts but was performing the duties of his trust. *Elkes v. Trustee Corp.,* 209 N.C. 832, 184 S.E. 826; *Denson v. Davis,* 256 N.C. 658, 124 S.E. 2d 827. The Trustee announced Pitts' bid and when no others were made, he declared Pitts the purchaser. Seventeen days after the sale, the Trustee executed the deed, which was promptly recorded.

The foregoing facts are alleged in the complaint. On inquiry by the Court during oral argument, counsel for the plaintiff advised that no improper conduct was chargeable to Mattocks. He, as Trustee, was the principal actor in the sale. He is not a party to the action. When wrongful conduct is not charged against the Trustee, and it being alleged in the complaint he acted under the power in a recorded first mortgage which secured a debt then in default, advertised and sold the property covered by the first lien, and executed a deed to the purchaser, that deed may not be set aside without allegations of

facts which will permit a legitimate inference that the sale and deed made pursuant thereto were fraudulent and the trustors were parties to the fraud.

If the makers of both notes had bought, or if facts alleged showing or permitting the legitimate inference Pitts bought for them, and not for himself, a different question would be presented. Facts and not conclusions must be alleged. The complaint is deficient in this respect. Inadequacy of consideration, standing alone, is not sufficient to justify setting aside a foreclosure sale. *Products Corp. v. Sanders,* 264 N.C. 234, 141 S.E. 2d 329; *Roberson v. Matthews,* 200 N.C. 241, 156 S.E. 496.

A junior mortgagee (or beneficiary in a junior deed of trust) has a number of remedies to which he may resort in order to protect his security. At any time prior to foreclosure, he may pay off the prior obligation. *Broadhurst v. Brooks,* 184 N.C. 123, 113 S.E. 576. At the foreclosure sale under the prior lien, he may bid on the property or see that the sale brings enough to protect him after discharging the prior lien. *King v. Lewis,* 221 N.C. 315, 20 S.E. 2d 305. Following foreclosure, he may, within 10 days, enter an upsetting bid and cause a resale. G.S. 45-21.27.

At the time Mattocks, Trustee, made the sale in April, 1964, the plaintiff failed to avail itself of any of its legal remedies. It now seeks to invoke an equitable remedy. In a court of equity, the plaintiff stands on slippery ground due to the fact it acquired the note more than 2½ years after the records of Randolph County gave notice that the security for its note had been sold under a prior lien. The plaintiff was put on constructive notice that it was acquiring an unsecured note. The defendants Rush and wife admit the execution and that the note has not been paid. On this admission, the plaintiff appears to be entitled to a judgment against the makers. For the reason assigned, the judgment of the Superior Court sustaining the demurrers is

Affirmed.

PRINCETON REALTY CORP., A NORTH CAROLINA CORPORATION, v. ROBERT KALMAN, INDIVIDUALLY; ROBERT KALMAN AS OFFICER OF STATESVILLE KNITTING MILLS, INC. AND IREDELL KNITTING MILLS, INC., AND POSITIVE KNITTING MILLS, INC.; AND STATESVILLE KNITTING MILLS, INC., IREDELL KNITTING MILLS, INC. AND POSITIVE KNITTING MILLS, INC., IN THEIR CORPORATE ENTITIES, ALL BEING NORTH CAROLINA CORPORATIONS; AND A. B. RAYMER, TRUSTEE.

(Filed 13 December, 1967)

1. Appeal and Error § 58—

Even though the findings of the trial court will be presumed correct and supported by evidence when there are no specific findings of fact and no request therefor, nevertheless in injunction proceedings the Supreme Court may review and weigh the evidence submitted to the hearing judge and find the facts for itself.

2. Injunctions § 13—

Where the sole or main relief demanded in an action is an injunction, and upon the hearing to show cause the facts appearing in the pleadings and by affidavits of the respective parties are conflicting, the temporary restraining order should ordinarily be continued to the hearing when plaintiff would suffer irreparable injury if the temporary order be dissolved and defendant would not suffer any considerable injury if it should be continued to the hearing, since in such instance dissolution of the temporary order would amount to a determination on the merits.

3. Mortgages and Deeds of Trust § 19—

The trustor in a deed of trust is entitled to restrain foreclosure if the note secured by the instrument is not in default. G.S. 45-21.34.

4. Injunctions § 13; Mortgages and Deeds of Trust § 19— Temporary order restraining foreclosure should be continued upon controverted facts.

In this hearing to determine whether a temporary order restraining a foreclosure should be continued to the hearing, plaintiff trustor by sworn allegations asserted that it had paid all installments within the time prescribed in the various instruments sought to be foreclosed, that defendant *cestuis* had refused to accept payment, and that plaintiff would suffer irreparable injury if the instruments were foreclosed. The trustee and *cestuis que trustent* alleged by sworn allegations that the installments were not paid at maturity, that defendants gave notice of default to trustor by registered mail and that thereafter trustor, after the expiration of the grace period, mailed checks which were insufficient in amount to cover the payments then due. *Held:* The temporary restraining order should have been continued to the hearing upon the controverted issues of fact.

5. Payment § 4—

While payment should be pleaded with sufficient certainty and particularity to give the debtor notice, trustor's allegations in this case asserting that it had made all installment payments within the time allowed in the note secured by the deed of trust and chattel trust indentures securing the notes, and that the *cestuis* had refused such payment, *held* sufficient,

since a general allegation of payment is ordinarily a sufficient plea of payment.

APPEAL by plaintiff from *McLaughlin, J.*, in Chambers in IREDELL, on 25 July 1967.

Civil action to enjoin foreclosure of certain security instruments.

A deed of trust was executed on 6 April 1966, between Princeton Realty Corp., party of the first part, A. B. Raymer, Trustee, party of the second part, and Statesville Knitting Mills, Inc., party of the third part, which provided in material part that Princeton Realty Corp., being indebted to Statesville Knitting Mills, Inc. in the principal sum of $4,000.00, had executed a promissory note whereby the principal sum was due and payable in twenty quarterly installments of $200.00 each, the first installment being due on the first day of July, 1966, and the remaining installments on the first day of each October, January, April and July thereafter until fully paid, plus interest on the successive unpaid balances of principal at six per cent. The note was secured by conveyance of certain real property described in the deed of trust together with all heating, plumbing, air conditioning fixtures and equipment now on or affixed thereto and made a part of the building thereon. If Princeton Realty Corp. failed to pay any installment of principal or interest as the same became due, then on application of Statesville Knitting Mills, Inc., its assignee, or any other person entitled to the moneys due thereon, the trustee was to advertise the property for sale under the deed of trust. The entire amount of the indebtedness was to at once become due and payable at the option of the holder in case of either of the following events:

1. Default in payment of any installment of principal or interest, "and such default shall continue for as long as thirty (30) days after notice has been given by Registered Mail to the offices of the undersigned and its attorneys:

Harvey A. Jones, Jr., Esq.
Jonas & Jonas
Lincolnton, N. C. and

Stanley B. Essner, Esq.
Empire State Bldg. Suite 4615
New York, N. Y. 10001."

2. . . . .

3. Default in payment "of either of the notes from Princeton Realty Corporation to Iredell Knitting Mills, Inc., Positive Knit-

ting Mills, Inc., or Robert Kalman secured by chattel trust indenture, registered simultaneously with this instrument and such default shall continue for thirty (30) days after notice to the party of the first part and its said attorneys."

Plaintiff alleged in its complaint that it had executed certain instruments to secure promissory notes as listed below:

Instrument	Secured party	Date Executed
1. Deed of trust	Statesville Knitting Mills, Inc.	4/6/66
2. Chattel trust indenture	Positive Knitting Mills, Inc.	4/6/66
3. Chattel trust indenture	Robert Kalman	4/6/66
4. Chattel trust indenture	Iredell Knitting Mills, Inc.	4/6/66

Plaintiff further alleged that defendants intended to foreclose the above listed instruments, and that notice of foreclosure had been posted at Iredell County Courthouse; that plaintiff had made all installment payments within the time allowed in the various instruments, but that defendants had refused to accept payment; that if defendant trustee is allowed to advertise and foreclose plaintiff's property, plaintiff would suffer irreparable damage and lasting injury by being deprived of its property and the industries located thereon. Plaintiff requested in its prayer for relief that its complaint be treated as an affidavit; that a temporary restraining order be issued to enjoin and restrain defendant trustee from any further proceedings in connection with such sale until a final determination of the rights of the parties.

Judge McLaughlin issued a temporary restraining order on 23 June 1967, and defendants were ordered to appear and show cause why the order should not be continued until a final hearing.

At the hearing to show cause, Robert Kalman stated by his sworn pleadings, *inter alia,* that the installments were not paid at maturity; that installments were due on 1 April 1967; that defendants gave notice of default to plaintiff by registered mail and deposited the letters in the U. S. Mail on 3 April 1967; that plaintiff mailed checks which were insufficient in amount, purporting to cover payments due 1 April 1967 by letter postmarked 4 May 1967; that said letter was received by defendant, A. B. Raymer, Trustee, on 6 May 1967. Therefore, default had continued for as long as 30 days after notice had been given as provided in the deed of trust and the chattel trust indentures, and in the notes secured by those instruments; and that as provided in said instruments, the payees had declared the entire amount of debt due, so that plaintiff was in default in payment of the entire balance on each of said notes. Kalman admitted that it was his intention to foreclose the deed of trust

and the chattel trust indentures and, further, that notice of foreclosure had been posted at the courthouse.

Thereafter, Judge McLaughlin entered an order which recited in part:

> ". . . and [this cause] being heard upon the complaint, Affidavits and Exhibits submitted by the plaintiff and the defendants, and it appearing to the court upon such hearing that the plaintiff is not entitled to the said Restraining Order;
>
> It is now ordered that the Restraining Order granted in this action on the 23rd day of June, 1967, be and the same is, hereby vacated and dissolved. . . ."

Plaintiff excepted to the signing of the order and appealed.

Collier, Harris & Collier and Edward T. Cook for plaintiff-appellant.

Raymer, Raymer & Lewis for defendant appellees.

BRANCH, J. The sole question to be decided on this appeal is whether the lower court erred in dissolving the temporary restraining order prior to a final hearing on the merits.

It is noted that the hearing judge in dissolving the order did not find facts, nor did appellant request that facts be found.

Although the Supreme Court indulges the presumption that the findings of the hearing judge are correct and requires the applicant to assign and show error, nevertheless, on appeal from an order granting or refusing an interlocutory injunction it is not bound by the findings of fact of the hearing judge. The Court may review and weigh the evidence submitted to the hearing judge and find the facts for itself. *Coach Lines v. Brotherhood,* 254 N.C. 60, 118 S.E. 2d 37; *Lance v. Cogdill,* 238 N.C. 500, 78 S.E. 2d 319.

The record in this case fails to show why a foreclosure was insisted upon and, further, fails to show whether the sums tendered to and refused by defendant Kalman were in the correct amount. We therefore deem it advisable to review the record. Upon such review we find that the pertinent facts may be summarized as follows: Plaintiff contends by its pleadings that it is correct in its payments on the notes secured by the instruments about to be foreclosed. Defendant Kalman by his pleadings and by introduction of exhibits squarely controverts this contention, by contending that notice was mailed to plaintiff by registered mail and that plaintiff did not tender payment in time nor sufficient in amount to prevent default under the terms of the security instruments.

We need not decide whether proof of due mailing of a letter

raises a presumption as to date of receipt of the letter, since we do not now consider the ultimate issues raised by the pleadings.

In order to decide the question presented for decision it becomes necessary that we review the applicable North Carolina cases.

This Court in *Studios v. Goldston,* 249 N.C. 117, 105 S.E. 2d 277, in affirming the continuance of a restraining order until final determination of the action on its merits, quoted from the landmark case of *Cobb v. Clegg,* 137 N.C. 153, 49 S.E. 80, as follows.

> "In *Cobb v. Clegg,* 137 N.C. 153, 49 S.E. 80, Walker, J., speaking for the Court, in pointing out the distinction between the old forms of common and special injunctions, said: 'If the facts constituting the equity were fully and fairly denied, the injunction was dissolved unless there was some special reason for continuing it. Not so with a special injunction, which is granted for the prevention of irreparable injury, when the preventive aid of the court of equity is the ultimate and only relief sought and is the primary equity involved in the suit. In the case of special injunctions the rule is not to dissolve upon the coming in of the answer, even though it may deny the equity, but to continue the injunction to the hearing if there is probable cause for supposing that the plaintiff will be able to maintain his primary equity and there is a reasonable apprehension of irreparable loss unless it remains in force, or if in the opinion of the court it appears reasonably necessary to protect the plaintiff's right until the controversy between him and the defendant can be determined. It is generally proper, when the parties are at issue concerning the legal or equitable right, to grant an interlocutory injunction to preserve the right *in statu quo* until the determination of the controversy, and especially is this the rule when the principal relief sought is in itself an injunction, because a dissolution of a pending interlocutory injunction, or the refusal of one, upon application therefor in the first instance, will virtually decide the case upon its merits and deprive the plaintiff of all remedy or relief, even though he should be afterwards able to show ever so good a case.' *Scott v. Gillis,* 197 N.C. 223, 148 S.E. 315; *Boone v. Boone,* 217 N.C. 722, 9 S.E. 2d 383; *Lance v. Cogdill,* 238 N.C. 500, 78 S.E. 2d 319; *Roberts v. Cameron,* 245 N.C. 373, 95 S.E. 2d 899."

See *Boone v. Boone,* 217 N.C. 722, 9 S.E. 2d 383.

The case of *Sanders v. Insurance Co.,* 183 N.C. 66, 110 S.E. 597, was an action to enjoin the sale of lands upon a deed of trust. The facts were conflicting upon the question of whether the mortgage

deed had been paid. The Court, holding that the injunction should be continued to the hearing to ascertain the facts involved, quoted from *Marshall v. Comrs.*, 89 N.C. 103, as follows:

> "The injunctive relief sought in this action is not merely auxiliary to the principal relief demanded, but it is the relief, and a perpetual injunction is demanded. To dissolve the injunction, therefore, would be practically to deny the relief sought and terminate the action. This the Court will never do where it may be that possibly the plaintiff is entitled to the relief demanded. In such cases, it will not determine the matter upon a preliminary hearing upon the pleadings and *ex parte* affidavits; but it will preserve the matter intact until the action can be regularly heard upon its merits. Any other course would defeat the end to be attained by the action."

The Court further stated:

> "The motion for the injunction was heard by the judge upon affidavits, and as it appeared from them, and the pleadings, that important issues are raised upon the vital question of indebtedness, as to whether there is any now due, and if any, how much, the court continued the preliminary injunction to the final hearing, . . ."

Again considering the question whether a restraining order should be continued to the final hearing, in the case of *Smith v. Bank,* 223 N.C. 249, 25 S.E. 2d 859, which was a civil action to restrain foreclosure sale of lands under power contained in a trust deed, the hearing judge entered judgment vacating the temporary restraining order. Holding that the temporary restraining order should have been continued to the final hearing, this Court said:

> "If the plaintiff, applying for injunctive relief as the main remedy sought in her action, has shown probable cause for supposing that she will be able to maintain her primary equity and there is reasonable apprehension of irreparable loss unless it remains in force, or if, in the opinion of the court, it appears reasonably necessary to protect the plaintiff's rights until the controversy between her and the defendants can be determined, injunction will be continued to the hearing. *Proctor v. Fert. Works,* 183 N.C. 153, 110 S.E. 861; *Cobb v. Clegg,* 137 N.C. 153; *Tobacco Association v. Battle, supra.* If the evidence raises a serious question as to the existence of the facts which make for plaintiff's rights and is sufficient to establish it, the preliminary restraining order will be continued to the hearing. *Tise v. Whit-*

aker-Harvey Co., 144 N.C. 508; *Tobacco Association v. Battle, supra.*"

In *Teeter v. Teeter*, 205 N.C. 438, 171 S.E. 620, the plaintiffs brought action alleging that the defendants advertised their land for sale under deed of trust in breach of an agreement not to foreclose during the current year, and further, that defendants had failed to make certain credits upon the note which said deed of trust secured. Plaintiffs asked for an accounting and that the sale be restrained. A temporary restraining order was signed and, after a hearing upon affidavits, the court dissolved the restraining order. Holding that the restraining order should have been continued to the hearing, this Court stated:

"This Court has held that it has the power to find and review findings of fact on appeal in injunction proceedings, and that 'where it will not harm the defendant to continue the injunction, and may cause great injury to the plaintiff, if it is dissolved, the court generally will restrain the parties until the hearing . . .; where serious questions were raised . . .; or where reasonably necessary to protect plaintiff's rights.' *Wentz v. Land Co.*, 193 N.C. 32, 135 S.E. 480; *Ferebee v. Thomason, ante*, 263."

For a clear and concise statement of the rules governing the granting or refusing of interlocutory injunctions, see *Huskins v. Hospital*, 238 N.C. 357, 78 S.E. 2d 116.

Appellee contends that plaintiff's complaint was fatally defective in that it failed to show plaintiff was entitled to injunctive relief, and particularly because of its failure to allege insolvency, restraint, fraud, oppression or usury.

G.S. 45-21.34 provides:

"Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the confirmation of any sale of such real estate by a mortgagee, trustee, commissioner or other person authorized to sell the same, to enjoin such sale or the confirmation thereof, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, *or upon any other legal or equitable ground which the court may deem sufficient: . . .*" (Emphasis ours.)

These contentions of appellee are not sustained when tested by the applicable rules as herein set out. Nor can we agree with appel-

lee's contention that the allegation "that the plaintiff has heretofore made all the installment payments under each of said deed of trust and chattel trust indenture within the time allowed in same, including the installments due on April 1, 1967," is conclusory and does not raise an issue of fact.

In 70 C.J.S., Payment, § 85(a)(1), it is stated: "The general allegation of payment is ordinarily held sufficient as a plea of payment. . . . payment must be pleaded with sufficient certainty and particularity as to give plaintiff notice thereof."

In this jurisdiction, where pleadings are construed liberally and in favor of the pleader, we hold that plaintiff sufficiently pleaded the ultimate fact of payment.

This record raises a reasonable apprehension of irreparable injury to plaintiff if the temporary restraining order be dissolved and negatives any considerable injury to defendant Kalman if continued to the final hearing. Further, the record shows the existence of a bona fide controversy, and that there is some probability that the plaintiff may prevail at final hearing. Thus, there was error in the order vacating the temporary restraining order. It should be continued to final hearing.

Reversed.

QUENBY CORP. v. FRANK H. CONNER COMPANY, ORIGINAL DEFENDANT; MONROE MECHANICAL CONTRACTORS, INC.; ARROW, INC.; WINECOFF ELECTRIC CO., INC.; W. J. SULLIVAN; AND INTERSTATE ROOFING CO., INC., ADDITIONAL DEFENDANTS.

(Filed 13 December, 1967)

1. Appeal and Error § 1—

Where only two of five additional defendants appeal from plaintiff's motion that the order making them additional defendants be revoked and the counterclaims against them be stricken, the Supreme Court is limited to a determination of the rights of the two appealing defendants and must render judgment to which appealing defendants are entitled, even though the decision has the effect of terminating the action against such appealing defendants without disturbing the counterclaims against the other three additional defendants.

2. Pleadings § 8—

An original defendant is not entitled to the joinder of additional defendants against whom the original defendant claims no right to relief when plaintiff's action against the original defendant may be finally determined without their joinder. G.S. 1-69, G.S. 1-73.

3. Same— Contractor, asserting no right against subcontractors, may not join them in suit by owner for breach of contract of construction.

Plaintiff owner instituted this action alleging that defendant contractor failed to complete construction within the time specified in the contract, resulting in loss of rents, that defendant defectively constructed a part of the building, resulting in damage in a specified sum, and failed to complete the construction to plaintiff's damage in a specified sum. Defendant brought a counterclaim asserting that as permitted by the contract it had sublet parts of the construction to named subcontractors, and alleged that plaintiff had ordered extra work not called for by the contract which was performed by it and the subcontractors, constituting a counterclaim by defendant and such subcontractors, and that each of the subcontractors was bound by its contract with plaintiff and had assumed all obligations owed by the contractor to plaintiff. Defendant demanded no relief against the additional defendants, the counterclaim being only in favor of the original defendant and the additional defendants against plaintiff. Two of the additional defendants excepted and appealed from the order of the court allowing plaintiff's motion to strike the counterclaims against the subcontractors and revoking the order making the subcontractors additional parties. *Held:* The demurrer of the two appealing additional defendants should have been sustained and the counterclaim dismissed as to them.

APPEAL by Defendants Monroe Mechanical Contractors, Inc. and Interstate Roofing Co., Inc., from *McConnell, J.*, by consent of all parties in chambers, 30 August 1967.

The plaintiff alleged it entered into a three-part contract with defendant for the construction of a shopping center on land owned by plaintiff in Albemarle and that it has paid the guaranteed maximum price and fully performed its obligations. It appended to the complaint copies of the contract. It further alleged that in reliance upon the contract, it leased space to the W. T. Grant Company in the shopping center, promising delivery of the premises by 1 June 1966, with rent to begin 1 August 1966 at an annual minimum rental of $74,902.00; that although defendant had notice of the Grant lease, it failed to complete construction under the contract, deprived plaintiff of rental income and damaged it in the amount of $22,801.75 as a result.

The plaintiff further alleged that the defendant defectively constructed the roof and floors of the mall of the shopping center, damaging it in the amount of $4,800.00. Also, that defendant has failed and refused to complete its contract and has diminished the value of the shopping center $7,700.00. In addition, plaintiff alleged it had been required to pay A. C. Electric Company $2,367.25 for work included in the Conner contract. It sued to recover the total of these amounts, $37,669.00.

The defendant answered that it had fully completed its contract, denied any liability to plaintiff, and said by counterclaim that, as

permitted by the contract, it had sublet parts of it to (1) Winecoff Electric Co. for the electrical work; (2) Interstate Roofing Co. for the roofing work; (3) W. J. Sullivan for the plumbing work; (4) Monroe Mechanical Contractors, Inc. for heating and air conditioning; (5) Arrow, Inc. for outside utility work; and that each of the subcontractors was bound by its contract with plaintiff and had assumed all obligations owed by Conner to Quenby.

Defendant further alleged that Quenby ordered extras in the course of construction, which were furnished by it and its subcontractors to a value of $157,080.46; that plaintiff has refused to pay therefor and that defendant has filed liens against plaintiff's property in the claimed amount, alleging that plaintiff owed:

(1) Frank H. Conner Co., defendant	$78,154.55
(2) Frank H. Conner Co. and Winecoff Electric Co., Inc.	26,526.98
(3) Frank H. Conner Co. and Monroe Mechanical Contractors, Inc.	8,475.30
(4) Frank H. Conner Co. and W. J. Sullivan	34,512.77
(5) Frank H. Conner Co. and Arrow, Inc.	2,983.33
(6) Frank H. Conner Co. and Interstate Roofing Co., Inc.	6,427.53

The defendant prayed judgment against plaintiff for the above and asked that it be declared a lien on plaintiff's property and that it "have such other and further relief" as it may be entitled to.

The Answer was verified 22 May 1967 and filed the next day, 23 May 1967.

On the date of its filing, 23 May 1967, the Clerk signed an order saying that the subcontractors were proper parties and making each of them additional party defendants with the order that the answer and counterclaim of the Conner Company be served upon them. The record shows that the directed service was made. The provision of the order that it was made upon the application of the Conner Company is not supported by the record, but this omission is not material in view of later proceedings.

Upon service of the "counterclaim" and orders making them additional parties, Interstate, Sullivan, Winecoff and Monroe demurred for misjoinder of parties and causes and failure to state a cause of action. Arrow filed an answer and claimed Conner owed it $2,983.33.

The plaintiff moved that the part of the Answer setting up coun-

terclaims against the subcontractors be stricken, and that the orders making the subcontractors parties be revoked.

Upon a hearing before the Judge, it was ordered that these motions be denied, that all the demurrers of the subcontractors be overruled and that they (the subcontractors) were necessary and proper parties.

Winecoff, Sullivan and Arrow did not except. The plaintiff excepted but did not appeal. Interstate and Monroe excepted and appealed.

Richardson and Dawkins by Koy E. Dawkins, Attorneys for additional defendant appellant, Monroe Mechanical Contractors, Inc.

Grier, Parker, Poe & Thompson by William E. Poe and Gaston H. Gage, Attorneys for additional defendant appellant, Interstate Roofing Co., Inc.

Gardner, Connor & Lee by D. M. Connor, Attorneys for original defendant appellee, Frank H. Conner Company.

Brown, Brown & Brown by Charles P. Brown, Attorneys for additional defendant appellees, Winecoff Electric Co., Inc. and W. J. Sullivan.

PLESS, J. An anomalous situation is presented in this case. Five subcontractors were made new parties — four of them demurred. The fifth filed an answer setting up a counterclaim against the original defendant, the contractor. The plaintiff moved to strike so much of the original defendant's further answer that in a practical sense it amounted to a motion to strike it in its entirety. This motion was denied, and plaintiff excepted but did not appeal. From adverse rulings upon the demurrers of the new parties, two defendants did not except. The other two, Interstate and Monroe, excepted and appealed.

It is apparent that the plaintiff and three of the subcontractors are content to have their litigation adjudicated in this action. If so, that was their right. The other two, Interstate and Monroe, by this appeal demonstrate their desire for different and separate methods. Even though it would be desirable to make a uniform ruling as to all five defendants, who occupy similar legal positions, we can rule only as to those who properly present their appeals. But with no uniformity of action by five who are uniformly affected by the ruling of the lower court, we are required to make what might appear as an incongruous decision.

The demurrers of the two appealing defendants are well taken. First because no claim has been made against them. "There must be in the first place, of course, a claim asserted by the original defendant which, tested by the substantive rules discussed in the pre-

ceding section, makes out a *prima facie* case on the pleading for relief over in favor of the original defendant, or third-party plaintiff, against the third-party defendant." 1 McIntosh, North Carolina Practice and Procedure (1964 pp.), § 722.5, pp. 77 and 78. McIntosh further says in Footnote 19.21 at page 78:

> "The allegations of such a cross-complaint are subject to the normal rules applying to the formal and substantive sufficiency of statement of any pleading asserting a cause of action for affirmative relief. *Jones v. Douglas Aircraft Co.,* 253 N.C. 482, 117 S.E. 2d 496 (1960)."

While Conner alleged in its further answer that Interstate had furnished "extras" to the extent of $6,427.53 and that Monroe had furnished them in the amount of $8,475.30, it asked no relief against them. On the contrary, it alleged that the plaintiff was indebted to it and to Interstate and Monroe in these amounts; that the plaintiff had refused to pay therefor, liens had been filed against the plaintiff's property for the alleged indebtedness and prayed judgment against the *plaintiff* for them. The tenor of the further answer was that Conner and the subcontractors had no controversy against each other but had a common cause against Quenby.

Even had there been a dispute between Conner and its subcontractors, it would not be germane to the plaintiff's cause of action because there is no allegation by the plaintiff of privity of contract existing between the additional party defendants and the plaintiff. In fact, the contract says: "Nothing contained in the contract documents shall create any contractual relation between any subcontractor and the owner."

This Court said in *Moore v. Massengill,* 227 N.C. 244, 41 S.E. 2d 655, in reference to G.S. 1-73:

> "It is not intended to authorize the engrafting of an independent action upon an existing one which is in no way essential to a full and complete determination of the original cause of action. . . . 'But it does not imply that any person who may have cause of action against the plaintiff alone, or cause of action against the defendant alone, unaffected by the cause of action as between the plaintiff and defendant, may or must be made a party. It does not contemplate the determination of two separate and distinct causes of action, as between the plaintiff and a third party, or the defendant and a third party, in the same action.'"

G.S. 1-69 provides:

"All persons may be made defendants, jointly, severally, or in the alternative, who have, or claim, an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the questions involved."

Gaither Corp. v. Skinner, 238 N.C. 254, 77 S.E. 2d 659, was an action in which the Gaither Corp. alleged it had contracted with Skinner to construct a building for it, and that the defendant had used faulty and defective materials in the construction of the roof and demanded damages in an amount sufficient to replace the defective roof. Skinner denied the allegations and alleged that he had subcontracted the construction of the roof to one C. R. Hopkins and that if it were defective, that Hopkins was responsible to the plaintiff and to the defendant and prayed that Hopkins be made a party to the action. The clerk granted the prayer, and Hopkins entered a special appearance and moved that he be dismissed from the action. The lower court allowed the motion, and Skinner appealed. It can be seen that the situation in that case was similar to the one under consideration here. The Court speaking through Devin, C.J., said:

" 'Necessary or indispensable parties are those whose interests are such that no decree can be rendered which will not affect them, and therefore the court cannot proceed until they are brought in. Proper parties are those whose interests may be affected by a decree, but the court can proceed to adjudicate the rights of others without necessarily affecting them, and whether they shall be brought in or not is within the discretion of the Court.' McIntosh, Prac. and Proc., Sec. 209, p. 184; *Colbert v. Collins,* 227 N.C. 395, 42 S.E. 2d 349; *Burgess v. Trevathan,* 236 N.C. 157, 72 S.E. 2d 231.

"The plaintiff has elected to pursue his action against the contractor with whom he contracted in order to recover damages for an alleged breach of that contract, and plaintiff should be permitted to do so without having contested litigation between the contractor and his subcontractor projected into the plaintiff's lawsuit. *Montgomery v. Blades,* 217 N.C. 654, 9 S.E. 2d 397."

In *Insurance Co. v. Waters,* 255 N.C. 553, 122 S.E. 2d 387, Parker, J., now C.J., speaking for the Court said:

"The question presented by the demurrer for decision is whether all parties are affected by all the causes of action alleged in appellants' [appellees'] further answer and defense, not whether some parties may be affected by some causes of action. It is obvious that the multiple causes of action alleged in ap-

pellants' [appellees'] further answer and defense do not affect all of the parties to the action, do not arise out of the same transaction, nor are all the transactions connected with the same subject of action."

In *Johnson v. Scarborough,* 242 N.C. 681, 89 S.E. 2d 420, it was said:

"'There must be at least substantial identity between the causes of action before they can be united in one suit, because, if there is not, the several causes of action may, for their decision, depend upon very different facts and principles of law, which would tend to confusion and uncertainty in the trial of the case and result in great prejudice to some, if not all, of the parties.'"

For the reasons above stated and based upon the authorities cited, we are of the opinion that the demurrers of the two appealing defendants should have been sustained and the cross action dismissed as to them.

Reversed.

FRANK H. CONNER COMPANY v. QUENBY CORP., OWNER, AND MONROE MECHANICAL CONTRACTORS, INC.; ARROW, INC.; WINECOFF ELECTRIC CO., INC.; W. J. SULLIVAN; AND INTERSTATE ROOFING CO., INC., SUBCONTRACTORS.

(Filed 13 December, 1967)

Abatement and Revival, § 8—

A subsequent action arising out of the identical contract involved in a prior suit and involving the rights of the same parties under that contract, is properly dismissed upon the original defendant's plea in abatement.

APPEAL by plaintiff from *McConnell, J.,* in Chambers, 30 August 1967.

This case substantially involves the dispute between the defendant Quenby Corp., who contracted with the plaintiff Conner Co. to construct the buildings for a shopping center in Albemarle, North Carolina. It was instituted by the plaintiff on 27 February 1967 to recover of Quenby the sum of $157,080.46, which it alleged was due it and the subcontractors on the project who were also made defendants with Conner Co.

When this action was instituted, there was already pending an

action in which Quenby, the owner, had sought to recover of Conner, the contractor, in connection with the same cause of action alleged in this litigation. There was but one entire contract between Quenby and Conner, and it is the basis of both suits.

Upon the defendant's plea in abatement because of the already pending litigation between the same parties and involving the same subject matter, the Court sustained the plea and ordered that the cause in its entirety be dismissed.

The plaintiff appealed.

Gardner, Connor & Lee by David M. Connor, Attorneys for plaintiff appellant, Frank H. Conner Company.

Coble, Tanner & Grigg by David L. Grigg, Attorneys for defendant appellee, Quenby Corp.

Brown, Brown & Brown by R. L. Brown, Jr., Attorneys for defendant appellees, Winecoff Electric Co., Inc., and W. J. Sullivan.

Grier, Parker, Poe & Thompson by William E. Poe and Gaston H. Gage, Attorneys for defendant appellee, Interstate Roofing Co., Inc.

PER CURIAM. The Court was correct in its ruling. In *Sales Co. v. Seymour,* 255 N.C. 714, 122 S.E. 2d 605, this Court said:

> "Decisions of this Court uniformly hold that the pendency of a prior action between the same parties for the same cause of action in a State court of competent jurisdiction works an abatement of a subsequent action either in the same court or in another court of the State having jurisdiction."

We have this day decided the case of *Quenby v. Conner, ante,* p. 208. The facts alleged in that case are substantially similar to the ones involved herein. In dismissing this action there was

No error.

STATE v. WILLIE SWANN.

(Filed 13 December, 1967)

1. Homicide § 20— Evidence held for jury on question of defendant's guilt of murder in the second degree.

The evidence for the State tended to show that on the morning of the homicide a salesman in the grocery store operated by the deceased observed three hams on a table and was told by the deceased that a colored man sitting nearby was there to take the hams with him, that the de-

ceased was alive when the salesman left the store and that a light green Ford station wagon was parked in front; that on the same morning a neighbor of the deceased heard unusual sounds and hollering from the store and then saw a light colored station wagon driven by a colored man leaving the premises; that deceased's body was found in the afternoon lying on the floor, with mortal wounds about his head and his clothing partially burned; that a physician found the burning to have been accomplished after the wounds were inflicted, that the deceased might have lived for some five or ten minutes but that he would have been able only to utter moans; that one ham was found in the store; that a witness saw the deceased on the same afternoon removing two hams from a light Ford station wagon, and that the defendant stated to her (and to another witness) that he went to the deceased's store to get the hams, that the building was burning when he arrived, that the deceased was on fire and hollering, "Help me, help me", and that the defendant got scared and left. *Held:* The evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of murder in the second degree.

2. Homicide § 13—

When the State satisfies the jury from the evidence beyond a reasonable doubt that the defendant intentionally killed the deceased with a deadly weapon, there arise the presumptions that the killing was unlawful and with malice, constituting the offense of murder in the second degree.

3. Criminal Law § 106—

Motion for nonsuit should be denied if there is substantial evidence tending to prove each essential element of the offense charged, and this rule applies whether the evidence is direct or circumstantial, or a combination of both.

APPEAL by defendant from *Carr, J.*, February 1967 Criminal Session of DURHAM.

Criminal prosecution on an indictment correctly charging defendant with murder in the first degree of Bee James on 20 May 1964, drawn in accordance with the provisions of G.S. 15-144.

Upon the call of the case for trial, the solicitor for the State announced in open court that he 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.

Defendant, who was represented at the trial by his present attorney of record, entered a plea of not guilty. Verdict: Guilty of murder in the second degree.

From a judgment of imprisonment, defendant appeals to the Supreme Court.

Attorney General T. W. Bruton and Assistant Attorney General George A. Goodwyn for the State.

C. C. Malone, Jr., for defendant appellant.

PARKER, C.J. When defendant appealed to the Supreme Court, the Presiding Judge found that he was an indigent and allowed him to appeal *in forma pauperis*. The court entered an order directing that the County of Durham furnish defendant's attorney a copy of the transcript of said trial; that the record in this case and the brief of defendant's counsel be mimeographed under the supervision of the clerk of this Court under the rules of this Court; and that the County of Durham should pay the costs of such mimeographing, 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.

The State introduced evidence; the defendant offered no evidence.

Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of the State's evidence.

The State's evidence, considered in the light most favorable to it and giving the State the benefit of every reasonable inference deducible therefrom, 2 Strong's N. C. Index 2d, Criminal Law, § 104, tends to show the following facts:

The deceased, Bee James, lived in a small house in the southern part of Durham County, the equivalent of about four and a half city blocks from King Scott Road — a main highway. The terrain was level from the highway to the house, and the house could be seen from the road. Bee James's house had an enclosed porch, and located on the right side of the porch was a small place where he sold groceries and merchandise.

Bruce Overby, a salesman of candies, crackers, peanuts, etc., arrived at Bee James's house with his truck from which he sold groceries direct about 11 a.m. on 20 May 1964. He carried groceries in to the enclosed porch and talked with Bee James. He observed three hams on a table on the left side of the porch. A colored man wearing overalls and light brown or tan shoes was there seated in a chair just inside the room. He could see his hands but did not see his face. This colored man was the only other person there. Overby remained at the residence about thirty minutes. He stated the deceased told him that "there was a man there then to take the hams with him." He observed a 1953 Ford Ranchwagon parked directly in front of the door about eight or ten feet from it. All the wheels of the Ranchwagon were of a different color, and the Ranchwagon itself was a light green color. When he left, Bee James was alive and in good health, the three hams were still on the table, and the Ranchwagon was still there directly in front of the door. Later, he saw this Ranchwagon on Ellington's used car lot. He went down to this lot with Deputy Sheriffs O'Briant and Leary on Friday following the Wednesday that he was at Bee James's house. The Ranchwagon

still had different color wheels on it. It appeared that something greasy had been inside the car; there were greasy fingerprints on the tail gate of the car.

Herbert Barbee lived on King Scott Road with his sister and on 20 May 1964 was sitting on the porch of her house, a distance of about two city blocks away from the home of Bee James. He has had two strokes of paralysis. While sitting on the porch he heard some unusual sounds between 11 a.m. and noon coming from the direction of Bee James's house. It sounded like somebody was unloading some irons. Then he heard some hollering. After he heard the noises, he saw a light colored station wagon come out from Bee James's house, and he could see that the driver was a colored man. He saw no other automobile leave James's house except the station-wagon. He did not see a truck or car of any kind go in or out of Bee James's driveway except the station wagon. He could hear the hollering, but he could not understand what was said. He reckons this went on for about thirty minutes. He heard this noise before he saw the station wagon leave.

L. J. Coleman, Sr., went to the residence of Bee James about 3:00 or 3:30 p.m. on 20 May 1964 to borrow a mule to plow some corn. He observed smoke coming out of the house. He opened the screen door and saw Bee James dead with his head burst open and his clothing burning. He went in the front door into the living room and into the bedroom. He observed the bed was on fire, and an empty five-gallon oil can was on the middle of the bed. The bed was on fire and smoking, but he saw no flames.

Walter C. Young, a deputy sheriff of Durham County, went to Bee James's house about 4:20 p.m. on 20 May 1964, in response to a call he received that there was a fire at Bee James's house. He did not know Bee James until that day. When he arrived he found Bee James lying flat on his back on the porch with his head burst open and his clothing burned practically off. The remnants of the clothing remaining on his body were still burning. Bee James was making no sound of any kind when Young saw him. Smoke was coming from the bedroom. The mattress from the bed inside the house had been removed and pulled out the back door by firemen who were there. There was an empty five-gallon oil can in the bedroom. He saw the body of Bee James moved from over a hole in the porch. He observed a ham lying on the table on the porch. At the end of the porch there was something like a concession stand which contained knick-knacks, such as potato chips, canned goods, sardines, etc. This concession stand was about five feet from the dead body. He saw no disturbance of merchandise nor signs of struggle in the concession area. He saw no signs of struggle at all.

D. R. Perry, a physician and medical examiner for the County of Durham for the past six years and stipulated by counsel to be a licensed physician and a medical expert, went to Bee James's house and examined him about 5:30 p.m. on 20 May 1964. When he arrived on the scene, Bee James's body was lying on the floor just inside the door of the enclosed porch of the home. He was dead when Dr. Perry arrived. There were four wounds on the right side of his head. Two or three were scalp wounds down to the bone, and one went through the scalp into the brain which caused his death. In his opinion, Bee James was unconscious after receiving this blow and probably died five to ten minutes later. In his opinion, after receiving the wound Bee James may have been able to moan, but he could not have called any name and would not have been conscious of what he was saying or doing. When he arrived there was a hole burned in the floor under Bee James's hips about eight by twelve inches wide, and the body had been burned. From the position of the body and the condition of the room inside the house he was of opinion that the burning was accomplished after the wounds were inflicted. He also testified that Bee James's death occurred two and a half hours before he arrived.

Edna Cole lived at the same address as the defendant on 20 May 1964. She has known defendant for a period of ten or fifteen years. She first saw defendant on that day at her brother's house about 8:30 a.m. when he took her to her mother's house to get a uniform to go to work. Defendant was driving a Ford station wagon of a light green color. She did not notice the color of the wheels. She does not recall what defendant was wearing. Defendant left her about 10:30 a.m. Thereafter, she saw defendant between 1:15 and 1:20 p.m. the same day at Dillard's store about a mile from the city limits of Durham. He was driving the same light green station wagon as he was driving earlier that day. She got into the car. She saw defendant get two hams out of the automobile and take them to a lady who lives on Morris Street. When she first got into the automobile, she asked defendant why he did not come back to take her back to school, and defendant stated he had been to Mr. Walker's and Mr. Bee James's to get some hams. He further stated that Bee James's house was on fire when he arrived, that Mr. James was on fire and hollering, and that he got scared and left. He did not tell her where he got the hams.

Gordon Strowd, Jr., knew defendant in May, 1964. On the evening of 20 May 1964 he saw defendant on Fayetteville Street with Edna Cole. Defendant was driving a light green Ford station wagon, but he did not observe the wheels. Defendant got out of the car and talked with him. During the conversation defendant told him that

he (defendant) went down to Bee James's house earlier that day, and when he got there the house was on fire and Bee James was lying on the porch burning and screaming for help. Defendant told him Bee James said, "Help me, son, help me," and defendant also told him that he (defendant) turned and left because he was scared.

Elmo Walker lives in or near Durham. Bee James lived approximately four miles or a little further from him. He knew defendant. During the day of 20 May 1964 defendant never came to his house. There are other Walkers who live in the neighborhood one of whom is his brother, Cornell Walker, who lives next door to him. He sold hams in 1964. His brother does not farm and does not sell hams but is a mechanic.

Herman Ellington operates a used car lot in Durham. In May, 1964 he sold defendant a light green 1953 Ford Ranchwagon. Also in May, 1964 defendant returned the car to his lot after telling Ellington that he was not able to pay for it. Ellington observed that all the wheels on the car were mismatched and of different colors.

For the purpose of passing upon defendant's motion for judgment of compulsory nonsuit, we consider the State's evidence in the light most favorable to it. Considering it in that light it would permit, but not compel, a jury to find the following facts: (1) Defendant had bought on time and had in his possession on 20 May 1964, the day Bee James was killed, a 1953 Ford Ranchwagon which had different colored wheels on it; (2) that on the day in question defendant's automobile was parked in front of James's house, and defendant was there when Bruce Overby arrived about 11 a.m. and he was still there when Overby left about thirty minutes later; (3) that when Overby left James's house there were three hams on a table on the enclosed porch; (4) that about 12 o'clock noon on the same day unusual noises came from James's house like somebody unloading some irons and hollering, and thereafter defendant was seen driving away from James's house; (5) that between 3:00 and 3:30 p.m. on the same day L. J. Coleman, Sr., came to James's house to borrow a mule to plow some corn and saw James lying on the floor of the enclosed porch dead and his clothes nearly burned off; (6) that about 5:30 p.m. on the day in question James's body was examined by Dr. D. R. Perry who was stipulated to be a licensed physician and a medical expert and who testified that James's body was lying on the floor of the enclosed porch of the house, that there were on the right side of his head cuts and gashes down through the scalp and one deep cut down through the skull into the brain which is the wound that caused his death five or ten minutes thereafter, that his clothes were practically burned off, that in Dr. Perry's

opinion from his examination of the dead body James became unconscious after receiving the death blow and may have been able to moan but could not have called any name, and that the burning occurred after James received the death wound; (7) that after James's death one ham was on the enclosed porch of his home, and the two other hams were in the possession of defendant in his car away from the James home; (8) that defendant's statement to Gordon Strowd, Jr., that when he went to James's house earlier that day the house was on fire, and James was lying on the porch burning and screaming for help and saying "Help me, son, help me," was not true because (a) Bruce Overby had seen him there for about thirty minutes when the house was not on fire and James was not hurt, and (b) James was unconscious and could not have talked after he received the death wound; (9) that there was no evidence of a struggle; and (10) that defendant intentionally killed James by the use of a deadly weapon inflicting a deep cut down through the skull into the brain causing death probably in five or ten minutes. The State's evidence would permit, but not compel, a jury to find that defendant intentionally killed James by a lethal blow with a deadly weapon which raises two presumptions against defendant: (1) That the killing of James was unlawful and (2) that it was done with malice. This constitutes the felony of murder in the second degree. 2 Strong's N. C. Index, Homicide, § 13.

All the evidence in the instant case is circumstantial. This Court, speaking by Higgins, J., said in *S. v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431, which has been quoted with approval in many of our later decisions (see Shepard's Citations):

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

cludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury."

In our opinion, and we so hold, the State's evidence in the case is sufficient to overthrow the challenge of the motion for judgment of compulsory nonsuit.

The judgment below is

Affirmed.

HENRY COUNCIL; HARDY COUNCIL AND WIFE, ELSIE COUNCIL; MOLLY ANDREWS AND HUSBAND, JOHN ROBERT ANDREWS; LORETTA ROBERTSON AND MARILYN COUNCIL, v. INEZ PITT, EXECUTRIX OF THE ESTATE OF MILLIE COUNCIL, AND VILMA MASSEY AND HUSBAND, HARVEY MASSEY; RALPH DUGGER AND WIFE, ESTELLA DUGGER; HARVEY DUGGER AND WIFE, VIRGINIA DUGGER; CECIL DUGGER AND WIFE, GLADYS DUGGER; RUG DUGGER; JOHN LEE DUGGER AND WIFE, JULIA DUGGER; ERNEST DUGGER AND WIFE, BETTY DUGGER; ESTHER D. HARVEY AND HUSBAND, ROBERT E. HARVEY; MADELINE DUGGER; JOHN JASPER BLACK AND WIFE, VIOLA BLACK; WILLIE DUGGER; CHARLIE VIRGINIA COLEMAN; LUCY HEMBY BETTS AND HUSBAND, ROOSEVELT BETTS; INEZ PITT AND HUSBAND, JAMES PITT, AND LILLIE BLACK LEWIS.

(Filed 13 December, 1967)

1. Husband and Wife § 17—

In an estate held by the entireties neither the husband nor the wife can defeat the other's right of survivorship in the land by a conveyance or an encumbrance to a third party, but if the conveying spouse survives the other spouse, the grantee will acquire title by estoppel.

2. Same—

A conveyance from one spouse to the other of an interest in an estate by the entireties is valid as an estoppel when the conveyance is validly executed, and the conveying spouse, and those claiming under him as his heirs at law, are estopped by his deed to claim the interest conveyed.

3. Same— Surviving spouse held estopped from asserting right of survivorship in land conveyed to husband.

In this proceeding for partition of land, the evidence was that the land in dispute was conveyed to both spouses pursuant to the wife's bid in a prior partition proceeding, and that the wife later executed a deed to the husband purporting to convey to him a one-half undivided interest in the land. The husband predeceased the wife without leaving a will, and

his heirs at law brought this action for partition against the wife. *Held:* Whether the wife's deed be regarded as a direct conveyance of the one-half undivided interest, or whether she, as surviving spouse, be estopped by her deed from asserting title to the entire tract by survivorship, the petitioners are entitled to partition.

4. Same—

Subsequent to the effective date of the 1957 statute, a conveyance from one spouse to the other of real property, or any interest therein, held by them as tenants by the entirety dissolves such tenancy in the property or interest conveyed and vests such property or interest formerly held by the entirety in the grantee. G.S. 39-13.3(c).

APPEAL by petitioners from *Bundy, J.*, May 1967 Session of MARTIN.

Special proceeding for the partition by sale of the 25-acre tract of land described in the petition. The pleadings and stipulations establish the following facts:

In 1934, Millie Council and Mary Dugger, as devisees under the will of John Dugger, each owned a one-half undivided interest in the 25-acre tract. In March 1934, Mary Dugger filed a petition in which she asked that the land be sold for partition between the tenants in common. In their answer to the petition, the respondents, Millie Council and her husband, Min Council, joined in the prayer that the land be sold. The clerk appointed commissioners who, after due advertisement, sold the land at public auction on 2 June 1934 and reported to the court that Millie Council became the last and highest bidder for said land at the price of $2,225.00. On 18 June 1934, the clerk confirmed the sale as reported and ordered the commissioners to "deliver to the said purchaser and her heirs and assigns a deed in fee simple for the said land" upon payment of the purchase price. On the same day, the commissioners executed a deed to Millie Council and Min Council for the land in suit. The deed recited the sale for partition, that "Millie Council and Min Council became the last and highest bidders for said land at the sum of Two THOUSAND TWO HUNDRED TWENTY FIVE AND No/100 ($2,225.00) DOLLARS," that they had "complied with the terms of said sale," and that the deed was being executed pursuant to a judgment of the Superior Court. This deed was acknowledged before the Clerk of the Superior Court on the day of its execution.

Three and a half years later, on 17 December 1937, Millie Council executed a deed to Min Council which purported to convey to him a one-half undivided interest in the same tract of land. It recited a consideration of $10.00, love and affection, "and other and more valuable considerations moving between the parties." It also contained the following assertion:

"It is the purpose and intent of this deed to place the title to the lands above described one-half in said Millie Council and the other half in Min Council, as a deed from J. C. Smith and Hugh G. Horton, Commissioners, to Millie Council and husband Min Council dated June 18, 1934, recorded in the Public Registry of Martin County in Book L-3 at page 530 seems to put the title in said parties as an estate by the entireties, whereas the said Min Council and wife, Millie Council, desire to own and hold said tract of land a one-half undivided interest each, to the end that the heirs of each may at the death of each inherit each other's half, and this deed is made and intended for that purpose, and this deed is void for any other purpose other than that expressed herein and nothing in this deed shall be construed to mean that Millie Council is conveying more than one-half of said tract."

Min F. Council died intestate in Martin County during 1948. On 21 July 1965, petitioners, who are the heirs at law of Min Council, brought this proceeding for partition against Millie Council. They alleged that Millie Council owned a one-half undivided interest in the 25 acres and that they owned the other one-half undivided interest subject to her right of dower. On 17 August 1965, Millie Council answered the petition. She alleged that she owned the 25 acres in fee simple and prayed that the petition be dismissed.

Millie Council died on 31 August 1965, leaving a will which was duly admitted to probate in September 1965. Defendants are her executrix and devisees, who were made respondents in her stead. They plead sole seizin and deny that petitioners have any interest in the land.

When the case came on for trial, the parties waived a jury trial, and Judge Bundy heard the matter upon the pleadings, stipulations, and record evidence. He found the facts as detailed above and held:

(1) The commissioners' deed dated 18 June 1934 to Millie Council and Min Council created an estate by the entireties;

(2) The deed from Millie Council to Min Council dated 17 December 1937 conveyed no interest in the land to Min Council;

(3) Upon the death of Min Council, title to the land vested in Millie Council as the surviving tenant by the entirety.

Judge Bundy adjudged that the respondents, as the devisees of Millie Council subject to the provisions of the will of Millie Council, are the owners and are entitled to the possession of the entire 25-acre tract described in the petition. He directed that the land be sold by the commissioners and the proceeds be paid to the executrix of the estate of Millie Council to be applied first to the payment of her debts and the balance to be distributed according to the terms of her will.

To the signing of the foregoing judgment petitioners excepted and appealed.

Edgar J. Gurganus for petitioner appellants.
Clifton W. Everett for respondent appellees.

SHARP, J. Petitioners, the heirs of Min Council, contend that the commissioners' deed to Millie and Min Council did not create an estate by the entireties but vested the title in Millie Council alone, and that her subsequent deed to her husband conveyed to him a one-half undivided interest, which they acquired by inheritance from him. It is the contention of the respondents, the executrix and devisees of Millie Council, that the commissioners' deed conveyed an estate by the entireties and that, in any event those who take through Min Council may not contend otherwise. They argue further that, as a tenant by the entirety, Millie Council could not convey to the other tenant a one-half undivided interest in the land.

It is unnecessary to discuss the effect of the variance between the order confirming the sale to Millie Council and the conveyance to Millie and Min Council. Nor is it necessary to decide whether the commissioners' deed created an estate by the entireties in Millie and Min Council or conveyed a fee simple to Millie. In either event, the decision here must be the same. If the commissioners' deed did not create an estate by the entireties, respondents correctly concede that the deed of 17 December 1937 from Millie to her husband conveyed to him a one-half undivided interest in the property and that petitioners are entitled to partition. If the commissioners' deed did convey an estate by the entireties to the grantees, petitioners are still entitled to partition because respondents, who claim under Millie Council, are estopped by her deed to claim that she acquired the whole estate by survivorship when her husband predeceased her.

One of the incidents of an estate by the entireties is that neither the husband nor the wife can defeat the other's right of survivorship in the land by a conveyance or encumbrance to a third party. *Capps v. Massey,* 199 N.C. 196, 154 S.E. 52; *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566; 2 Strong, N. C. Index, Husband and Wife §§ 15, 16 (1959). If, however, the conveying spouse survives the other, the grantee will acquire title by estoppel. *Harrell v. Powell,* 251 N.C. 636, 112 S.E. 2d 81; *Capps v. Massey, supra; Hood v. Mercer,* 150 N.C. 699, 64 S.E. 897. It is equally "well settled in this State that a conveyance from one spouse to the other of an interest in an estate by the entireties is valid as an estoppel when the requirements of the

law are complied with in the execution thereof." *Jones v. Lewis,* 243 N.C. 259, 262, 90 S.E. 2d 547, 550; *accord, Hutchins v. Hutchins,* 260 N.C. 628, 133 S.E. 2d 459; *Harrell v. Powell, supra; Willis v. Willis,* 203 N.C. 517, 166 S.E. 398. Not only the conveying spouse but also "those claiming under him as his heirs at law, as well as others standing in privity to him, are estopped by his deed to claim the land." *Keel v. Bailey,* 224 N.C. 447, 449, 31 S.E. 2d 362, 363.

The deed of 17 December 1937 from Millie to Min Council was acknowledged in the manner required by the law then applicable to contracts between husband and wife. N. C. Code of 1935, § 2515. (See also §§ 1000, 3175, 3293). That deed clearly manifested the intention of the parties to hold the land as tenants in common so that the heirs of each might inherit one-half of the property. Whether the deed be regarded as a direct conveyance of a one-half undivided interest to Min Council or be held to have estopped Millie Council, the survivor, from claiming title to the whole by survivorship, the result is the same: Petitioners, as owners of a one-half undivided interest in the lands described in the petition, are entitled to partition in accordance with their prayer for relief in the amended petition. See Annot., Entireties — Termination by Deed, 8 A.L.R. 2d 634, 639 (1941). It is noted that legislation has eliminated the question whether such a deed operates as a conveyance or an estoppel. G.S. 39-13.3(c), enacted as N. C. Sess. Laws, 1957, ch. 598, § 1, now provides:

"A conveyance from a husband or a wife to the other spouse of real property, or any interest therein, held by such husband and wife as tenants by the entirety dissolves such tenancy in the property or interest conveyed and vests such property or interest formerly held by the entirety in the grantee."

The judgment of the court below is reversed, and this proceeding is remanded for the entry of a decree in accordance with this opinion.

Reversed.

STATE v. GEORGE F. DORSETT

AND

STATE v. LARRY FRANKLIN DORSETT

AND

STATE v. TOMMY YOW.

(Filed 13 December, 1967)

1. Appeal and Error § 3—

The Supreme Court will not pass upon a constitutional question when such question was not raised and was not passed upon in the court below.

2. Indictment and Warrant § 9—

In a criminal prosecution for a statutory offense, including the violation of a municipal ordinance, the warrant or indictment is sufficient if it follows the language of the statute or ordinance and thereby charges each essential element of the offense in a plain, intelligible, and explicit manner; however, if the words of the statute or ordinance fail to set forth every essential element of the offense, they must be supplemented by allegations which charge the offense plainly, intelligibly and explicitly.

3. Same—

The purpose of a warrant or indictment is to give defendant notice of the charge against him to the end that he may prepare his defense and be in a position to plead former acquittal or former conviction in the event he is again brought to trial for the same offense, and to enable the court to know what judgment to pronounce in case of conviction.

4. Same; Municipal Corporations § 27— Warrants held to charge violation of ordinances against disturbing the peace with noise.

Separate warrants against defendants set forth the municipal ordinance proscribing the creation of loud and unnecessary noise of such intensity as to constitute a wilful disturbance of the peace, including the creation of any unreasonably loud or unnecessary noise by any device such as a motorcycle, and each warrant charged defendants, respectively, with creating a loud and unnecessary noise of such intensity as to constitute a wilful disturbance of the peace by use of a motorcycle on a specified date at a specified place on a street of the municipality. *Held:* Allegations in respect of time, place and circumstances are sufficient to describe and identify a specific offense, and it was error for the court to quash the warrants on the ground that each warrant failed to allege a violation of the ordinance in question.

APPEAL by the State of North Carolina from *Crissman, J.*, August 28, 1967 Criminal Session of GUILFORD.

Separate warrants were issued by the Municipal-County Court of Guilford County, Criminal Division, for the arrest of George F. Dorsett, Larry Franklin Dorsett and Tommy Yow. Each charges the defendant named therein, on June 8, 1967, "did unlawfully and wilfully disturb the peace by the use of a motorcycle in such a manner as to create loud and unnecessary noise, in the 1700 and 1800

blocks of Trogdon Street, Greensboro, North Carolina, in violation of Greensboro Code of Ordinances, Section 13-12(b)(4)," etc.

In each case, the said Municipal-County Court adjudged the defendant guilty and pronounced judgment and defendant appealed. When the cases were called in the superior court, each defendant moved to quash the warrant "on the grounds (1) that the City Ordinance under which the defendants were being prosecuted was unconstitutional for vagueness and (2) that the warrants in question failed to allege a violation of the City Ordinance." The court allowed each defendant's motion to quash.

The agreed statement of case on appeal contains the following: "After hearing the arguments of counsel for the defendants and arguments of the Solicitor for the State, the Court, although declining to rule that the ordinance in question was or was not unconstitutional for vagueness, allowed the motions to quash on the ground that each warrant failed to allege a violation of the ordinance in question."

The State of North Carolina in apt time excepted to each of the court's rulings and gave notice of appeal. The three cases, all involving the same legal question, are before us in one consolidated record.

Atorney General Bruton and Staff Attorney Vanore for the State.
Jordan, Wright, Henson & Nichols for defendant appellees.

BOBBITT, J. Section 13-12 of the Greensboro Code of Ordinances provides:

"(a) Subject to the provisions of this section, the creation of any unreasonably loud, disturbing and unnecessary noise in the city is prohibited. Noise of such character, intensity, and duration as to be detrimental to the life or health of any individual is prohibited.

"(b) The following acts, among others, are declared to be loud, disturbing and unnecessary noises in violation of this section, but said enumeration shall not be deemed to be exclusive, namely:

(1) Blowing horns. The sounding of any horn or signal device on any automobile, motorcycle, bus, or other vehicle, except as a danger signal, so as to create any unreasonable loud or harsh sound, or the sounding of such device for an unnecessary and unreasonable period of time.

(2) Radios, phonographs, etc. The playing of any radio, phonograph or any musical instrument in such manner or with such volume, particularly during hours between eleven o'clock p.m. and seven o'clock a.m. as to annoy or disturb the quiet,

comfort, or repose of any person in any dwelling, hotel, or other type of residence.

(3) Pets. The keeping of any animal or bird, which, by causing frequent or long continued noise, shall disturb the comfort and repose of any person in the vicinity.

(4) Use of vehicle. The use of any automobile, motorcycle, or vehicle so out of repair, so loaded, or in such manner as to create loud or unnecessary grating, grinding, rattling or other noise.

(5) Blowing whistles. The blowing of any steam whistle attached to any stationary boiler, except to give notice of the time to begin or stop work or as a warning of danger."

The warrants, in compliance with G.S. 160-272, sufficiently plead the Greensboro Ordinance on which the criminal prosecutions are based.

In the superior court, defendants asserted, as one of the grounds for their motions to quash the warrants, that the ordinance "was unconstitutional for vagueness." However, Judge Crissman expressly declined to rule on this question. Nor has this question been discussed in the briefs or on oral argument in connection with the present appeal. Under these circumstances, "in conformity with the well established rule of appellate courts, we will not pass upon a constitutional question unless it affirmatively appears that such question was raised *and passed upon* in the court below." (Our italics.) *State v. Jones,* 242 N.C. 563, 89 S.E. 2d 129.

The single question before us on this appeal is whether the court erred in quashing the warrants "on the ground that each warrant failed to allege a violation of the ordinance in question."

In a criminal prosecution for a statutory offense, including the violation of a municipal ordinance, the warrant or indictment is sufficient if and when it follows the language of the statute or ordinance and *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; *State v. Sossamon,* 259 N.C. 374, 130 S.E. 2d 638. If the words of the statute fail to do this they "must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense 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, and cases cited.

The purpose of the warrant or indictment "is (1) to give the defendant notice of the charge against him to the end that he may

prepare his defense and to be in a position to plead former acquittal or former conviction in the event he is again brought to trial for the same offense; (2) to enable the court to know what judgment to pronounce in case of conviction." *State v. Burton,* 243 N.C. 277, 90 S.E. 2d 390.

The declared purpose of the ordinance is to prohibit within the city limits of Greensboro "any unreasonably loud, disturbing and unnecessary noise." Here, each warrant charges the defendant named therein with creating a loud and unnecessary noise of such intensity as to constitute a wilful disturbance of the peace; that he did so by the use of a motorcycle; that he did so on June 8, 1967; and that this was done in the 1700 and 1800 blocks of Trogdon Street, Greensboro, North Carolina. In our view, the ordinance under consideration is violated if and when a person creates a noise that is unnecessary, unreasonably loud and substantially disturbs the peace of the community. Applying the stated legal principles, we are of opinion, and so decide, that each of the warrants under consideration sufficiently charges the commission of the criminal offense created and defined by the ordinance. Certainly, it is not required that the intensity of the noise be described in the warrant in terms of decibels as measured by an audiometer.

Defendant relies primarily on *State v. Walker,* 249 N.C. 35, 105 S.E. 2d 101, in which this Court quashed the bill of indictment in a criminal prosecution based upon G.S. 163-196. The indictment charged that defendant, on a specified date, "did unlawfully and wilfully by his own boisterous and violent conduct disturb one Helen H. Taylor, a duly qualified, appointed and acting registrar for the May 1956 Democratic Primary for the voters of Seaboard Township in Northampton County while in the performance of her duties as such registrar, to wit: While examining one Mark Johnson, an applicant for registration . . ." In *Walker,* the allegations of the warrant did not disclose in any respect the nature of the alleged boisterous and violent conduct, or the place where the alleged incident occurred, or in what manner the registrar was disturbed in the performance of her duty. This Court considered the allegations insufficient to describe and identify a specific offense. Here, the allegations, in respect of time, place and circumstances, are considered sufficient to describe and identify a specific offense. The factual differences are such that the decision in *Walker* may not be considered a controlling precedent to decision here.

In each of the three cases, the judgment quashing the warrant is reversed.

Reversed.

WILLIE A. BLANTON v. DORIS MUNDAY FRYE.

(Filed 13 December, 1967.)

1. Automobiles § 10—

The fact that a motorist in driving her vehicle onto the highway from a driveway with the intention of crossing the first lane and turning left, has her vehicle stall so as to block the first lane, that she then releases the gears in hope that the vehicle would roll across the highway and attempts to restart the motor, both without avail, does not constitute a violation of the law against parking or obstructing the highway, and such motorist has only the duty to give passing motorists such notice of the danger created by her vehicle as the occasion permits.

2. Evidence § 17—

When the evidence tends to show that plaintiff was traveling east and approached a vehicle which had entered the highway from the south from a driveway and was standing where it had stalled in attempting to make a left turn on a highway, with its rear some three feet from the south shoulder and its front some one or two feet across the center line, the psysical evidence discloses that plaintiff driver was not in a position to see lights on the stationary vehicle if they had been burning, and his testimony that he did not see any lights on the stationary vehicle, is without probative force.

3. Trial § 21—

The court may not weigh the defendant's evidence on motion to nonsuit, but it may consider defendant's evidence which is not in conflict with that of plaintiff in ascertaining whether the evidence is sufficient to raise the issue for the jury.

4. Automobiles § 75— Evidence held insufficient to show negligence on part of motorist having car stall on highway.

The evidence tended to show that defendant entered the highway from a driveway on the south side of the highway, intending to make a left turn, and that when the rear of defendant's car was some two feet from the south shoulder of the road, the engine stalled and defendant was unable to restart the motor, and that the car would not roll by gravity when the gears were released. There was positive evidence that the lights were burning on defendant's vehicle. Plaintiff, traveling east, was blinded by the lights of oncoming traffic and did not see the stationary vehicle until he was some 50 feet therefrom, and, to avoid collision, drove off the highway to his right into the bank on the shoulder of the road, resulting in the injury in suit. *Held:* The evidence is insufficient to raise the issue of negligence for the jury, and nonsuit was properly entered.

APPEAL by plaintiff from *Latham, S.J.*, March 1967 Session, BURKE Superior Court.

This is a civil action to recover damages for injuries the plaintiff sustained when his automobile ran into the bank of Highway No. 70 in Burke County. The accident occurred at 9:30 p.m. on May 20, 1966. The plaintiff alleged his lane of travel east was completely blocked by the defendant's dark red Oldsmobile automobile

which was negligently parked in the highway without lights or flares, and that, in order to avoid a collision, he was forced off the highway, and suffered injury.

The plaintiff alleged, and testified, that a curve in the road, the dark color of the defendant's vehicle, and the blinding effect of lights on vehicles approaching from the east prevented his discovery of the defendant's vehicle until he was within 50 feet of the roadblock. ". . . I saw the red automobile in the road. I cut to the right to avoid hitting her right in the side and then I don't remember a thing until I was in the hospital. I was approximately 50 feet from the car, in the road, when I was no longer blinded. . . . Just as I saw the red automobile, . . . or whatever color it was, I didn't see any lights whatsoever on the automobile. . . ."

On cross-examination, the plaintiff admitted that 5 days after the accident he signed a statement which recited, ". . . When I first saw the car, I thought it was on my right in a road or driveway. I did hit my brakes before I cut to my right to avoid hitting it broadside. . . . (I)t was not moving at all. It did have the headlights on and sitting at an angle at about northwest." He testified the statement about the lights was not correct. The plaintiff's only other witness, Patrolman Chambers, arrived at the scene of the accident 3 or 4 minutes after it happened. He found the defendant's red automobile at an angle across the road. The rear was about 3 feet from the right edge of the surface and the front was 1 or 2 feet over the center line. He did not remember whether there were lights on any of the vehicles. Neither vehicle showed any observable damages. "He (plaintiff) told me that he didn't see the Frye car until he was right on it. . . . I can't definitely say . . . whether or not there was *(sic)* any lights on the car being driven by the defendant." The parties, by stipulation, admitted the doctor's report as evidence of the plaintiff's injuries.

The defendant testified: ". . . I pulled my car away from my mother-in-law's residence, pulled out into the highway on the main road and my car stopped. I was about crossways of the middle line. My motor just quit and I couldn't get it started, but I still had my lights on. I never did turn them off. I kept trying to start it and I saw the car coming toward me. He was coming pretty fast and it wouldn't roll back. I put it in park to try to re-start. It would not roll back and wouldn't start." On cross-examination, defendant admitted she went to a Justice of the Peace and paid off a ticket for failure to yield right-of-way. ". . . I couldn't hardly get off from work. I just went to the Justice of Peace and paid it off. On the day that I paid it off, I didn't feel . . . I was guilty. . . ."

The defendant's sister-in-law, a passenger in the Oldsmobile,

testified: ". . . She pulled out and the car stalled. We were at an angle and she tried to get it parked. I mean she tried to get it cranked and it wouldn't crank. So she tried to get it to roll and it wouldn't roll. . . . The lights were on the car in which I was riding and they were never turned off. . . ."

The Court sustained defendant's motion for nonsuit when renewed at the close of all the evidence. From the judgment dismissing the action, the plaintiff appealed.

Byrd, Byrd & Ervin Law Firm /s/ John W. Ervin, Jr., for plaintiff appellant.

Patton & Starnes by Thomas M. Starnes for defendant appellee.

HIGGINS, J. The pleadings present issues of defendant's negligence and plaintiff's contributory negligence. At the close of all the evidence, the Court, without assigning any reason, entered judgment of compulsory nonsuit. Either insufficient evidence of defendant's negligence or evidence of plaintiff's contributory negligence as a matter of law would sustain the judgment.

The parties admitted the accident occurred at night. At the time the plaintiff approached the scene of the accident, the defendant's Oldsmobile was at an angle across the south lane of U. S. Highway 70. The rear end was about 3 feet from the south shoulder. The front was 1 or 2 feet across the center line. The plaintiff was blinded by the lights of vehicles meeting him and failed to see the defendant's disabled automobile until he was "within 50 feet" or as he told the officer "until he was right on it".

All the evidence disclosed the defendant had left the home of her mother-in-law and attempted to enter U. S. Highway 70 from the south, intending to cross the south lane and travel west. However, as she entered the highway, the motor suddenly cut off. Her attempts to start the motor failed. The gears were released and the vehicle would not coast in either direction. The plaintiff cut sharply to his right, missed the defendant's vehicle, but struck a bank and sustained injuries.

All the evidence disclosed the defendant's efforts to start the engine failed. She released the gears but the force of gravity was not sufficient to move the vehicle. The defendant could not avoid stopping (stalling) on the highway. Her conduct was not in violation of the law against parking or obstructing the highway. *Saunders v. Warren*, 264 N.C. 200, 141 S.E. 2d 308; *Melton v. Crotts*, 257 N.C. 121, 125 S.E. 2d 396; *Meece v. Dickson*, 252 N.C. 300, 113 S.E. 2d 578.

In the emergency which had suddenly arisen, without fault on her part, it was the defendant's duty to give passing motorists such notice of the danger her vehicle created as the occasion permitted. She continued her efforts to start the engine and, according to her evidence, kept her lights on. The plaintiff alleged she had parked without lights. He testified he saw the automobile blocking his traffic lane. "I did not see any lights. . . . I cut to the right to avoid hitting her in the side". Not once did the plaintiff say the lights were not on, or that he could have seen lights had they been on. Obviously, the side view did not readily expose either the front or the rear lights. His statement that he did not see lights is without probative force. The physical evidence, in the light of the plaintiff's testimony, indicate he was not in a position to see lights on the defendant's vehicle. His testimony goes no further than to say "I did not see any lights". Had he gone further and testified he was in a position to see lights and did not see them, a different question probably would have confronted Judge Latham. The plaintiff did not see the vehicle until he was right on it, according to his own statement. His attention thereafter was devoted to his efforts (happily successful) to avoid "striking her in the side".

Motion to nonsuit does not permit the Court to weigh the evidence; that is the exclusive province of the jury. *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330. However, when nonsuit is denied at the close of the plaintiff's evidence (as in this case) the defendant's evidence, which is not in conflict with the plaintiff's, is taken into account. *Eason v. Grimsley,* 255 N.C. 494, 121 S.E. 2d 885. The defendant, and one of her witnesses, gave positive testimony that lights on the Oldsmobile were on. The mere statement that plaintiff did not see a light is not enough if he omits to go further and say he was keeping a lookout and was in a position to see lights. *Hollingsworth v. Grier,* 231 N.C. 108, 55 S.E. 2d 806; *Parkway Bus Co. v. Coble Dairy Products Co.,* 229 N.C. 352, 49 S.E. 2d 623.

The plaintiff's evidence raises serious doubt whether the presence or absence of lights on the Oldsmobile could have influenced the plaintiff's evasive action. He could see neither his traffic lane nor the stalled automobile until the lights facing him had passed. According to the evidence, when he applied brakes, his vehicle missed the Oldsmobile, spun around twice, and landed against the bank of the road. Whether the absence or presence of lights could have been a proximate cause of the accident is problematical. *Morris v. Jenrette Transp. Co.,* 235 N.C. 568, 70 S.E. 2d 845. Suffice it to say that all the positive evidence discloses the disabled vehicle's lights were

on. Evidence of negligence on the part of the defendant is not disclosed. Nonsuit was proper. Judgment of the Superior Court is

Affirmed.

ANDREW CROSBY. PLAINTIFF, v. FANNY W. CROSBY, DEFENDANT.

(Filed 13 December, 1967.)

1. Divorce and Alimony § 23—

The court in a divorce action acquires jurisdiction to determine the custody and maintenance of the children of the marriage, both before and after final decree of divorce, and will determine the question of custody in the light of the paramount welfare of the children.

2. Same—

The order directing the husband to make payments for the support of the minor children of the marriage is *res judicata* only so long as the facts and circumstances remain the same, and the decree is subject to alteration upon change of circumstances affecting the welfare of the children, and the ability of the father to meet the need for such support must also be considered.

3. Same— Evidence held insufficient to support order modifying order for support of child of the marriage.

When a husband moves to vacate the original order directing him to make payments for the support of the minor child of the marriage, he has the burden of showing that circumstances have changed between the time of the order and the time of the hearing of his motion, and when his evidence discloses that at the time of the motion he had a larger weekly take-home pay than at the time the order was issued, his evidence that some three months after the order for support of the child was entered he acquired four additional children to whom he owes the duty of support, without further explanation, is insufficient to disclose a change of condition supporting an order that such payments should be vacated.

4. Same; Appeal and Error § 57—

Where the court makes no detailed findings in support of its order vacating a prior order for support of the minor child of the marriage in a divorce action, and the evidence of record is insufficient to disclose a change of condition warranting a modification of the order, the cause must be remanded for specific findings.

APPEAL by defendant from order of *Johnston, J.*, filed 24 July 1967 in FORSYTH County Superior Court.

This case originated as a civil action for absolute divorce on the ground of one year's separation.

Defendant filed answer to her husband's complaint for divorce and prayed, *inter alia*, that plaintiff be ordered to pay to defendant

not less than $110.00 per month for the support of their minor child until the child became twenty-one years of age. An order was entered on 6 January 1966, ordering plaintiff to pay $25.00 per week to defendant for the support and maintenance of the minor child, until the child became twenty-one years old. Judgment in the divorce action was filed on 3 January 1966, granting plaintiff an absolute divorce from defendant. The order was modified on 1 March 1966, by ordering the payment to be made for the benefit of the minor child to be paid into the office of the Clerk of the Domestic Relations Court of Forsyth County, North Carolina.

Defendant filed motion on 3 April 1966 asking that plaintiff be ordered to show cause why he should not be held in contempt and alleging in this motion that plaintiff was $235.00 in arrears in his payments under said order for child support. This order was issued. On 24 May 1967, plaintiff filed motion setting out that his circumstances had drastically changed and prayed that the order theretofore entered be vacated and either modified or eliminated. After hearing was held on plaintiff's motion, Judge Johnston entered an order dated 21 July 1967, which, in pertinent part, is as follows:

> ". . . it appearing that this is a Petition and Motion in the cause for a change of the orders heretofore entered requiring the plaintiff to pay support for a child who has finished one year of college and will be 20 years of age this year and requesting that the orders heretofore entered be changed based on the change of circumstances that now exists; and it further appearing from a consideration of the evidence and the arguments of counsel that the orders of the court heretofore entered requiring the said plaintiff to make such payments shall be and the same are hereby vacated as of this date. . . ."

Defendant excepted to the failure of the court to find any facts in support of its order and to the entry of the order and gave notice of appeal.

Hayes and Hayes and W. Warren Sparrow for plaintiff.
Randolph and Drum for defendant.

BRANCH, J. The question presented for decision is: Did the court sufficiently find facts, based on competent evidence of change of circumstances since entry of order for child support, to justify vacating said order?

When a divorce action is instituted, the court acquires jurisdiction over the children born to the marriage and may hear and determine questions as to the custody and maintenance of the children,

both before and after final decree of divorce. In the exercise of this jurisdiction the welfare of the child is of paramount consideration. *Story v. Story,* 221 N.C. 114, 19 S.E. 2d 136. G.S. 50-13.

It is generally recognized that decrees entered by our courts in child custody and support matters are impermanent in character and are *res judicata* of the issue *only so long as the facts and circumstances remain the same as when the decree was rendered.* The decree is subject to alteration upon a change of circumstances affecting the welfare of the child. *Thomas v. Thomas,* 248 N.C. 269, 103 S.E. 2d 371; *Griffin v. Griffin,* 237 N.C. 404, 75 S.E. 2d 133; *Neighbors v. Neighbors,* 236 N.C. 531, 73 S.E. 2d 153.

In cases of child support the father's duty does not end with the furnishing of bare necessities when he is able to offer more, *Williams v. Williams,* 261 N.C. 48, 134 S.E. 2d 227, nor should the court order an increase in payments absent evidence of changed conditions or the need of such increase. Admittedly, the welfare of the child is the "polar star" in the matters of custody and maintenance, yet common sense and common justice dictate that the ultimate object in such matters is to secure support commensurate with the needs of the child and the ability of the father to meet the needs. *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E. 2d 487.

When plaintiff moved that the original order be vacated and either modified or eliminated, he assumed the burden of showing that circumstances had changed between the time of the order and the time of the hearing upon his motion. *Williams v. Williams, supra.*

In the instant case plaintiff's motion to vacate and modify or eliminate the order entered on 1 March 1966 is supported only by the motion itself and a statement made by plaintiff's counsel. Plaintiff's motion states that the child is capable of being self-supporting, and that he has offered to get her employment; that plaintiff has worked out a plan to pay her college tuition; that plaintiff had two jobs when the original order was entered, but is no longer able to continue with two jobs; that he is now supporting four other children. The statement made by plaintiff's counsel was that at the time of the hearing on plaintiff's motion his weekly take-home pay was $88.17. The original order found that his weekly take-home pay was approximately $75.00.

It is apparent that plaintiff's conclusion that the child is self-supporting and his allegation that he has worked out a plan to pay her college tuition do not show material change of circumstances affecting the child's welfare. The statement made by plaintiff's counsel shows a circumstance unfavorable to plaintiff's contention, since it shows an increase in his ability to pay since the entry of the original order.

The most provocative of plaintiff's contentions is that he now supports four other children. He was married to defendant in August 1941, and the youngest child born to that marriage was 19 years old at the time of the hearing on his motion. Plaintiff obtained his divorce from defendant on 3 January 1966, and the record sheds no light on how plaintiff acquired four children to whom he owes the duty of support since January 1966.

The case of *Sayland v. Sayland,* 267 N.C. 378, 148 S.E. 2d 218, is a case in which the husband filed a motion in the cause asking that he be relieved of his obligation to pay alimony which had been imposed by consent judgment in action commenced under G.S. 50-16 because, among other things, he had remarried and assumed additional obligations. The court, *inter alia,* stated:

> "Payment of alimony may not be avoided merely because it has become burdensome, or because the husband has remarried and voluntarily assumed additional obligations. However, any considerable change in the health or financial condition of the parties will warrant an application for change or modification of an alimony decree, and 'the power to modify includes, in a proper case, power to terminate the award absolutely.' "

The principles enunciated in *Sayland* would apply with equal force to a motion seeking to vacate an order for child support. Certainly, without further explanation, plaintiff in this case cannot rely on his allegation that he is now supporting four other children as a change of circumstances which would justify the vacation of the support order.

It is stated in *In re Housing Authority,* 233 N.C. 649, 65 S.E. 2d 761:

> ". . . the findings of fact . . . are sufficient to support the order . . . And since the evidence upon which the Utilities Commission made its findings of fact is not brought forward, it will be presumed that there was competent evidence to support its findings, . . ." (Citing cases.)

This presumption would not apply here because there was not sufficient findings of fact.

The court's findings of fact as to the care and custody of children will not be disturbed when supported by competent evidence, even though the evidence be conflicting. *Tyner v. Tyner,* 206 N.C. 776, 175 S.E. 144; *In Re Hamilton,* 182 N.C. 44, 108 S.E. 385.

However, when the court fails to find facts so that this Court can determine that the order is adequately supported by competent

evidence and the welfare of the child subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact. *Swicegood v. Swicegood,* 270 N.C. 278, 154 S.E. 2d 324.

It may be that all the circumstances do not appear in the record, but as the record stands, neither the record nor the findings of fact are sufficient to show that the order is adequately supported by competent evidence.

The order entered by the trial court is vacated and this cause is remanded to the Superior Court of Forsyth County for more detailed findings of fact as to change of circumstances affecting the welfare of the child, and for the entry of proper orders.

Error and remanded.

STATE OF NORTH CAROLINA v. LANDON JOHNSON, ROBERT LEE HOLLINGSWORTH AND KING DAVID PURCELL.

(Filed 13 December, 1967.)

1. Criminal Law § 87—

It will not be held for error that the court permits the solicitor to ask leading questions which bring forth testimony that could have been otherwise obtained and the testimony brought forth is not objectionable or the import of the testimony is not subject to reasonable dispute but has only the effect of saving time, the matter being in the wide discretion of the trial court.

2. Criminal Law § 9; Homicide § 20—

Evidence tending to show that four defendants agreed to assault a particular person and get his money, that three of them went into such person's house, and that the defendant turning State's evidence hit the deceased in the back of the head with an ax handle a number of times, inflicting mortal injury, that another of defendants stated he was going to finish defendant off and stomped him in the ribs four or five times, and that the three defendants took deceased's billfold containing a sum of money, *is held* sufficient to sustain a conviction of the two defendants pleading not guilty.

3. Same—

Evidence that the four defendants agreed to assault a designated person and take his money, that one of the defendants stayed outside as a lookout while the other defendants went into the house and committed the robbery and murder, *held* sufficient to sustain the conviction of the lookout as an aider and abettor, notwithstanding he received no benefit from the stolen money, and such defendant's youth and retarded mentality are matters to be considered by the parole authorities at the proper time.

4. Criminal Law § 74—

Where the court hears testimony on the *voir dire* and finds that defendant was amply advised of his constitutional rights and that his statement was voluntary and competent, order admitting the statement in evidence will not be disturbed when the record amply supports the court's findings.

5. Criminal Law § 5—

Testimony of an expert that defendant is retarded to some extent but that he could relate his circumstances around the time of the crime in a logical and coherent manner, and that he knew right from wrong, is sufficient to disclose his legal responsibility for his criminal acts.

APPEAL by defendants from *Farthing, J.,* 8 May 1967 Mixed Session HOKE County Superior Court.

Robert Lee Hollingsworth, King David Purcell, Malcom McCoy and Landon Johnson were charged in separate bills of indictment with murder in the first degree of Neill Archie McCormick on 18 December 1966. McCoy entered a plea of guilty and testified for the State. The three other defendants were tried together by consent. All were convicted of murder in the first degree with a recommendation of life imprisonment, from which all defendants appealed.

In its strongest light, the evidence for the State tended to show that the four defendants conspired to go to the home of McCormick, "get him" and take his money. Purcell wanted to buy a 1954 Buick for $75 and intended to use McCormick's money to do so. In a statement made by Johnson, he said: "We had talked about knocking Neill McCormick in the head two weeks [earlier] and taking his money. . . . [We] had talked about this. . . ."

McCoy testified, in summary, that he and the other three defendants were together for several hours, all were drinking, and "Purcell mentioned about hitting Mr. McCormick and getting some money . . . at the time this was mentioned, all four of the persons [defendants] were in the car"; that Purcell said that McCormick "gets a check" and "if we hit him, we will get some." Hollingsworth said, "Let's go get him." The defendants rode around some more and then went to McCormick's house, and all got out of the car and went to the house. As they walked up to the house, Landon Johnson was told he was "supposed to look out — see if anything was coming or going." He was to whistle one time if he heard or saw anybody coming. The other defendants went into the house, except Purcell who remained outside for about five minutes looking inside. McCormick came to the door, turned around and walked back toward the heater. At that time Hollingsworth told McCoy to hit McCormick from the back. McCoy hit him several times with an ax handle and McCormick fell. After he fell, McCormick started to move and Hollingsworth told McCoy to hit him again and to keep

hitting him. He said he hit McCormick about ten times in the head. While McCormick was lying on the floor, Purcell came into the house and said he "was going to finish him off" and stomped McCormick in the ribs four or five times. They then took McCormick's billfold which contained $65, with which they later sought to buy the 1954 Buick. McCormick died from the injuries inflicted.

Other almost unbelievably cruel and cold-blooded actions of the defendants, being unnecessary to summarize, are omitted.

Hair & Ruppe by Lacy S. Hair; Hostetler, McNeill & Willcox by R. Palmer Willcox; Moses & Moses by William L. Moses, Attorneys for defendant appellants.

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

PLESS, J. The three appealing defendants have filed one case on appeal and one brief. The errors assigned in behalf of Hollingsworth and Purcell deal with "leading questions" which the defendants alleged were permitted by the Court. These questions are not brought forth in the brief, and we are required to go upon a voyage of discovery to locate them. Having done so, we find that they refer largely to the testimony of McCoy and that they are merely directing his attention to the feature of the case about which he was then being examined.

The defendants have several exceptions to the "leading questions" asked by the Solicitor, but in each instance we find them to be harmless and timesaving. Many objections are made to the use of leading questions, but a leading question is not incompetent *per se*. In describing the scene of an event, for instance, where there is no reasonable ground for dispute, leading questions are not only not objectionable but are actually desirable in preliminary descriptions that are necessary to an understanding of the *locus in quo*. A skilled attorney can, in one full descriptive question, paint a picture for the benefit of the Court and jury that could well take a substantial and wasteful length of time to evoke if an unlettered or poorly educated witness is left to describe a scene without suggestion or "leading." The competence of the question should be decided upon whether it is harmful and is likely to result in an answer that could not be otherwise obtained. And so, our courts have wisely and almost invariably held that the presiding judge has wide discretion in permitting or restricting "leading questions." 2 Strong, N. C. Index, Evidence § 57; *McKay v. Bullard*, 219 N.C. 589, 14 S.E. 2d 657; *State v. Cranfield*, 238 N.C. 110, 76 S.E. 2d 353. These exceptions are without merit. Consideration of the objections show that the evi-

dence elicited could have been "otherwise obtained" but at considerable waste of time and that the defendants were not prejudiced by them.

The evidence of the State is to the effect that McCoy hit McCormick with an ax handle eight or ten times and knocked him down, after which Purcell said he was going to "finish him off", and he then stomped him in the ribs several times with his feet. McCormick was dead when they left there. This is quite sufficient to withstand the exceptions of Hollingsworth and Purcell to the refusal of the Court to dismiss the case as to them or to set aside the verdict. This evidence was uncontradicted except by the defendants' formal plea of not guilty.

The appeal of Johnson presents additional exceptions. The defendant Johnson was a sixteen-year-old colored boy of less than average intelligence at the time of his involvement in this murder.

To state the facts of the case, which are practically undisputed, immediately causes unbelief that people in a civilized society could possibly do what the defendants did. The horror and callousness of the murder cause a normal person to doubt that it "could happen here" — but it did. To buy a twelve-year-old car, the participants' cold bloodedly took a human life.

The defendant Johnson did not strike a blow and received no benefit from the stolen money. And yet, upon all the evidence, it was unquestionably sufficient to support the verdict of guilty. "It is thoroughly established law in this State that, without regard to any previous confederation or design, when two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty." *State v. Taft,* 256 N.C. 441, 124 S.E. 2d 169.

The defendant Johnson's written admission was, if anything, favorable to him. It was not admitted until the able trial judge had heard from at least four witnesses that the defendant's rights had been fully and completely respected. The judge also heard the testimony of the defendant upon *voir dire,* in which the voluntariness of his statement was substantially admitted. The Court's ruling that the defendant's statement was voluntary and competent was amply supported by the evidence. Johnson admitted his association with his co-defendants and his presence, outside the house, at the time McCormick was struck and stomped by the others.

His court-appointed counsel emphasizes the youth and lack of intelligence of the defendant. The evidence of the specialist who examined and observed the defendant for thirty days was that he was "retarded to some extent" but that he "could relate his circum-

stances around the time . . . in a logical and coherent manner" and that he knew right from wrong.

There is a tendency to excuse and absolve the most cold-blooded and hard-hearted murderers on the theory that normal persons would not commit their inexcusable crimes. We cannot accept this philosophy. To do so would result in leaving society helpless and defenseless against the most inexcusable crimes of horror and violence.

The defendant Johnson is legally responsible for his participation in a calculated robbery resulting in the death of the victim. His rights have been more than fully protected, and he must pay his debt to society. And yet his inactive involvement was such that because of his youth and retarded mentality, he may have hope for consideration by the parole authorities at the appropriate time.

A careful consideration of all the defendants' exceptions reveals them to be without substantial merit.

No error.

STATE OF NORTH CAROLINA v. WILSON MILLER.

(Filed 13 December, 1967.)

1. Criminal Law §§ 24, 26, 30—

When the solicitor announces upon defendant's arraignment, or thereafter in open court, that the State will not ask for a verdict of guilty of the maximum crime charged but will ask for a verdict of guilty of a designated and included less offense embraced in the bill, and the announcement is entered in the minutes of the court, such announcement is the equivalent of a verdict of not guilty on the charge or charges the solicitor has elected to abandon, and the State will not be permitted another prosecution on the charge or charges eliminated.

2. Criminal Law § 171—

An announcement by the solicitor in open court that the State would prosecute defendant only for manslaughter precludes the State from thereafter prosecuting defendant for murder in the second degree, but the trial court's submission of the charge of second degree murder to the jury, though technically erroneous, *held* not to warrant a new trial in this case, since the jury returned a verdict of guilty of manslaughter, and since the record fails to disclose that another trial would produce a different or more favorable result.

APPEAL by defendant from *Carr, J.*, May 1967 Criminal Session, DURHAM Superior Court.

At the May 1965 Session, the Grand Jury returned a bill of indictment charging the defendant, Wilson Miller, with the murder of

Bruce Browning. At the December 1965 Session, upon arraignment, the Solicitor announced that the State would not seek a verdict of guilty of murder in the first degree but would ask for a verdict of guilty of murder in the second degree, or manslaughter, as the evidence might warrant. The jury returned a verdict of guilty of manslaughter. The Court imposed a prison sentence of 5 to 7 years. On appeal, this Court granted a new trial. The case is reported in 267 N.C. 409.

At the new trial before Carr, J., the Solicitor announced the State would only prosecute for the crime of manslaughter. The announcement was recorded. However, the Solicitor either made the announcement inadvertently or changed his mind after conference at the bench with the Court and defense counsel. The charge of murder in the second degree and manslaughter were submitted to the jury under the Court's charge. The State's evidence at the new trial (which is summarized in our former opinion) was substantially the same in material parts as that introduced at the first trial.

The jury again returned a verdict finding the defendant guilty of manslaughter. Judge Carr imposed a prison sentence of 5 to 7 years. The defendant has again appealed.

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

Blackwell M. Brogden for defendant appellant.

HIGGINS, J. Defense counsel, in the brief and in the oral argument, has insisted the trial court committed prejudicial error by permitting the Solicitor to place the defendant on trial for murder in the second degree, after having placed in the record the announcement he would ask for a verdict of guilty of manslaughter only. Had the jury convicted the defendant of murder in the second degree, as it might have under the Court's charge, a grave question would be presented whether the verdict could stand. But the jury, having convicted of manslaughter only, we are confronted with the question whether prejudice is shown by the submission of murder in the second degree.

This Court, in many cases, has considered the effect of the Solicitor's announcement that the State would not prosecute on certain counts in a bill. There seems to be no difference whether the counts are separately stated or included as different degrees of guilt in a single count.

In *State v. Hunt,* 128 N.C. 584 (431 in the revision), 38 S.E. 473, Clark, J. (later C.J.) stated: "Under an indictment for murder the defendant may be convicted either of murder in the first degree,

murder in the second degree, or manslaughter, and even of assault with a deadly weapon, or simple assault 'if the evidence shall warrant such finding' when he is not acquitted entirely. Laws 1885, ch. 68. It is as if all these counts were separately set out in the bill (for it includes all of them), *S. v. Gilchrist,* 113 N.C. 673; and the Solicitor can *nol pros.* any count, and a *nol pros.* in such case is in effect a verdict of acquittal as to that. *S. v. Taylor,* 84 N.C. 773; *S. v. Sorrell,* 98 N.C. 738. (587)."

In *State v. Brigman,* 201 N.C. 793, 161 S.E. 727, Stacy, C.J. stated: "The announcement of the solicitor made before entering upon the trial that the State would not prosecute the defendant for the alleged wilful abandonment and nonsupport of his wife, was tantamount to taking a *nolle prosequi,* or . . . an acquittal, on this charge." Citing *State v. Hunt, supra.*

In *State v. Wall,* 205 N.C. 659, 172 S.E. 216, Stacy, C.J. stated: "The announcement of the solicitor made before entering upon the trial that the State would not ask for a verdict of more than murder in the second degree was tantamount to making a *nolle prosequi* on the capital charge." Citing *State v. Spain,* 201 N.C. 571, 160 S.E. 825.

In *State v. Locklear,* 226 N.C. 410, 38 S.E. 2d 162, this Court stated: "And when the solicitor stated that he would not ask for a verdict of first degree burglary but would only ask for a verdict of second degree burglary on the indictment, it was tantamount to taking a nol pros with leave on the capital charge." Citing *State v. Spain, supra.*

The use of the expression "with leave" seems to imply the capital charge might thereafter be revived. We do not think the authorities permit another prosecution for any offense which the Solicitor has elected to eliminate. The Solicitor is a constitutional officer authorized and empowered to represent the State. The State is not permitted to split up an indictment and try it piecemeal. In *State v. Haddock,* 254 N.C. 162, 118 S.E. 2d 411, Parker, J. (now C.J.) stated: "The trial judge's election not to submit to the jury in his charge the second count in the indictment will be treated as the equivalent of a verdict of not guilty on that count." Citing *State v. Mundy,* 243 N.C. 149, 90 S.E. 2d 312; *State v. Love,* 236 N.C. 344, 72 S.E. 2d 737. The correct theory is that the State should present all charges in the indictment in one trial without reserving anything which would or might bring the defendant back to answer a charge which the State, by failing to present at the proper time, had abandoned.

In this case, the defendant has not shown prejudice. At the first trial, issues of his guilt of murder in the second degree or man-

slaughter were properly submitted. The jury convicted of manslaughter. The State's evidence tended strongly to show the defendant intentionally shot Bruce Browning through the heart. Browning was unarmed. In neither of his trials did the defendant testify or introduce evidence. The record fails to disclose any valid ground upon which the defendant may place hope for a verdict of not guilty.

Inasmuch as the legal effect of the Solicitor's announcement not to prosecute for murder in the second degree is directly presented on this appeal, we deem it not inappropriate to state here what we conceive to be the legal effect of the announcement. When, upon arraignment, or thereafter in open court, and in the presence of the defendant, the Solicitor announces the State will not ask for a verdict of guilty of the maximum crime charged but will ask for a verdict of guilty on a designated and included lesser offense embraced in the bill, and the announcement is entered in the minutes of the Court, the announcement is the equivalent of a verdict of not guilty on the charge or charges the Solicitor has elected to abandon. *State v. Pearce,* 266 N.C. 234, 145 S.E. 2d 918.

It appears the Solicitor's announcement that he would prosecute for manslaughter only precluded the State from prosecuting for murder in the second degree. Consequently, the Court committed error in submitting second degree murder, and charging the jury on that offense. However, the record fails to disclose any basis for hope that another trial would produce a different or more favorable result. Technical error is not enough. Such error is non-prejudicial unless it may have affected the outcome. *State v. Woolard,* 260 N.C. 133, 132 S.E. 2d 364; *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39; *State v. Scott,* 242 N.C. 595, 89 S.E. 2d 153; *State v. Garner,* 203 N.C. 361, 166 S.E. 180.

No error.

PLESS, J., concurs in result.

STATE v. DAVID S. FEAGANES.

(Filed 13 December, 1967.)

1. Criminal Law § 166—

Exceptions which are not supported by any argument or citations in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Criminal Law § 77—

Evidence to the effect that as defendant and deceased were leaving the room immediately preceding the fatal shooting, the witness told defendant's

wife to stop them that they were going to fight, *held* competent as a part of the *res gestae.*

3. Homicide § 14—

Evidence that deceased was a special internal revenue agent who was not permitted or required to carry a gun in the performance of his duties *held* competent in a prosecution for his murder.

4. Criminal Law § 43—

The introduction in evidence of photographs of the body of deceased will not be held for prejudicial error when the court categorically instructs the jury that the photographs were admitted solely for the purpose of illustrating the testimony of the witness if the jury should find they did so illustrate his testimony.

5. Criminal Law § 53—

It is competent for the county medical examiner to testify from his examination of the body of the deceased as to the wounds and as to his opinion that the wounds could have been caused by a bullet.

6. Criminal Law § 168—

Where the charge of the court, considered contextually, is free from substantial error, objection thereto will not be sustained, and a single sentence, even though it be subject to criticism when read out of context, will not be held for prejudicial error when it is without harmful effect upon such contextual construction.

7. Criminal Law § 118—

A misstatement of the contentions of the parties must ordinarily be brought to the attention of the trial court in apt time in order for objection thereto to be considered.

8. Homicide § 20—

Evidence favorable to the State in this case which tended to show that defendant and deceased willingly entered into a fight, and that immediately after they had stepped out of the room where they had been drinking beer, defendant shot deceased twice, inflicting fatal injury, *held* sufficient to support conviction for murder in the second degree, notwithstanding defendant's evidence tending to show that he killed in self-defense.

APPEAL by defendant from *Crissman, J.*, and a Jury, 20 February 1967 Criminal Session, GUILFORD County Superior Court, Greensboro Division.

The defendant was convicted of murder in the second degree in connection with the death of Charles Pete Beal on 24 October 1966, and from a prison sentence of five to ten years with a recommendation of work release, appealed.

The State's evidence tended to show that the defendant was at Irving Park Delicatessen in Greensboro drinking beer with some friends about 8:30 p.m. Gloria Beal, wife of the deceased, worked as a waitress there. Beal came in and ordered a beer, and the defendant re-

marked that he wished he could get service like that. Beal replied that the waitress was his wife. Feaganes said, "I don't give a damn who she is." Beal's response was, "I don't give a damn who you is." Feaganes then said, "Well, step outside" and started out the door. Beal followed him, and as they got to the foyer two shots were fired. Both shots struck the deceased in the heart, causing his death. The defendant told the arresting officer that he had drunk from four to seven beers before going to the delicatessen and had another one there. He also said, "I . . . had an argument with this man at the bar, and I came out and he has a gun sticking right at me . . . Only thing about him, he got hold of a man too fast for him." Then he said, "Something is wrong with me. I had to shoot the s.o.b. twice. . . . I shot him the first time and he dropped the gun, and he reached to pick the gun up, and when he did, I shot him again. . . . I reckon I'll have to go out to [the] pistol range and do a little practicing."

The evidence of the defendant painted an entirely different picture which, if believed, made out a good case of self-defense. It was to the effect that he (Feaganes) had an argument with the deceased (Beal), started to leave and was followed by Beal who "had a gun stuck right at him," was cursing him with foul language, and that under those conditions, he shot the deceased twice. A .22 pistol was found under the body of the deceased. One witness said that he saw Beal reach into his right pocket, come out with a pistol and point it toward the door where Feaganes was walking; that he then heard two shots close together. Another witness for the defendant said that as Feaganes got into the foyer, the colored man was going into his hip pocket and was still fumbling in it when he went out of his (the witness') sight.

Other features of the evidence are discussed in the opinion.

Cahoon & Swisher by Robert S. Cahoon, Attorneys for defendant appellant.

T. W. Bruton, Attorney General, and James F. Bullock, Deputy Attorney General, for the State.

PLESS, J. The defendant refers to thirty-nine assignments of error and eighty-three exceptions in his brief. However, no argument or citation is presented in support of many of them; and under Rule 28, Rules of Practice in the Supreme Court, they are deemed abandoned.

The first exception presented is that the witness Rosetta Ireland was permitted over the defendant's objection to testify that as the defendant and the deceased were leaving the room she told Beal's

wife "come and stop them; they're going to fight." This was "a declaration uttered simultaneously, or almost simultaneously, with the occurrence of the act" and is competent as a part of the *res gestae. Staley v. Park,* 202 N.C. 155, 162 S.E. 202.

The evidence showed that Feaganes had been a Special Agent with Internal Revenue and that he was then an Estate Tax Examiner. The State was permitted to show over the objection of the defendant that he was not permitted or required to carry a gun in the performance of his duties. In this, there was no error.

The defendant excepted to the identification of several photographs of the body of the deceased which showed the location of the wounds on his body, and later to the fact that they were permitted to be shown to the jury. The record does not show that these photographs were offered as exhibits, but we find the defendant's exception in this regard without merit since the Court instructed the jury: "[Y]ou will consider these photographs for the purpose of illustrating the testimony of the witness, if you find they do illustrate his testimony, and for that purpose only." This instruction is in accord with the rule stated in *State v. Perry,* 212 N.C. 533, 193 S.E. 727.

The defendant further excepts to the evidence of Dr. Allan B. Coggeshall, the County Medical Examiner, who was stipulated to be a medical expert. He testified, in summary, that he examined the body of the deceased, described the wounds he found and gave it as his opinion that the wounds could have been caused by a bullet. These exceptions are without merit. *State v. Knight,* 247 N.C. 754, 102 S.E. 2d 259; *State v. Mays,* 225 N.C. 486, 35 S.E. 2d 494.

The defendant took fifty-nine exceptions to the charge of the Court, making twenty-eight assignments of error. Considering the charge as a whole, we find that it is free from substantial error. It is a standard charge dealing with the subjects of murder in the second degree, manslaughter, self-defense, fighting willingly, malice, and contains a satisfactory recapitulation of the evidence and the contentions of the parties.

The defendant has many exceptions that take up a full page of the mimeographed record. These exceptions are vague and at the same time fulsome; we find them without merit. Some exceptions are based upon a single sentence which, standing alone, may be subject to criticism but when read with the preceding or following sentence constitutes an accurate statement of the law.

The defendant also criticizes the Court's statement of the evidence and some of the contentions. However, the defendant failed to call the alleged inaccuracies to the attention of the Court at the time, and they are therefore waived. *State v. Case,* 253 N.C. 130,

116 S.E. 2d 429. Nevertheless, we have given them consideration and do not find that the defendant could have been prejudiced thereby. The defendant made no request for additional or different statements of the evidence, contentions of the parties, or any aspect of the law of the case, although he now claims that the charge was in violation of G.S. 1-180. We fail to find error in this respect.

This was a case in which the defendant admitted the shooting, and the deceased died immediately. There was no question that his death was caused by the bullet wounds. The evidence offered by the defendant, if accepted by the jury, would have justified a verdict of acquittal. It apparently accepted the State's evidence to the effect that both parties willingly entered into the fight and that the defendant had failed to show justification for the killing. The statements of the defendant in which he expressed no regret in having killed his fellow man but rather lightly referred to his embarrassment in being required to shoot the deceased twice and referring to the deceased as a s.o.b. probably caused the jury to reject his claim of self-defense.

A careful consideration of the defendant's exceptions fails to reveal prejudicial error which would justify a new trial.

No error.

REDEVELOPMENT COMMISSION OF HIGH POINT, PETITIONER, v. W. S. SMITH AND WIFE, ALBERTA SMITH, GUILFORD COUNTY AND CITY OF HIGH POINT, RESPONDENTS.

(Filed 13 December, 1967.)

1. Eminent Domain § 9—

In condemnation proceedings the issue as to the amount of compensation is for determination *de novo* by jury trial in the Superior Court. G.S. 40-19, G.S. 40-20.

2. Eminent Domain § 6—

In a condemnation proceeding the fact that the respondent's expert witness had served as one of three commissioners has no bearing upon his competency as a witness or upon the competency of his testimony relating to the value of the property condemned; nor may the respondent seek to buttress the witness' testimony by a showing that the clerk had appointed him as a commissioner.

3. Same—

In a condemnation proceeding, evidence tending to show that the respondent's expert witness had served as a commissioner in assessing respondent's damages, *held* not prejudicial in view of the fact that the petitioner sought to impeach the witness' testimony on cross-examination by

questioning the discrepancy between his testimony on trial as to the property's value and an amount stated in a paper bearing the witness' signature, it then being brought out in explanation by respondent on redirect that the paper was the commissioners' report and that the figure therein represented their composite views.

4. Trial § 37—

Ordinarily, error in stating the contentions of a party must be brought to the trial court's attention in apt time to afford opportunity for correction.

APPEAL by petitioner from *Crissman, J.*, May 20, 1967 Special Civil Session of GUILFORD, High Point Division.

Petitioner, Redevelopment Commission of High Point (Commission), pursuant to authority conferred by the "Urban Redevelopment Law," G.S. Chapter 160, Article 37, instituted this special proceeding, as authorized by G.S. 160-465, in accordance with the procedure prescribed by G.S. Chapter 40, Article 2, to acquire by condemnation the fee simple title to described property known as 507-509 East Commerce Street, High Point, North Carolina, owned by respondents Smith. The City of High Point and Guilford County were joined as respondents on account of their claims for ad valorem taxes. Hereafter the word "respondents" will refer only to respondents Smith.

The subject property, which is within the East Central Urban Renewal Area, fronts eighty-five feet on East Commerce Street and extends therefrom two hundred feet. A five-room house designated 507 Commerce Street and a four-room house designated 509 Commerce Street are located thereon.

Commissioners assessed respondents' damages at $9,100.00 and the clerk confirmed their report. Respondents excepted, appealed and demanded a trial by jury.

In the superior court, all issues, including petitioner's right to condemn, were determined by stipulation except the issue as to the amount of compensation to be paid respondents. It was stipulated that November 8, 1965, was the date respondents' property was taken by petitioner.

Upon trial, the court submitted, and the jury answered, the following issue: "What is the total fair market value of the real property described in the petition as of November 8, 1965? ANSWER: $11,000.00."

The court entered judgment providing that, upon payment of $11,000.00 plus interest and costs, including a fee to respondents' attorney, the title of respondents would be divested and petitioner would be the owner in fee simple of the subject property.

Petitioner excepted and appealed.

Haworth, Riggs, Kuhn & Haworth, Don G. Miller and Robert L. Cecil for petitioner appellant.

Thomas Turner for respondents appellees.

BOBBITT, J. The issue as to the amount of damages or compensation was for determination *de novo* by jury trial in the superior court. G.S. 40-19; G.S. 40-20; *Proctor v. Highway Commission,* 230 N.C. 687, 55 S.E. 2d 479; *Gallimore v. Highway Comm.,* 241 N.C. 350, 85 S.E. 2d 392.

Henry Shavitz, called by respondents, testified, after qualification, as an expert witness in the field of real estate appraisal. On direct examination, he testified in his opinion the fair market value of the subject property as of November 8, 1965, was $11,000.00. No reference was made to the fact he had served as one of the three commissioners. The fact he had served as commissioner had no bearing upon his competency as a witness or upon the competency of his testimony. Admittedly, respondents would not be entitled to show, for the purpose of buttressing the qualifications and testimony of Shavitz, that the clerk had appointed him as a commissioner. *Light Co. v. Smith,* 264 N.C. 581, 142 S.E. 2d 140.

After completion of Shavitz' direct testimony, evidence was admitted with reference to the appointment and service of Shavitz as commissioner. Petitioner assigns the admission thereof as error. The validity of petitioner's contention must be determined in the light of the circumstances under which this evidence was received.

On cross-examination, counsel for petitioner confronted Shavitz with a paper bearing three signatures, the middle signature being that of Shavitz, in which the subject property was valued at $9,100.00. When called upon to explain the discrepancy between the figure appearing on the paper and his testimony at trial, Shavitz stated in substance he was one of three signers of the paper, but that the preliminary investigation and preparation of the paper had been done somewhat hastily. The obvious purpose of this cross-examination was to impeach, not to buttress, the testimony of Shavitz. On redirect examination, over objection, it was brought out by counsel for respondents that the paper was the report of the commissioners. Shavitz then stated in further explanation of the discrepancy that $9,100.00 was a composite figure fixed by the three persons who signed the report and did not necessarily represent his personal views. On recross-examination, the report was identified at the instance of petitioner's counsel. Shavitz was cross-examined at length concerning the qualifications of Mr. Clinard and of Mr. Vaughn, the other two commissioners. Later the report was offered in evidence by respondents and was admitted without objection. In this

manner, the veil of secrecy, if any, with which counsel for petitioner sought to clothe the identity of the paper during his original cross-examination of Shavitz was removed. Whether Shavitz' credibility as a witness at trial was impaired by the fact he had signed the paper was before the jury for consideration in the light of the actual facts.

Neither Mr. Clinard nor Mr. Vaughn was called by either party. The commissioners' report disclosed the three commissioners, in their composite judgment, had valued the subject property at $9,100.00. This brought to the attention of the jury the views of Clinard and Vaughn. Under the circumstances, the evidence tending to show Shavitz had served as a commissioner cannot be considered of such prejudice to petitioner as to justify a new trial.

It is noted that there was ample evidence apart from the testimony of Shavitz to support the jury's verdict.

Petitioner's remaining assignments of error, other than formal assignments, relate to two excerpts from the charge. These excerpts, which include certain inaccurate statements in respect of certain evidence, are taken from the portion of the charge in which the court was stating the contentions of petitioner. The failure of counsel for petitioner to call these inaccuracies to the court's attention indicates they were not considered to have prejudicial significance. "(A)n assignment of error based on an exception to statements in the charge giving the contentions of the parties, and not called to the attention of the court at the time they are made, in order to give the court an opportunity to make a correction of any erroneous statement made therein, will not be upheld." *Rudd v. Stewart,* 255 N.C. 90, 96, 120 S.E. 2d 601, 606; 4 Strong, N. C. Index, Trial § 37. Such misstatements as occur in these excerpts are not considered of such prejudicial significance as to constitute sufficient ground for the award of a new trial.

Petitioner having failed to show prejudicial error, the verdict and judgment will not be disturbed.

No error.

STATE OF NORTH CAROLINA v. THEODORE HENRY FRANKUM.

(Filed 13 December, 1967.)

1. Assault and Battery § 14—

Evidence tending to show that the defendant shot the prosecuting witness in the leg as he was walking away, unarmed, from the defendant's

house, *held* sufficient to be submitted to the jury on the issue of defendant's guilt of assault with a deadly weapon with intent to kill resulting in serious injury, and especially so when defendant's own testimony revealed that he saw no weapon and was not in fear of harm at the time.

2. Criminal Law § 164—

Where the jury convicts defendant of a lesser degree of the crime charged, any error relating solely to a higher degree of the offense cannot be prejudicial.

APPEAL by defendant from *McLean, J.*, 24 July 1967 Criminal Session, GASTON County Superior Court.

The defendant was charged with a felonious assault on Lawrence Miller on 3 April 1967 by shooting him in the right leg with a .22 rifle. The defendant entered a plea of not guilty.

The evidence for the State tended to show that Frankum and Miller lived beside each other; that Miller went to the defendant's house on the night in question looking for his "housekeeper." He found a drinking party going on; and upon being told that his lady friend was not there, he walked away. He got to his own lot when he was shot in the leg. After that, he heard the defendant tell "that woman that keeps house for him . . . 'I'm going to shoot the s.o.b.'" Miller said he had no gun or weapon when he was shot and that he lost five weeks from his work.

The defendant testified that Miller came to his house "pretty well drunk," hit his guest Walt Brady, and knocked blood out of his mouth; that he (the defendant) asked him to leave, and Miller turned around and said, "'You G.d. black s.o.b., why don't you shoot me?' I said, 'I will.'" That Miller was in the front room of the defendant's house when shot; "[h]e opened the door and . . . crawled down the road and somebody picked him up . . . and took him to the hospital."

The jury returned a verdict of guilty of assault with a deadly weapon. Judgment of eighteen months' imprisonment (to run concurrently with the suspended sentence involved in *State v. Frankum, post,* p. 255) was pronounced, and the defendant appealed.

Donald E. Ramseur, Attorney for defendant appellant.

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

PLESS, J. The defendant's own testimony as shown in the statement of facts would justify a peremptory instruction of guilt. But in addition, he "corroborated" it by repeating on cross examination that "[h]e [Miller] was standing in the front room when he turned back and said 'You G.d. black s.o.b., why don't you shoot me?' And

so I did. . . . I got up off the bed to shoot him. . . . No, sir, wasn't hurting a soul. . . . I didn't see no knife. . . . I wasn't scared. I just shot him because he come down there raising hell." The lady who "keeps house" for the defendant also testified that when Miller asked Frankum why he didn't shoot him that Frankum said, "I will" and shot him, and the defendant was not in any great fear or harm at the time.

The defendant's motion to dismiss has no merit as shown by the quoted portions of his own evidence. Other exceptions relating to the admission of evidence are without merit.

The defendant excepts to the Court's charge regarding an aggressor in the home of another and an instruction about a felonious assault. The defendant has shown only that Miller was obnoxious, but unarmed and making no assault when shot. "[N]o words, however violent or insulting, justify a blow." *Goldberg v. Ins. Co.*, 248 N.C. 86, 102 S.E. 2d 521. Because the jury did not convict of the felonious assault, any incorrect instruction relating thereto would not constitute error. *State v. McCaskill*, 270 N.C. 788, 154 S.E. 2d 907.

As stated above, the defendant was guilty of an assault with a deadly weapon, at least, upon his own statement. The Court was kind enough to the defendant to give him a chance before the jury that he did not deserve. He has no valid complaint.

No error.

STATE OF NORTH CAROLINA v. THEODORE HENRY FRANKUM.

(Filed 13 December, 1967.)

Criminal Law § 167—

Any technical error in putting into effect a suspended sentence *held* not prejudicial to the defendant in this case when the sentence is to run concurrently with another sentence of imprisonment imposed upon defendant the same day, it being to defendant's advantage to be freed of the sentence of suspension in this manner.

APPEAL by defendant from *McLean, J.*, 24 July 1967 Criminal Session, GASTON County Superior Court.

The defendant was convicted in the Domestic Relations Court of Gaston County of the willful abandonment and non-support of his wife and two minor children. The Court continued prayer for judgment upon conditions, and the defendant appealed to the Superior Court. There, on 21 November 1966, he entered a plea of

guilty to the charge; and the Court imposed a sentence of eighteen months' imprisonment, suspended on condition, among others, that he pay $20.00 per month for the support of his minor children, and that he pay the costs within three months. In July 1967, Judge McLean found that the defendant had failed to comply with the above conditions and ordered that commitment issue to place the prison sentence into effect. On the same date, Judge McLean had imposed upon the defendant a sentence of eighteen months for assault with a deadly weapon (*State v. Frankum, ante,* p. 253), with the provision that it was to run concurrently with the sentence pronounced in this case. The defendant appealed in both cases.

Donald E. Ramseur, Attorney for defendant appellant.

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

PER CURIAM: The defendant contends that the technical requirements for placing a suspended prison sentence into effect were not observed in this case. Even if his claim were substantiated, it is apparent that no substantial disadvantage to him has resulted.

Since he must serve an eighteen months' sentence in the assault case referred to above, it will be to his benefit to be freed of the suspended sentence in this case by serving it concurrently with the other sentence.

This, of course, does not relieve the defendant of the responsibility of supporting his minor children, and he is still subject to prosecution for any future, and wilful, failure to do so.

No error.

THOMAS WAYNE MIMS v. JOURDAN COLUMBUS DIXON.

(Filed 13 December, 1967.)

1. Automobiles § 19—

An accident occurring when plaintiff's vehicle, traveling east, turned right into an intersection and, just as the turn was being completed, was struck by defendant's vehicle, which had approached from the opposite direction and was making a left turn into the same street, occurs within an intersection, G.S. 20-38(12), notwithstanding that the extension of the street upon which plaintiff was traveling was a number of feet southeast of the intersecting street.

2. 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 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 will not be considered.

3. Automobiles § 79—

Plaintiff's evidence tending to show that he made a right turn into an intersecting street and that after he was in the intersection defendant's car, which had approached from the opposite direction, made a left turn into the intersecting street and collided with plaintiff's car, *held* to take the issue of negligence to the jury. G.S. 20-155(b).

4. Automobiles § 8—

Whether a motorist, at a given time, is keeping a reasonably careful lookout to avoid danger is ordinarily an issue of fact to be determined by a jury.

5. Negligence § 26—

Nonsuit on the ground of contributory negligence should be denied when the relevant facts are in dispute or opposing inferences are permissible from plaintiff's proof, but may be properly entered only when plaintiff's own evidence establishes this defense as the sole reasonable conclusion.

6. Automobiles § 79—

Plaintiff made a right turn into an intersecting street and defendant, who had approached from the opposite direction, made a left turn into the same street and collided with plaintiff's car after plaintiff's car was in the intersection and was just completing the right turn. *Held:* Plaintiff's evidence does not disclose contributory negligence on his part as a matter of law.

APPEAL by defendant from *Carr, J.*, June 1967 Civil Session of DURHAM.

Action *ex delicto* growing out of an automobile collision in which plaintiff seeks to recover $450 for damages to his automobile and for being deprived of its use, and also asks for a reasonable allowance for attorney's services in the action.

Plaintiff instituted this action in the Durham County civil court and, with the establishment of the District Court of Durham County, this action was transferred to the District Court. This action was heard at the 16 January 1967 Civil Session of the civil division, District Court of Durham County, and the following issues were submitted to the jury and answered as indicated:

"1. Was the plaintiff damaged by the negligence of the defendant as alleged in the complaint?

"ANSWER: Yes.

"2. Did the plaintiff, by his own negligence, contribute to his damages as alleged in the answer?

"ANSWER: No.

"3. What amount, if any, is the plaintiff entitled to recover of the defendants?

"ANSWER: $450.00."

Thomas H. Lee, Judge Presiding, entered judgment in accordance with the verdict; and in his judgment provided that the defendant shall pay $250 as a reasonable attorney's fee as provided by G.S. 6-21.1 to plaintiff's attorney to be taxed as part of the costs. From the judgment entered, defendant appealed to the Superior Court which, by virtue of the provisions of G.S. 7A-280, has "appelate jurisdiction in civil cases to review for error of law or legal inference: (1) Every final judgment of the district courts of their respective judicial districts. . . ."

The appeal came on to be heard before Carr, J., at the June 1967 Civil Session of Durham County. Judge Carr entered an order affirming the judgment of the District Court of Durham County and certifying the case back to that court for compliance by the defendant with said judgment of the District Court Division. Judge Carr's order recited in substance that the appeal was heard in the Superior Court by him; and that after considering the briefs filed therein, the nature of the controversy, and the arguments of counsel, he was of opinion that the judgment rendered in the District Court Division of the General Court of Justice, Durham County, should be affirmed.

From this judgment, defendant appealed to the Supreme Court.

Bryant, Lipton, Bryant & Battle by Alfred S. Bryant for defendant appellant.

Blackwell M. Brogden for plaintiff appellee.

PER CURIAM. When the case was tried in the District Court, both parties offered evidence. Defendant's sole assignment of error is that Judge Carr erred in affirming the District Court's overruling of his motion for judgment of compulsory nonsuit made at the close of all the evidence in the District Court. Defendant contends that the plaintiff has no evidence tending to show negligence on the part of the defendant, but if he has, then plaintiff's evidence leads to the unescapable conclusion that plaintiff is guilty of contributory negligence.

Plaintiff alleged in substance and offered evidence tending to show that at about 4:05 p.m. on 8 February 1964 he was operating his Chevrolet automobile proceeding in an easterly direction along

Main Street in the city of Durham, approaching the intersection of Main Street and Maple Street; that he ascertained that the roadway was clear for him to proceed and he did proceed to make a right turn from Main Street into Maple Street in order to continue in a southerly direction; that, as he was turning from Main Street into Maple Street, defendant, who had been operating his motor vehicle in a westerly direction along Main Street, approached the same intersection and proceeded to enter it and make a left turn into Maple Street, and by so doing did strike the left side of plaintiff's automobile with force and violence forcing it off the traveled portion of Main Street up onto the curb and property on the western side of Maple Street. Plaintiff further alleged and supported with evidence that on 8 February 1964 the intersection of Main Street with Maple Street at the point of the collision was not a so-called square intersection, since that portion of Main Street west of Maple Street is offset to the south from that portion of Main Street east of Maple Street, and that portion of Main Street west of the intersection of Maple Street, from which plaintiff was turning, is a considerable number of feet south of that portion of Main Street from which defendant was turning; that at this intersection the roadway was of blacktop construction, dry, and the weather was clear and the sun was shining from the west; that the defendant was negligent in this respect: (1) He did fail to keep a proper lookout for other vehicles on the roadway ahead of him; (2) he did change the course of travel of his motor vehicle by making a left turn without first ascertaining that such movement could be made in safety; and (3) he did fail to yield the right of way to another motor vehicle which had established itself within the intersection; and that the negligence of defendant in the operation of his car was the sole proximate cause of the collision and damage to plaintiff's automobile. Plaintiff's evidence tended to show the following facts: That there is no traffic control for vehicles in this intersection; that defendant said at the time and scene of the collision to an officer that he was blinded by the sun and he did not see plaintiff's automobile. Plaintiff testified in substance that as he approached the intersection he looked to his left and was able to see across the intersection and down into Main Street east of the intersection; that the last time he looked to the left was just before he took his eyes off the street and got ready to turn; that before the accident he looked the defendant's way and it was clear, and that he first saw the defendant out of the corner of his eye a second before the impact; that he was going anywhere from "7, 8, 9, or 10 miles an hour." The right front of defendant's car struck the left front of plaintiff's car. Plaintiff's car was hit on

the left as he was making a right turn into South Maple Street. He was fixing to straighten up on Maple Street when he was hit.

It seems clear that the collision occurred within the terms of the definition of an intersection set forth in G.S. 20-38(12). *Goss v. Williams,* 196 N.C. 213, 145 S.E. 169.

Defendant testified that he was in the intersection first and was not blinded by the sun. It is hornbook law that defendant's evidence which tends to impeach or contradict plaintiff's evidence will not be considered on a motion for judgment of compulsory nonsuit. 4 Strong's N. C. Index, Trial, § 21.

Taking plaintiff's evidence as true and considering it in the light most favorable to him, and giving him the benefit of every fact and inference of fact pertaining to the issues which may be reasonably deduced from the evidence, 4 Strong's N. C. Index, Trial, § 21, it would permit a jury to find that defendant drove into this intersection of Main Street and Maple Street when plaintiff was in the intersection first, G.S. 20-155(b), when defendant was blinded by the sun and could not keep a proper lookout for other vehicles on the roadway ahead of him, and that he failed to allow the right of way to another motor vehicle which had established itself within the intersection before he entered, G.S. 20-155(b), and that the defendant was guilty of actionable negligence.

Whether a motorist, at a given time, was keeping a reasonably careful lookout to avoid danger is ordinarily an issue of fact to be determined by a jury. *Peeden v. Tait,* 254 N.C. 489, 119 S.E. 2d 450. Whether a nonsuit on the ground of contributory negligence should be granted or whether the issues should be submitted to the jury must be determined in accordance with the facts of each particular case. *Carrigan v. Dover,* 251 N.C. 97, 110 S.E. 2d 825. Nonsuit on the issue of contributory negligence should be denied when the relevant facts are in dispute or opposing inferences are permissible from plaintiff's proof. 3 Strong's N. C. Index, Negligence, § 26. The evidence favorable to plaintiff must be taken as true and considered in the light most favorable to plaintiff. Strong, *ibid.* Since the burden of proof on the issue of contributory negligence is upon defendant, nonsuit on the ground of contributory negligence should be allowed only when plaintiff's own evidence, taken in the light most favorable to him, so clearly establishes this defense that no other reasonable inference or conclusion can be drawn therefrom. Strong, *ibid.* Considering plaintiff's evidence in the light of the accepted rule in passing upon a motion for judgment of compulsory nonsuit on the ground of plaintiff's contributory negligence, it is our opinion, and we so hold, that plaintiff has not proved himself out of

court. *Lincoln v. R. R.*, 207 N.C. 787, 178 S.E. 601. The court properly submitted the case to the jury.

The judgment of Judge Carr is

Affirmed.

STATE OF NORTH CAROLINA v. LONNIE BENGE.

(Filed 13 December, 1967.)

1. Homicide § 6—

Manslaughter is the unlawful killing of a human being without malice and without premeditation or deliberation.

2. Homicide § 9—

While ordinarily a person free from fault is under no duty to retreat when attacked in his own home, regardless of the character of the assault against him, even so, he may not use excessive force in repelling the attack and overcoming his adversary

3. Homicide § 20—

Evidence permitting inferences that deceased came to the home in which defendant resided, renewing threats against defendant, the defendant armed himself with a pistol, went to the door and shot deceased, that defendant followed deceased outside defendant's habitation and shot him at least three times as deceased lay on the ground, and that defendant admitted that he never saw a weapon in deceased's hands, *is held* sufficient to sustain conviction of manslaughter, since it tends to show that defendant used excessive force in repelling the attack.

APPEAL by defendant from *Campbell, J.*, February 1967 Session of CALDWELL.

Defendant was charged under a bill of indictment with first degree murder. Upon call of the case the Solicitor elected to try defendant for second degree murder or manslaughter, as the evidence might warrant. Defendant entered a plea of not guilty.

The State's evidence tended to show that on the night of 13 August 1966, defendant was at the home of his sister and her husband, where he resided. Shortly after 11:00 P.M. Tom Spears, the deceased, came to the front door, a transparent storm door, and made threats against the life of defendant, who was sitting in the living room inside the front door. Defendant's sister saw Tom Spears open the door and defendant jump up and go to the door. She heard two shots, but did not know who had fired them. Her husband, Andrew Spears, father of deceased, was in the bedroom at the time and heard three or four shots fired in rapid succession.

Tom Spears was found lying in the yard in front of the door stoop. Andrew Spears looked out the front door and saw defendant standing by his car. He then heard a shot, saw defendant fall and the gun pitch out of defendant's hand. Andrew Spears picked up the 38 special Smith and Wesson, the only weapon he saw, and gave it to officer Kenneth Huss when he arrived.

Huss, a member of the Police Department of the town of Hudson, was about a third of a mile away at the time of the shooting. He testified that he heard four rapid-fire shots and then another shot fifteen or twenty seconds later. At the scene, Huss examined the clothing and contents of Tom Spear's pockets and found no weapon. Huss turned the pistol over to Charles E. Whitman of the S. B. I.

Charles E. Whitman stated that the pistol had been in his possession since the incident and that it had five spent cartridges and one live cartridge in the chamber. Whitman's examination of the scene revealed evidence of blood on the door stoop and blood stains on the door facing on the inside of the storm door. He also observed blood on a rumpled door mat, located at the door, and was of the opinion that the mat had been used to wipe up blood. Andrew Spears denied that he or his wife had wiped up any blood with the door mats. In Whitman's opinion, when he arrived at the scene Tom Spears was dead.

Dr. Paul Tilley, Caldwell County Coroner, testified that he had examined Tom Spear's body and found four wounds, all near the mid-line of the chest, apparently gunshot wounds, which, in his opinion, caused death.

At the conclusion of the State's evidence, defendant's motion for nonsuit was denied.

Defendant, Lonnie Benge, testified in substance as follows: He was married with five children but was separated from his wife at the time of the alleged offense. He had not lived with his wife from March to August 1966, but had visited his children at his wife's home during that period. During those visits, Tom Spears was at defendant's wife's house and told defendant not to come there and had threatened to kill him. On the night of 13 August 1966, defendant saw Tom Spears sitting in a car with defendant's wife at her house. Defendant conversed with his wife concerning the whereabouts of his daughter. As defendant started to leave, Tom Spears threatened to kill him. Defendant then drove straight home. Defendant, while standing in the living room, saw Tom Spears approach in his car and stop outside. Spears appeared to get something out of the dash of his car. Defendant stated that he thought Spears was coming to kill him, and that he got a gun out of the dresser

drawer, but did not intend to kill Spears. Defendant sat down in a chair and laid the gun beside him. Tom came to the door and said: "Lonnie, I have come here to get you tonight. Tonight is going to be the night." Defendant replied that he wanted no trouble, but Spears repeated his threat. Spears was reaching in his hip pocket, but never took anything out of his pocket. He threatened to kill defendant again and jumped at the storm door. Defendant stated: "I got up, and I got that gun, and he started in there. I told him not to come. He started in there anyway. I shot him." Spears fell in the yard, and when defendant stepped off the steps, he fell on top of Spears. Spears got hold of the gun and shot defendant, and as they scuffled defendant got the gun from Spears and shot him two or three more times. Defendant stated that he did not shoot himself, that he blacked out after he got up off of Spears. He stated that he did not see Spears with a weapon and that Spears never got inside the house.

At the conclusion of all the evidence defendant renewed his motion for nonsuit, which was denied.

The jury returned a verdict of guilty of manslaughter. Defendant's motion to set aside the verdict was overruled and judgment was entered on the verdict.

Defendant appealed.

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

Ted G. West for defendant.

PER CURIAM. Defendant contends the court erred in denying his motion for nonsuit at the close of all the evidence.

Manslaughter is the unlawful killing of a human being without malice and without premeditation or deliberation. *State v. Street,* 241 N.C. 689, 86 S.E. 2d 277.

Defendant cites the case of *State v. Johnson,* 261 N.C. 727, 136 S.E. 2d 84, to support his position. This case correctly states the law as follows:

> "Ordinarily, when a person who is free from fault in bringing on a diffculty, is attacked in his own home or on his own premises, the law imposes on him no duty to retreat before he can justify his fighting in self defense, regardless of the character of the assault, but is entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault and secure himself from all harm. *This, of course, would not excuse the defendant if he used ex-*

cessive force in repelling the attack and overcoming his adversary. State v. Francis, 252 N.C. 57, 112 S.E. 2d 756; *State v. Frizzelle,* 243 N.C. 49, 89 S.E. 2d 725." (Emphasis ours.)

In the instant case defendant admits shooting deceased with a pistol and further admits that he never saw a weapon in deceased's hand. There is other evidence from which it can be inferred that defendant's repeated firing was unnecessary to his own self-defense, and that defendant followed deceased outside his habitation and shot him at least three times as he lay on the ground.

In order to make good the plea of self-defense, the force used must be exerted in good faith to prevent the threatened injury and to repel, but the question of excessive force is to be determined by the jury. *State v. Cox,* 153 N.C. 638, 69 S.E. 419. Considering the evidence in the light most favorable to the State, we hold that the trial judge properly overruled defendant's motion for nonsuit at the close of all the evidence.

Patently, the State's evidence is of sufficient probative force to sustain the verdict, and the assignment of error to the court's refusal to set the verdict aside for lack of evidence is overruled.

No error.

STATE OF NORTH CAROLINA v. RALPH ODELL WRIGHT.

(Filed 13 December, 1967.)

1. Constitutional Law § 36; Criminal Law § 138—

The fact that the trial court recommended that defendant be allowed to serve under the Work Release Program in a sentence imposed in one case but that it failed to make such recommendation in a sentence of imprisonment imposed the same day in another case, the two sentences to run consecutively, does not constitute cruel and unusual punishment, since G.S. 148-33.1 authorizes but does not require the court to recommend that the prisoner be granted the privilege of the Work Release Program in each case.

2. Same—

A defendant may not contend that consecutive sentences entered by the court in two separate cases constitute cruel and unusual punishment when the sentences are within the limits of the applicable statute, since the court has authority to provide that such sentences run consecutively.

APPEALS by defendant from *Clark, S.J.,* (erroneously shown in the record as Shaw, J.) at the 1 May 1967 Criminal Session of GUILFORD, High Point Division.

Two entirely separate cases were commingled by the appellant for the purposes of this review. There are two assignments of error. The first relates to one case, the second to the other.

In the first case (Superior Court Docket 3984), Wright was charged in an indictment, proper in form, with the felonious breaking and entering of a building occupied by Masland Duraleather Company in High Point on 24 October 1966, and, in a second count of the same indictment, with the larceny from the said building of 220 rolls of plastic upholstery material belonging to the company. At the 13 March 1967 Session, he entered a plea of not guilty and the trial of the case was begun, Armstrong, J., presiding. In the course of the trial, through his court appointed counsel, he withdrew the plea of not guilty and entered a plea of guilty to "receiving stolen goods valued at less than Two Hundred Dollars ($200), a misdemeanor, as upon a true bill found," he having waived the finding and return by the grand jury of a bill of indictment charging that offense and consenting to the hearing and disposition of the matter upon an information. The information, which was read and explained to him, charged him with feloniously receiving 220 rolls of plastic upholstery material of the value of $11,100 belonging to the said company, he knowing at the time that they had been feloniously stolen. Before permitting the defendant to enter such plea and the solicitor to accept it, the presiding judge questioned the defendant at length concerning his understanding of the charge and his desire to so plead. By consent of the defendant, prayer for judgment was continued to the 10 April Criminal Session. Judgment in this case was actually pronounced on 4 May 1967, at which session of the superior court, Clark, S.J., presided. The record discloses no reason for this delay in the entry of the judgment. The defendant did not object thereto and does not now do so. Judgment was entered that the defendant be confined in the common jail of Guilford County for 18 months, to be assigned to work under the supervision of the State Prison Department.

In the second case (Superior Court Docket 4600), Wright was charged in an indictment, proper in form, with felonious breaking or entering a building occupied by named partners trading as West Fairfield Superette, in High Point, on 6 March 1967, with the larceny, after so breaking and entering, of property of the partners of the value of $234.47 and with receiving such property knowing it to have been stolen. This case came on for trial before Clark, S.J., on 4 May 1967 at the same time the case above mentioned was before the court for judgment, Wright being represented in both matters by the same court appointed counsel. In this case, he tendered a plea of guilty to misdemeanor breaking and entering and larceny,

which pleas were accepted, the count charging receiving being abandoned. Thereupon, the counts charging breaking or entering and larceny in this case (Superior Court Docket 4600) were consolidated for judgment, and judgment was entered that the defendant be confined in the common jail at Guilford County for two years, to be assigned to work under the supervision of the State Prison Department, this sentence to run consecutively with the sentence imposed in the first case (Superior Court Docket 3984).

Thereupon, after the imposition of the sentences in the two cases, but on the same day, the court made the following entry in the second case (Superior Court Docket 4600), no such entry being made in the first case (Superior Court Docket 3984):

> "The defendant appeared back in open court and asked that he be allowed to serve his sentences under the Work Release Plan. The court questioned this defendant at length about his willingness to enter such plea as has heretofore been recorded, and defendant stated in open court that he was satisfied with the treatment he had received from his court appointed counsel, as well as the sentences imposed, and that he understood, and still wished his plea recorded. The court recommends that the defendant be given the option of serving the sentence herein imposed under the Work Release Plan, *in this case.*" (Emphasis added.)

Thereafter, on 12 May 1967, the defendant notified the clerk of the superior court that he desired to appeal in both cases. Shaw, J., then presiding, thereupon found that the notice of appeal was given in due time and allowed the same, appointing new counsel to represent the defendant upon the appeal.

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

Haworth, Riggs, Kuhn & Haworth for defendant appellant.

PER CURIAM. The defendant assigns as error the failure of the court in the first case (Superior Court Docket 3984) to recommend that the defendant be given the option of serving the sentence in that case under the Work Release Plan, contending that this constitutes cruel and unusual punishment. This assignment is without merit. G.S. 148-33.1 authorizes but does not require the presiding judge of the sentencing court to recommend that the prisoner be granted the privilege of the Work Release Program in such case. It appears from the record that the presiding judge, having imposed sentences in the two separate cases and having provided that the

sentence in the second case should commence upon the expiration of the sentence in the first case, saw fit to recommend that the defendant be given the privileges of the Work Release Program in the second case only; that is, after he had completed the service of the sentence imposed in the first case. This was within the discretion of the trial judge.

The remaining assignment of error is that in the second case (Superior Court Docket 4600) the sentence was imposed to commence at the expiration of the sentence imposed in the first case (Superior Court Docket 3984), the defendant contending that this constitutes cruel and unusual punishment. The sentence of two years in jail cannot be deemed cruel and unusual *per se*. Obviously, it is not unlawful to provide that a sentence imposed for a criminal offense shall begin to run at the expiration of a sentence previously imposed in another case for a different criminal offense. *State v. Dawson*, 268 N.C. 603, 151 S.E. 2d 203.

No error.

VIRGINIA R. KING, PLAINTIFF, v. JOHN J. HIGGINS AND T & A TRUCKING COMPANY, A CORPORATION, DEFENDANTS.

(Filed 13 December, 1967.)

1. Damages § 3—

When negligence produces some actual physical impact or genuine physical injury, damages may be recovered also for mental or emotional disturbance naturally and proximately resulting therefrom.

2. Damages § 16—

In a personal injury action, an instruction that the plaintiff, if entitled to recover at all, was to be awarded as damages one compensation in a lump sum for all injuries, past and prospective, caused by defendant's wrongful act, including loss of both bodily and mental powers or for actual suffering both of body and mind, *held*, without error.

3. Appeal and Error § 50—

A party may not complain of an asserted error in the charge when the instruction complained of is embodied in almost the identical language in his own request for instructions.

4. Trial § 38—

The court is not required to charge the jury in the precise language of the instructions requested so long as the substance of the request is included in the charge.

5. Damages § 16—

The failure of the court to define mental suffering as including embarrassment, mortification, and disfiguring or humiliating injuries, as requested by plaintiff in her prayer for instructions, is not error in the absence of any evidence that plaintiff had undergone this type of mental suffering.

6. Trial § 38—

The court may properly refuse a requested instruction which is not a correct statement of the law applicable to the evidence, and the court is under no duty to modify or qualify it so as to remedy the defect therein.

APPEAL by plaintiff from *Crissman, J.*, at the 6 March 1967 Civil Session of GUILFORD.

The plaintiff sues for personal injuries and property damage alleged to have been sustained by her when her automobile, which she was driving, was struck from the rear by a truck, owned by the corporate defendant and driven by the individual defendant in the course of his employment. The jury found in favor of the plaintiff upon the issue of negligence and awarded her $1,300 for damage to her automobile and $12,500 for her personal injuries. Judgment was entered in accordance with the verdict. The plaintiff seeks a new trial upon the issue of damages only and assigns as error the charge of the court upon the question of damages recoverable for personal injury, the failure of the court to give the instruction requested by the plaintiff upon this question, and the failure of the court to declare and explain the law arising upon the evidence as required by G.S. 1-180.

There was evidence tending to show that the plaintiff sustained what is commonly called a whiplash injury to her neck and back. The plaintiff testified to substantial and continuing pain and weakness in her arm and back, continuing headaches, her inability to perform work which she had previously done, and substantial restrictions upon her ability to move various parts of her body. She offered medical testimony attributing these pains and disabilities to the injury received by her in this collision and the testimony of a psychiatrist that she suffered from a "depressive reaction" which was "nearly completely incapacitating to her," which had a 30 per cent chance of permanency and which the psychiatrist believed "was related to the accident in which she was involved," although there are many other possible causes of such condition.

The plaintiff assigns as error the following instruction upon the question of damages for personal injury:

> "Now, the Court charges you that in cases like this one, if the Plaintiff be entitled to recover at all, that she is entitled to

recover as damages one compensation in a lump sum for all injuries, past and prospective, in consequence of the defendants' wrongful act. Now, these are understood to embrace indemnity for actual nursing and medical expenses and loss of time from inability to perform ordinary labor or capacity to earn money. The plaintiff is to have a reasonable satisfaction, if she be entitled to recover at all, for loss of both bodily and mental powers or for actual suffering both of body and mind which are the immediate and necessary consequences of the injury that she sustained in this accident or in this collision, and it is for you, members of the jury, to say under all the circumstances what is a fair and reasonable sum which the defendants should pay the plaintiff by way of compensation for the injury that she sustained."

This portion of the charge to the jury is virtually a verbatim quotation of the first portion of the plaintiff's requested instruction on this issue. The court further instructed the jury that it was to consider the age of the plaintiff, her life expectancy as shown in the Mortuary Tables, the nature of the work and value of her services at the time of her injury, "along with the other evidence in arriving at what would be fair and reasonable compensation to her." The court then reviewed the contentions of the parties as to the nature and extent of the plaintiff's injuries and pain and resulting inability, past and prospective, to work as she did prior to the collision, and as to the expenses incurred by her as a consequence of such injury.

Hines and Dettor for plaintiff appellant.
Smith, Moore, Smith, Schell & Hunter for defendant appellee.

PER CURIAM. "It is almost the universal opinion that recovery may be had for mental or emotional disturbance in ordinary negligence cases where, coincident in time and place with the occurrence producing the mental stress, some actual physical impact or genuine physical injury also resulted directly from defendant's negligence." *Williamson v. Bennett,* 251 N.C. 498, 112 S.E. 2d 48. See also *King v. Britt,* 267 N.C. 594, 148 S.E. 2d 594. In the present case the jury was instructed that the plaintiff, if entitled to recover at all, was to be awarded in a lump sum a fair and reasonable compensation for all of her injuries, past and prospective, including "actual suffering both of body and mind." There is no error in that portion of the charge quoted above in the statement of facts, to which the plaintiff excepted. It is in accord with the decision of this Court in

Mintz v. R. R., 233 N.C. 607, 611, 65 S.E. 2d 120. Furthermore, the plaintiff, having requested an instruction in almost the exact language used, cannot complain of it as error entitling her to a new trial. *Overton v. Overton*, 260 N.C. 139, 144, 132 S.E. 2d 349; *Carruthers v. R. R.*, 218 N.C. 377, 11 S.E. 2d 157.

The contention that the court did not give the remainder of the instruction requested by the plaintiff is also without merit. Much of such remainder of the requested instruction was given in substance though not in the precise language of the request. In this there was no error since the court is not required to charge the jury in the precise language of the request so long as the substance of the request is included in language which does not weaken its force. *Dinkins v. Booe*, 252 N.C. 731, 114 S.E. 2d 672; *Lloyd v. Bowen*, 170 N.C. 216, 86 S.E. 797.

It was not error for the court to refuse to give the definition of "mental suffering" contained in the request. The definition or explanation of the term so requested included, among other things, "mortification", "embarrassment", "humiliation", "grief," and "disfiguring or humiliating" injuries. The plaintiff did not testify to any feeling or humiliation or embarrassment as a result of her injuries, and since there was no evidence of any disfiguring injury, there was no basis for an implication of this type of mental suffering such as was present in *King v. Britt, supra.* There being no evidence of this type of mental suffering, the plaintiff was not entitled to her request that the jury might consider it in determining the amount to be awarded as damages. A requested instruction which is not, in its entirety, a correct statement of the law applicable to the evidence may be refused, the court being under no duty to modify or qualify it so as to remedy the defect therein. *Horse Exchange v. R. R.*, 171 N.C. 65, 87 S.E. 941; *Edwards v. Telegraph Co.*, 147 N.C. 126, 60 S.E. 900.

The charge of the court below, considered in its entirety, properly states the measure of damages and the elements of the plaintiff's injury to be considered by the jury in the light of the evidence in the record. We find in it no error which would justify a new trial.

No error.

STATE OF NORTH CAROLINA v. MORRIS ROBINSON.

(Filed 13 December, 1967.)

1. Homicide § 20—

Evidence in this case held sufficient to be submitted to the jury on the issue of defendant's guilt of murder in the second degree.

2. Criminal Law § 85—

Where a defendant takes the stand as a witness, he is subject to cross-examination as to convictions for prior criminal offenses for the purpose of impeachment.

3. Same—

Where defendant, on cross-examination, states positively that his criminal record consists of only two convictions, the State may question defendant further and may properly elicit from him, for purposes of impeachment, that he had also been convicted of other offenses, subject, however, to the qualification that had defendant denied the additional convictions the denial could not be contradicted.

4. Criminal Law § 163—

An assignment of error to a portion of the charge containing a number of propositions must fail if the charge is correct as to any one or more of them.

APPEAL by defendant from *Froneberger, J.*, 6 February 1967 Special Criminal Session of MECKLENBURG. *Certiorari* allowed 20 September 1967.

Defendant was tried and convicted upon a bill of indictment which charged that he did unlawfully, willfully, feloniously, and with malice, kill and murder Richard N. Adams. The State's evidence tended to show:

On Saturday, 22 October 1966, at about 12:45 a.m., 250 persons were at the Hi-Fi Country Club in Charlotte, where a band was playing. Richard N. Adams was standing beside the air conditioner and William Chisholm, the operator of the club, was standing about 12 feet from Adams. Chisholm observed defendant cross the room, walk up to Adams and, without a word, shoot him in the left chest. As a result of the bullet wound, Adams died from a massive hemorrhage. Chisholm, who had seen Adams do nothing, grabbed defendant and asked why he shot Adams. Defendant, without replying, broke away from him and ran toward the door. As Chisholm pursued him two Charlotte policemen, R. E. Simmons and T. C. Barret, who also worked as security officers at the Hi-Fi Club, came through the door. Chisholm told them to arrest defendant, that he had just shot a man. The two officers took defendant into custody and removed from his right front pocket a .22 caliber pistol containing one spent bullet. After the arrest, a woman, who falsely rep-

resented herself to be defendant's wife, demanded permission to talk to him. She asked defendant what had happened, and he replied that he had to shoot someone. In answer to her inquiry why he had shot "this person," defendant "said that this person had taken $30.00 from him and he was not letting any person take his money and get away with it."

Defendant's evidence tended to show that at the time of the shooting Adams was at a table with four or five others. Ten minutes before the shooting Adams had been sitting there cleaning his nails with a knife. Defendant, testifying in his own behalf, gave this version of the shooting: He went over to Adams' table and asked for money which Adams owed him. Adams said that he was not going to give defendant any more money, and they argued about it 5-10 minutes. Defendant then left and visited several other tables, passing and repassing Adams' table a number of times. When Adams told him to quit walking by his table, defendant passed on without comment. He returned in a short time, however, to tell Adams that he had paid his entrance fee and that he would walk through the aisle as much as he liked. Defendant then renewed his demands for money. Adams again refused to pay him and ordered him away from the table. Defendant leaned across the table toward Adams and the two cursed each other for two or three minutes during which time Adams remained seated. However, "he got mad and that is when he went in his pocket. . . . He did not get quite out of his chair, at that particular moment. When he brought his hand out of his pocket he started up. I saw a knife in his hand. . . . The pistol came from my pocket. I went into my pocket to get the pistol because he went to his pocket. . . . I know his reputation, it is violent. I was standing up at the time that I fired the pistol. After the shooting . . . I did not move for . . . a few seconds. I then stepped over Adams, I came back down the aisle. . . . The officers stopped me at the front door."

The jury found defendant guilty of murder in the second degree as charged in the bill of indictment. From the prison sentence imposed, he appealed.

T. W. Bruton, Attorney General; Ralph Moody, Deputy Attorney General, for the State.

Peter H. Gerns for defendant appellant.

PER CURIAM. The statement of facts discloses the sufficiency of the evidence to withstand defendant's motion for nonsuit, and a careful consideration of each of defendant's assignments of error discloses no prejudicial error.

On cross-examination, after defendant had stated positively that his criminal record consisted of only one conviction of larceny and one conviction of assault, over his objection, the solicitor elicited from him the admission that he had also been convicted of store-breaking and larceny, larceny of an automobile, hit and run, operating a motor vehicle without an operator's license, larceny of automobile tires, trespass and larceny, and simple assault. Defendant's contention that the State was bound by his first statement that he had been convicted only of larceny and assault is without merit. The solicitor had the right "to sift the witness." *State v. King,* 224 N.C. 329, 30 S.E. 2d 230. For the purpose of impeachment, defendant was subject to cross-examination as to convictions for prior criminal offenses. *State v. Norkett,* 269 N.C. 679, 153 S.E. 2d 362. Had defendant denied that he had been convicted of the additional charges when the solicitor questioned him about them, his denial could not have been contradicted by the record of his convictions, *State v. King, supra;* Stansbury, N. C. Evidence § 48 (2d Ed., 1963). Defendant, however, admitted the convictions.

Defendant's assignment of error 14-A, which is based upon a broad side exception, involves three full pages of the charge dealing with the law of self-defense. An assignment of error must be based upon an exception which points out some specific part of the charge as erroneous, and an exception to a portion of a charge embracing a number of propositions is insufficient if anyone of the propositions is correct. *Doss v. Sewell,* 257 N.C. 404, 125 S.E. 2d 899; *State v. Lambe,* 232 N.C. 570, 61 S.E. 2d 608. We have, however, considered the entire charge. In it we find no error which, in our opinion, could reasonably be supposed to have prejudiced defendant.

In the trial, we find

No error.

STATE v. JIMMY WILLIAMS.

(Filed 13 December, 1967.)

1. Criminal Law § 166—

An assignment of error not brought forward and referred to in the brief is deemed abandoned. Rule of Practice in the Supreme Court No. 28.

2. Assault and Battery § 14—

Evidence in this case *held* sufficient to support conviction of defendant of assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death.

3. Criminal Law § 85—

Cross-examination of defendant in regard to previous offenses committed by him are competent solely for the purpose of impeaching his credibility as a witness, but where defendant does not request the court to instruct the jury to consider such testimony solely for the purpose for which it is competent, an exception thereto cannot be sustained.

4. Criminal Law § 95—

Where evidence competent for a restricted purpose is offered generally, it is incumbent upon the opposing party to request the court to restrict its admission. Rule of Practice in the Supreme Court No. 21.

APPEAL by defendant from *Copeland, Special Judge,* May 1967 Session of NEW HANOVER.

Defendant was tried on a bill of indictment charging that defendant, on September 27, 1966, committed a felonious assault on one Delores Summers, to wit, an assault with a deadly weapon (shotgun) with intent to kill inflicting serious injuries not resulting in death, the felony created and defined by G.S. 14-32.

Defendant, an indigent, was represented at trial and is represented on appeal by court-appointed counsel.

Evidence was offered by the State and by defendant. Defendant's evidence consists solely of his testimony.

Evidence for the State tends to show the following: Defendant, who resided in Onslow County, and David Moore, who resided in Pender County, drove to Wilmington, N. C., in Moore's car. In Wilmington, they met Delores Summers and her friend, Brenda Burnett, in "a little joint" called Anchors Inn. Upon leaving Anchors Inn, they went to White Front Grill; and thereafter they rode around in Moore's car. Brenda got out and went to her home. Delores, refusing defendant's insistent request that she go to Jacksonville with him, got out of the car and started towards her home. When she had walked twenty-five feet from him, defendant, using "a little sawed-off shotgun," shot Delores in the back. Shotgun pellets made "approximately 125 puncture wounds in her body," and extended from her knee joint "right up to the top of her head." Delores made her way to the porch of a nearby house. The residents of the house found her, bleeding, "lying in the door, with her head against the door . . ." She was taken to the hospital by a police officer. There she received emergency treatment, which included the removal of some, although not all, of the pellets. Defendant and Moore left the scene immediately after the shooting.

Defendant's testimony is to the effect Moore had become angry with Delores; that Moore brought out the shotgun and threatened to shoot Delores; that he, in order to prevent this, scuffled with Moore for possession of the shotgun; and that the shotgun discharged

accidentally and thereby inflicted the injuries to the back of Delores. Moore was not a witness. He was "supposed to be in New York" and could not be reached.

The jury returned a verdict of "guilty as charged in the bill of indictment," and the court pronounced judgment imposing a prison sentence of not less than five nor more than seven years. Defendant excepted and appealed. Thereupon, the court ordered that New Hanover County pay the necessary costs incident to perfecting defendant's appeal.

Attorney General Bruton and Staff Attorney Vanore for the State.
O. K. Pridgen, II, for defendant appellant.

PER CURIAM. The assignment of error directed to the court's denial of defendant's motion for judgment as in case of nonsuit is not referred to in defendant's brief and therefore, under our Rule 28, is taken as abandoned by defendant. The assignment was without merit and rightly considered so by defendant's counsel.

The only assignment of error brought forward by defendant and discussed in his brief relates to testimony, elicited on cross-examination of defendant, relating to prior *convictions* of defendant for unrelated criminal offenses.

Defendant testified, but did not otherwise put his character in issue. For purposes of impeachment, he was subject to cross-examination as to convictions for unrelated prior criminal offenses. However, admissions as to such convictions are not competent as substantive evidence but are competent as bearing upon defendant's credibility as a witness. Stansbury, North Carolina Evidence, Second Edition, § 112; *State v. Sheffield,* 251 N.C. 309, 312, 111 S.E. 2d 195, 197. Under these circumstances, defendant was "entitled, *on request,* to have the jury instructed to consider (this evidence) only for the purposes for which it is competent." (Our italics.) Stansbury, *op. cit.,* § 79; *State v. Norkett,* 269 N.C. 679, 153 S.E. 2d 362. Defendant assigns as error the court's failure to so instruct the jury with reference to defendant's admissions as to his prior criminal convictions; but, defendant having failed to request that the court so instruct the jury, the assignment is without merit.

"It is a well recognized rule of procedure that when evidence competent for one purpose only and not for another is offered it is incumbent upon the objecting party to request the court to restrict the consideration of the jury to that aspect of the evidence which is competent." *State v. Ray,* 212 N.C. 725, 729, 194 S.E. 482, 484. This is in accord with our Rule 21 which, in pertinent part, provides: ". . . nor will it be ground of exception that evidence competent

for some purposes, but not for all, is admitted generally, unless the appellant asks at the time of admission, that its purpose shall be restricted." Rules of Practice in the Supreme Court, 254 N.C. 783 *et seq.*

Defendant having failed to show prejudicial error, the verdict and judgment will not be disturbed.

No error.

STATE OF NORTH CAROLINA v. ELIJAH STRATER, JR.

(Filed 13 December, 1967.)

1. Assault and Battery § 14—

Evidence in this case held sufficient to support conviction of defendant of assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death.

2. Assault and Battery § 8— Instruction on right of self-defense held erroneous.

Where the evidence discloses that defendant was an employee of a dance hall, that a dispute arose between another employee and a patron, that defendant went to the scene and, only after the patron had fired one shot and was attempting to fire another, did defendant hit the patron with a baseball bat, it is error for the court to charge the jury that it is the duty of a person assaulted other than in his home to retreat as far as he can with reference to his own safety before acting in self-defense, since on the evidence, viewed in the light favorable to defendant, defendant is entitled to a charge that if defendant did not bring on the difficulty and was assaulted with a deadly weapon he was entitled to repel the assault, provided he did not use excessive force.

APPEAL by defendant from *Hobgood, J.*, July, 1967 Criminal Session, GRANVILLE Superior Court.

In this criminal prosecution, Elijah Strater, Jr. was indicted, tried, convicted by the jury, and sentenced by the Court to a term of 3 to 5 years in the State's prison. The indictment charged a felonious assault on Arthur Walker with a deadly weapon, to wit, a baseball bat, with intent to kill, inflicting serious injury not resulting in death.

The State's evidence disclosed that Elijah Strater, Jr. and Jessie Marrow were employed by a dance hall operator in Granville County. On the night of March 11, 1967 Arthur Walker, with two companions, attended a dance. A dispute arose between Walker's companion, Willie Thornton, and Jessie Marrow over the former's admission fee. The argument took place on the platform near the door. Walker

went to the platform and offered to pay Thornton's admission fee. Marrow refused to receive it. During the argument Strater picked up a baseball bat and struck Walker on the head. Walker was unconscious for 5 hours, remained in the hospital for 3 weeks, has not been able to work since, and has lost the sight in one eye. Walker and another witness testified Walker was unarmed.

The defendant, Strater, testified he went to the platform after the argument began and that Walker drew a pistol, fired a shot at him which creased his face, and was attempting to shoot again when the defendant picked up the bat and used it in his self defense. He offered a witness who corroborated his story, except that he did not hear the shot. About 100 people were in the hall and there was a lot of noise. One of the State's witnesses testified: ". . . I saw the pistol marked Defendant's Exhibit A lying right beside the piccolo and Walker. . . . I didn't see the pistol until after Walker was hit . . ."

From the judgment imposed on the verdict of guilty, the defendant appealed.

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

Hugh M. Currin for defendant appellant.

PER CURIAM. The defendant assigns as error the Court's refusal to direct a verdict of not guilty on the ground the evidence was insufficient to justify a conviction. The State's evidence made out a case of felonious assault. The defendant's evidence made out a case of self defense.

In the charge, the Court instructed the jury: "The laws of self-defense vary depending on whether a person is at his home, trying to protect his family and what not, but here we have the defendant in a place of business . . . but when you are other than in your own home when you are being assaulted you must retreat as far as you can do in reference to your own safety."

The evidence disclosed the defendant was an employee of Chavis Inn, where the dance was being conducted. When the disturbance began on the platform near the door, the defendant went to the scene. According to the State's evidence, he used the bat without any provocation. However, according to the defendant's evidence, he was assisting in preserving order and did not wield the bat until Walker had fired one shot and was attempting to fire again. At that instant the defendant used the bat. The defendant worked at the dance hall, but that was not his home. Nevertheless, if he was without fault in bringing on the difficulty, when he was assaulted

with the pistol, he had a right to stand his ground and repel force with force. He was within the law, so long as he used no more force than was reasonably necessary or which appeared to him to be reasonably necessary to repel the assault. *State v. Fowler,* 250 N.C. 595, 108 S.E. 2d 892.

The charge as quoted above denied the defendant the right to defend himself without first retreating. The Attorney General concedes, and we agree, the charge was erroneous because it did not state the proper rule to be applied if the jury should find the defendant did not bring on the difficulty, was assaulted with a deadly weapon, and did not use excessive force in resisting the assault. For the errors in the charge, the defendant is entitled to a

New trial.

STATE OF NORTH CAROLINA v. RIP ALSTON.

(Filed 13 December, 1967.)

1. Constitutional Law § 32—

Where a defendant, after full explanation of his rights, repeatedly refuses the court's offer to appoint him counsel as an indigent, the court may not force counsel upon him, and defendant's own evidence in this case held to disclose that he had ample mental capacity to determine the matter for himself.

2. Narcotics § 4—

Evidence in this case *held* amply sufficient to support defendant's conviction of illegal possession of marijuana on the dates specified in the indictments.

APPEAL by defendant from *Burgwyn, E.J.,* July 1967 Criminal Session (Conflict) DURHAM Superior Court.

The defendant was charged in two similar indictments with the violation of G.S. 90-88 in that he had illegal possession of marijuana on December 19 and December 21, 1966. With his consent, the cases were tried together and verdicts of guilty were returned. Upon judgments of five (5) years' imprisonment in both cases, running concurrently, the defendant appealed.

M. Hugh Thompson, Court-appointed Counsel for defendant appellant.

T. W. Bruton, Attorney General, and James F. Bullock, Deputy Attorney General.

PER CURIAM. When the defendant came before the Bar, the presiding judge was most solicitous. He emphasized that the defendant was entitled to an attorney and did everything but force the defendant to accept the services of court-appointed and expense-free counsel. The defendant was emphatic in his refusal. He told the Court that "[he] could do it [defend himself] as well as any lawyer." The Court then apparently reluctantly permitted the defendant to go to trial after having made findings in full compliance with *Johnson v. Zerbst,* 304 U.S. 458, 58 S. Ct. 1019, 82 L. ed. 1461, and *Powell v. Alabama,* 287 U.S. 45, 53 S. Ct. 55, 77 L. ed. 158.

The gist of all these rulings is concisely stated in *Gideon v. Wainwright,* 372 U.S. 335, 83 S. Ct. 792, 9 L. ed. 2d 799:

> "Counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived."

In *State v. Pritchard,* 227 N.C. 168, 41 S.E. 2d 287, Chief Justice Stacy said:

> "The defendant insisted on trying his own case, which he had every right to do under the statute. G.S. 1-11. He proved to be a poor lawyer and an unwise client."

In *State v. McNeil,* 263 N.C. 260, 139 S.E. 2d 667 and *State v. Bines,* 263 N.C. 48, 138 S.E. 2d 797, we held that the constitutional right to counsel does not justify forcing counsel upon an accused who wants none.

To represent him in this appeal, the defendant has accepted the services of court-appointed counsel who urges that the defendant did not have sufficient intelligence to knowingly and understandingly waive the right to counsel. The defendant is a high school graduate, worked at a radio station, booked bands for dances, operated a business in Durham (Speedie Products), and is writing a religious book. His activities refute his lawyer's claim.

The evidence for the State tended to show that on December 19 the defendant delivered ten packages of marijuana to Gossie Hudson, for which he received $50.00. On December 21, he gave another package of marijuana to Hudson.

The defendant did not testify, and this was his right. Neither did he offer other witnesses to refute the State's evidence. He cross-examined the State's witnesses with some degree of skill, but left the evidence against him with no contradiction. It was quite sufficient to support the verdicts against him. His exception to the failure of the Court to set them aside is overruled.

In his trial, we find

No error.

DORIS P. DRIVER v. IRBY D. GILL AND WIFE, RHODA GILL.

(Filed 13 December, 1967.)

APPEAL by defendants from *Braswell, J.,* 19 May 1967 Civil Session of WAKE.

Plaintiff instituted this action for property damage and personal injuries which she allegedly sustained on 9 January 1965 in an intersection accident in Zebulon when the Cadillac automobile owned by defendant Rhoda Gill and operated by her husband, defendant Irby D. Gill, collided with the Chevrolet which plaintiff was operating. Plaintiff alleges that the collision was proximately caused by the negligence of Mr. Gill, who entered the intersection from a servient street without stopping in obedience to the stop sign which faced him.

Defendants deny that Mr. Gill was in anywise negligent. They aver that plaintiff's negligence was the sole proximate cause of the collision in that she approached the intersection at a high and unlawful rate of speed, without keeping a proper lookout, and in that she failed to yield the right-of-way to the Gill vehicle, which was first in the intersection. Defendants pleaded the contributory negligence of plaintiff and counterclaimed for damages to the Cadillac.

Plaintiff offered evidence tending to show: About 4:30 p.m., she was driving west on Sycamore Street, the dominant highway, at a speed of 20-25 MPH. As she approached the intersection of Sycamore and Church Streets, defendant Irby Gill, traveling north on Church Street at a speed of 45 MPH, also approached the intersection. The speed limit in this area was 25 MPH. The weather was clear, and the driver's view of the intersection was unobstructed. Defendant Irby Gill, without stopping in obedience to the stop sign which faced him, entered the intersection and struck the left side of plaintiff's automobile about the center of the intersection. When plaintiff first saw the Cadillac, it was about 1½-car lengths south of the stop sign. In the collision, the entire front end of defendants' automobile was damaged. Plaintiff received head, neck, arm, back, and knee injuries. Damage to her teeth and gums necessitated extensive dental work over a period of a year. Her medical bills were large, and she lost 5½ weeks from work. Her automobile was damaged in the sum of $1,350.00. At the time of the trial, two years after the accident, she continued to suffer from severe headaches two or three times a week, muscle spasms in her neck, and numbness and pain in her right arm which interfered with her housework.

Defendants' evidence tended to show: The automobile which Mr. Gill was driving was a family-purpose car, and he was driving it

with the permission of his wife, the owner. Traveling north on Church Street, he approached its intersection with Sycamore Street at a slow rate of speed. He stopped at the stop sign, which was located about 10 feet from the intersection. At that time, he observed plaintiff 150 feet to his right. She was approaching the intersection, traveling west on Sycamore Street at a speed of about 50 MPH and looking in the opposite direction toward a house. He proceeded into the intersection and the front of his car struck plaintiff's Chevrolet "approximately" at the rear door. His car was damaged to the extent of $750.00.

The court submitted to the jury the issues arising upon the pleadings. The jury answered the issues of defendants' negligence and plaintiff's contributory negligence in favor of plaintiff and awarded her $15,000.00 for personal injuries and $1,200.00 for damage to her automobile. The issues with reference to Mrs. Gill's counterclaim were not answered. From the judgment entered upon the verdict, defendants appealed.

Manning, Fulton & Skinner by M. Marshall Happer, III, for plaintiff appellee.

Broughton & Broughton by John D. McConnell, Jr., for defendant appellants.

PER CURIAM. Defendants' assignments of error all relate to the charge, which — considered as a whole, as all charges must be —, discloses that the court correctly applied the law to the evidence in the case. *Motor Co. v. Insurance Co.*, 220 N.C. 168, 16 S.E. 2d 847.

Plaintiff's testimony relating to her persistent headaches and other symptoms, and the testimony of the dental surgeon that she had nine teeth broken in the accident, justified the court's charge that the award of damages was to be made on the basis of a cash settlement of plaintiff's injuries, past, present and prospective. The charge on the measure of damages was in accord with the rule laid down by Stacy, C.J., in *Mintz v. R. R.*, 233 N.C. 607, 65 S.E. 2d 120.

The verdict in this case appears to have been in accord with the greater weight of the evidence, and in the trial, we find

No error.

STATE OF NORTH CAROLINA v. THOMAS E. CLARK.

(Filed 18 December, 1967.)

Constitutional Law § 32—

The fact that defendant is not represented by counsel at the preliminary hearing is not a deprivation of defendant's rights, there being the introduction of no admissions made by defendant on such preliminary hearing, nor the admission of any evidence prejudicial to defendant at such preliminary hearing.

APPEAL by defendant from *Campbell, J.*, May 15, 1967 Session, CALDWELL Superior Court.

The defendant was arrested on separate warrants charging: (1) the felonious breaking and entering into the City Flour and Feed Co. building on February 14, 1967 and larceny of goods of the value of less than $200; (2) the felonious breaking and entering into the Harper Furniture Company building on February 15, 1967 and larceny of goods of the value of more than $200; and (3) the felonious breaking and entering into the City Auto and Transmission Service building on February 23, 1967 with intent to steal personal property therein stored. The defendant waived a preliminary hearing and was bound over to Superior Court of Caldwell County. The Grand Jury, at the May, 1967 Session, returned bills of indictment charging the above designated felonies and two others of the same character involving different buildings.

Upon a showing of indigency, the Court appointed counsel to represent the defendant at the trials in the Superior Court. The defendant first entered pleas of not guilty to all charges. However, after the State had begun the presentation of its evidence, the defendant withdrew his pleas of not guilty and entered pleas of guilty in all cases. Before accepting the pleas, the Court conducted a thorough examination of the defendant under oath with respect to his change of pleas. The record fully sustains the Court's findings the pleas of guilty were freely, understandingly, and voluntarily made.

The Court, in Cases No. 67 CRD 1835, 67 CRD 1836 and 67 CRD 1838 imposed sentences of not less than 7 nor more than 9 years, to run concurrently. In Case No. 67 CRD 1837, prayer for judgment was continued for 5 years conditioned on good behavior. From the above sentences, the defendant appealed.

The record as first certified contained contradictory statements as to the defendant's pleas. Upon remand under this Court's order, the record in the Superior Court was corrected and as now certified shows that the defendant entered pleas of guilty. The corrections were certified here from the Superior Court under date of December 11, 1967.

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

Ted S. Douglas for the defendant.

PER CURIAM. As his sole ground for the appeal, the defendant alleges his constitutional rights were violated in that he was not afforded counsel at his preliminary hearing. As shown by the record, and the addendum thereto, the defendant was indicted in 5, or perhaps 6, cases, each charging felonies. Concurrent sentences of 7 to 9 years were entered by the Court. Neither at the preliminary nor at the trial did the State offer evidence of any admissions made by the defendant. Nothing prejudicial to him was shown to have taken place at any time. The assignment of error based on failure of the State to provide counsel at a preliminary hearing has been carefully considered and has been answered against the defendant's contention in *Gasque v. State*, 271 N.C. 323, 156 S.E. 2d 740.

This opinion was held up pending the correction of the Superior Court records. These corrections have been made and the opinion is released as of December 18, 1967.

No error.

STATE OF NORTH CAROLINA v. JOSIAH BISHOP, #1359 & 1360

AND

STATE OF NORTH CAROLINA v. RAYMOND L. BASKIN, #1361 & 1362

AND

STATE OF NORTH CAROLINA v. LESTER THOMPSON, #1363 & 1364

AND

STATE OF NORTH CAROLINA v. MACARTHUR MCCAIN, #1365 & 1366.

(Filed 12 January, 1968.)

1. Criminal Law § 75—

The test of the admissibility of a confession is whether the statements made by the defendant were in fact voluntarily and understandingly made.

2. Same—

That the defendant was in the custody of police officers at the time of making the confession is but a circumstance to be considered in determining the voluntariness of the confession and does not of itself render the confession incompetent.

3. Criminal Law § 76—

Upon challenge of the competency of a confession, the trial judge should excuse the jury, hear the evidence of the State and the defendant upon the question of whether defendant voluntarily and under-

standingly made the confession, and then make findings of fact, if the evidence be conflicting, to show the basis of his ruling in admitting the confession, and the court's findings which are supported by evidence are conclusive, but its conclusion of law from the facts found is reviewable.

4. Same—

The admissibility of a confession is to be determined by the facts appearing in evidence when it is received or rejected, and not by the facts appearing in evidence at a later stage of the trial.

5. Criminal Law § 75—

It has been the rule in this State for over 140 years that a confession obtained by the slightest emotions of hope or fear ought to be rejected.

6. Same—

The decision in *Miranda v. Arizona*, 384 U.S. 436, requires that a suspect in the custody of police officers must be warned, prior to interrogation, (1) that he has the right to remain silent, (2) that any statement made by him may be used as evidence against him in court, (3) that he has the right to counsel prior to and during the interrogation, and (4) that, if indigent, counsel will be appointed for him if he so desires.

7. Same— Confessions of defendants held voluntary and competent.

The evidence on the *voir dire* was to the effect that the defendants were informed of their rights under *Miranda v. Arizona* prior to interrogation on their first day in custody, that they did not make any statements at that time, with one defendant expressly declining to talk until he consulted a lawyer, that the defendants were not pressed for further statements that day, and that on the following day, after again being informed of their rights, they made inculpatory statements to the police officers. *Held:* The fact that the defendants declined to make any statements at their first interrogation does not render incompetent any subsequent statements made to police officers, it affirmatively appearing that the defendants were adequately advised of their constitutional rights at each interrogation, and that their statements were in fact freely made.

8. Criminal Law § 103—

Where police officers testify that the defendants made inculpatory statements to them, and the defendants deny the making of such statements, whether defendants made the statements and the weight, if any, to be given to such statements are solely for the determination of the jury

9. Searches and Seizures § 1—

Where the person in possession and control of an automobile voluntarily consents to the search of the vehicle, he cannot thereafter object to the admission of incriminating articles found therein.

10. Same—

Evidence in this case *held* sufficient to show a free and intelligent consent to the search of an automobile.

11. Criminal Law § 106—

The extra-judicial confession of guilt by a defendant must be supported by evidence *aliunde* the confession which establishes the *corpus delicti*, and such evidence may be circumstantial or direct.

12. Burglary and Unlawful Breakings § 5; Larceny § 7—

Evidence that a storehouse had been broken into, that a stolen truck was backed up to the entrance of the building, that the defendants were located in the nighttime a short distance from the building in an automobile, and that a search of the automobile revealed a wire cutter, a pistol, and a pair of wet shoes which fitted tracks along a ditchbank near the storehouse, *held* sufficient, when taken together with the confessions of the defendants, to go to the jury on the issue of defendants' guilt of larceny and of breaking and entering a storehouse.

APPEAL by defendants from *Cowper, J.*, March 1967 Criminal Session of NASH.

Defendants were tried under indictments charging larceny and receiving and breaking and entering.

The pertinent evidence offered in behalf of the State may be summarized as follows:

W. W. "Brownie" Pitt testified that he engaged in the business of renting trucks, trailers and cars at 301 W. Thomas Street in Rocky Mount, N. C. He rented GMC vans under agreement with Nationwide and Move, Inc. On 16 February 1967, a truck described as a 1965 green, 18-foot, 2-ton GMC, with "Move, Inc." and "18-B-126" on the side of the truck and valued at $6,000.00, was taken from the above location. Pitt did not rent the truck to defendants, nor did he give them permission to use it.

Floyd Smiley testified that he worked at a storeroom, located at 106 E. Grand Street in Rocky Mount, as a storekeeper for the City of Rocky Mount. On 16 February 1967, 10,000 pounds of copper wire, valued at 60¢ per pound, and various other supplies were stored in that building. He said that he completely locked the building when he left at 5:00 P.M. that day. About 10:00 P.M. that night he was notified of a break-in, whereupon he went back to examine the storeroom. He found that one of the doors had been pried open and two doors, leading to the main storeroom where the wire and other supplies were stored, were open. He observed that some flashlights were missing at that time.

Carl W. Bateman testified that he saw an enclosed van truck backed up to the open, sliding door of the storeroom between 9:30 and 10:00 P.M. that night. He radioed the police department and requested that they check into the matter.

Police Officers Randolph Saunders and James Shearin went to the storeroom in response to a call. Saunders identified two flash-

lights, found on the seat of the GMC truck, as being the property of the City of Rocky Mount. Both officers testified that a GMC truck was backed up to a door of the storehouse. Inside the open door were several rolls of copper wire.

Police Officer W. E. Patterson testified that he received a call to go to the storehouse. After searching the storehouse, he started patroling the area. He observed a white Thunderbird automobile about two blocks from the storehouse and followed the car a distance before stopping it and talking to the three occupants. Defendant McCain was driving the car and, upon request, produced a valid drivers license, but no registration card. When questioned about being in the vicinity, McCain stated he was looking for a place by the name of "Tosa." Neither Patterson nor Officer Edwards had heard of the place, so they asked defendants to follow their car to the police station. At the police station, Patterson mentioned "Tarboro", and they said that was the place they were looking for; that they had to pick up a relative there. At this point, defendant objected, and the jury was excused from the courtroom. On *voir dire*, officer Patterson stated that he had not placed defendants under arrest, and that he did not advise McCain of his rights at that time; that he asked permission to look in the car because "they were in the vicinity of a break in." McCain gave him permission to look in the car and gave him the keys. Thereafter, the court overruled the objection and the jury was recalled to the courtroom. Patterson then testified, in the presence of the jury, that he found a wet pair of shoes under the seat of the Thunderbird and wire cutters, an automatic pistol, clothes and another pair of wet shoes in the trunk. He further stated that Josiah Bishop was then taken into another room where he was advised of his rights. Bishop did not ask for an attorney. The following question was then asked: "After you advised him of these various matters, did he make any statement?" Upon objection, the jury was excused from the courtroom. Patterson, on *voir dire,* testified as follows:

> "I advised the defendant Bishop, 'You have the right to remain silent. Anything you say can be used against you in court. You have the right to the presence of a lawyer. If you cannot afford a lawyer one will be appointed for you before any questioning, if you so desire. If at any time before or during questioning you wish to remain silent you may do so. After hearing your rights, do you understand you do not have to talk or answer any questions asked you and if you do answer any questions asked you and if you do it can and will be used against you in court.' "

The court found as a fact that the statements made by Bishop to Officer Patterson were voluntarily made after he had been warned of his constitutional rights. The jury was recalled to the courtroom. Patterson then testified that Bishop told him the shoes were damp because he had gone into the woods. Patterson did not question the other two defendants who were picked up that night.

Police Officer Tom Moore testified that he was working at the desk at the police station on the night in question; that Raymond Baskin came into the station about 11:30 P.M. and inquired about the Thunderbird sitting outside the station, stating he was the owner of the car. Another man came to the station with him. Shortly thereafter, Baskin hurriedly left the station. Officer Joseph Brown testified that he saw Baskin leave the station and begin running when he reached the sidewalk, and that Sgt. Hoell came running out behind Baskin. Brown and Hoell gave chase and overtook Baskin about one and a half blocks from the police station.

Detective Horace Winstead testified that he met the four defendants on the morning of Friday, 17 February 1967, at the police station, where they were in jail. He took Bishop out of jail and into an office where he advised him of his rights. Bishop signed a paper acknowledging that he understood the warning. Winstead told Bishop that he wanted to discuss the break-in and the larceny of a truck. At this point the jury was excused from the courtroom. On *voir dire,* Winstead testified that he had talked to all four defendants, warning them of their rights beforehand. The warning, given individually to each of the four defendants, was as follows:

> "You have the right to remain silent. Anything you say can be used against you in court. You have a right to the presence of a lawyer. If you cannot afford a lawyer one will be appointed for you, before any questioning, if you so desire. If at any time before or during questioning you wish to remain silent you may do so. After hearing your rights do you understand you do not have to talk or answer any questions asked you, and if you do it can and will be used against you in court."

Winstead stated he did not threaten them or promise them hope of reward or leniency. He testified that he talked to Bishop about 15 minutes and Bishop said that before he made any further statement he would like to talk to a lawyer. Winstead replied, "That's fine, I'll put you right back in jail until we can get you a lawyer." He also testified that in separate conversations with Thompson, McCain and Baskin, each stated that he did not have anything to say, so questioning was postponed and they were returned to jail.

He said he talked to each of these three defendants for a period of about five minutes.

The court found as a fact that all four defendants were warned of their constitutional rights prior to making any statement and that such statements as were made, were made voluntarily. The jury was recalled. Winstead then testified in the presence of the jury that Bishop told him he knew nothing of the break-in.

Winstead testified that he thereafter took McCain's shoes to a ditch located about 100 feet from the storeroom. There was water, sand and oil in the ditch and the same three elements were on the shoes. There were tracks in the sand, in which Winstead placed the shoes. The shoes were exactly the same size as the tracks. The tracks led down to and through a culvert under the railroad. Winstead returned to the station and talked to McCain with reference to the tracks and his shoes. McCain responded by refusing to say anything about the shoes and stating he did not want to make any further statement. Winstead then put him back in jail. Subsequently, Winstead talked to Thompson and Baskin individually, and each defendant stated that he did not wish to make a statement, after which they were placed back in jail. Officer Winstead then testified that on the next day, in the presence of Lt. Moore and Detective Luper, each defendant separately and in the presence of each other made statements; that before they made statements, they were each again warned of their constitutional rights in the same manner as on the day before. The statements made by the defendants were, in substance, as follows:

Bishop: That he had been the "look out" man and had stood on the railroad tracks; that his job was to "holler out Police," which he did when he saw a car approaching, and then ran.

McCain: That he was the driver of the Thunderbird; that they rode by the city storeroom "and figured there ought to be some wire in there." He went in the back door of the storeroom and when in the main part of the storeroom saw the copper wire. He and Baskin then drove over to Brownie Pitt's service station.

Baskin: He and McCain entered the storeroom where he observed the wire. They then went to the service station, where he took the switch out, fastened the wires together in the truck and drove it back to the city lot. He stated to the others that they were to get the wire and that he would walk on ahead because he had a bad ankle and was afraid that the police would catch him. The next time he saw the others was when he observed his car in front of the police station and went inside to inquire about it. While in the police station, he decided that he should leave, which he did, but was easily caught.

Thompson: During a casual conversation between Thompson and the law enforcement officers, Thompson stated that if they had any questions to ask, to do so, and that he would tell them what they wanted to know. He then stated that he was supposed to have been a "look out" man with Bishop on the railroad tracks, but ran when Bishop shouted that the police were coming.

Then Winstead, Lt. Moore, and Officer Luper talked to all the defendants together. Winstead testified that all the defendants agreed that they went to the storeroom for the purpose of stealing copper wire; that McCain went back to the lot when he heard someone shout "police", whereupon he ran down a ditch and through the culvert. Three defendants got back to the car and were riding around looking for Baskin when the police stopped them. None of the defendants signed written statements. Winstead stated that the defendants talked freely and that he made no promises to them. Warrants were issued for defendants on 18 February 1967 at the request of Winstead, on information and belief. On cross-examination, Winstead testified that Bishop was the first to make a statement. Bishop had previously talked to a lawyer, but the lawyer was not present nor did Bishop request his presence at the time the statement was made.

The testimony of detective W. O. Moore tended to corroborate the testimony previously given by detective Horace Winstead.

The State then rested.

Mamie Tyson Staton, testifying for defendants, stated that Baskin had brought her from Washington, D. C., to Tarboro, N. C., a week before her father died and then came to pick her up and take her back to Washington. Concerning the events occurring on Thursday, 16 February 1967, she stated that McCain and Thompson left Tarboro about 7:45 P.M. to take a girl to the bus terminal. Around 10:00 P.M. she left Baskin asleep at her mother's house in Tarboro and went to her brother's house. There she took a telephone call for Baskin. She was told that the police had Baskin's car in Rocky Mount. When she informed Baskin of the telephone conversation, he persuaded someone to take him to Rocky Mount to check on his car. Baskin left Tarboro shortly after 10:00 P.M.

Defendant Raymond Baskin testified that he, Bishop, Thompson and McCain came to North Carolina in his 1961 Thunderbird for the purpose of taking Mamie Staton back to Washington, D. C. They first arrived in Tarboro and stayed there about ten minutes. From Tarboro they went to Durham, where they stayed overnight in the Jack Tar Hotel. From Durham they returned to Tarboro. About 5:30 P.M. McCain, Thompson and Bishop carried three women to the bus station in Raleigh. Baskin stayed with Mamie

Staton in Tarboro. Baskin next saw the other three defendants at the police station in Rocky Mount. Baskin went to the police station because McCain, Thompson and Bishop had not returned. He called a friend in Durham who informed him that McCain had called and wanted Baskin to come to Rocky Mount to identify the car. At the police station, Baskin stated that he was told he was going to be charged with carrying a concealed weapon. Baskin then walked out of the police station. He was brought back to the station, where he stayed until the following Tuesday. Baskin stated that he did not tell the officers he was involved in the break-in or that he stole a truck.

Defendants Bishop, McCain and Thompson, testifying individually, stated in substance as follows:

They left Washington, D. C. for North Carolina with Baskin, in the latter's Thunderbird, for the purpose of transporting Mamie Staton back to Washington. On arrival in Tarboro, N. C., they stayed about 15 minutes and then left for Durham, where they stayed overnight. Thursday, they returned to Tarboro. Bishop, McCain and Thompson left Baskin at Mamie Staton's house and returned to Durham. That same evening, as they were returning to Tarboro from Durham, because of their unfamiliarity with the road they became lost in Rocky Mount. Two officers stopped them and, upon request, McCain produced his drivers license. When asked about their presence in the vicinity, they explained to the officers that they were looking for a town by the name of "Tobie." The officers did not know of such a town and asked them to follow their car to the police station. At the station the officers mentioned "Tarboro" and defendants agreed that was the town they were looking for. One of the officers asked McCain for the keys to the car, and he gave them to the officer. McCain was informed that he was going to be arrested for having a stolen vehicle unless he could get the owner to identify the car. Upon request, McCain was permitted to make two telephone calls in an attempt to locate Baskin.

All three defendants testified that they knew nothing of the break-in and stolen truck and that they did not tell the police officers anything.

In addition, Bishop testified that when he refused to sign a statement, one of the detectives "took the flashlight and put a knot on my head," and, instead of placing him back in jail with Thompson and McCain, had taken him to the Nashville jail. He further testified he was told that if he would sign the statement, his bond would be reduced and that there would be a possibility of a lesser sentence. Conversely, Baskin testified that he had made three or four tele-

phone calls and that "The police department was right nice to me. They treated me all right; they gave me all these charges."

All defendants were found guilty of breaking and entering and larceny, and from judgments entered, all defendants appealed.

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

W. O. Rosser and Alfred S. Bryant for defendants.

BRANCH, J. The principal contention of defendants is that the court erred in admitting into evidence the confessions of defendants.

The test of admissibility is whether the statements made by defendants were in fact voluntarily and understandingly made. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *State v. Roberts,* 12 N.C. 259. Although the fact that the defendant was in custody is a circumstance to be considered when considering the voluntariness of a confession, *State v. Guffey,* 261 N.C. 322, 134 S.E. 2d 619, this fact does not of itself render it incompetent. *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344.

When a confession of a defendant is offered into evidence, and the defendant objects, the trial judge should then excuse the jury and in the absence of the jury hear the evidence of both the State and defendant upon the question of whether defendant, if he made an admission or confession, voluntarily and understandingly made the admission or confession. *State v. Rogers, supra; State v. Gray, supra; State v. Conyers,* 267 N.C. 618, 148 S.E. 2d 569.

The general rule is that after such inquiry the trial judge shall make findings of fact to show the basis of his ruling on the admissibility of the evidence offered, and that the facts so found are conclusive on the appellate courts when supported by competent evidence. Nevertheless, the conclusions of law drawn from the facts found are not binding on the appellate courts. *State v. Hines,* 266 N.C. 1, 145 S.E. 2d 363; *State v. Walker,* 266 N.C. 269, 145 S.E. 2d 833; *State v. Conyers, supra.* However, in the case of *State v. Keith,* 266 N.C. 263, 145 S.E. 2d 841, where the defendant contended that he had made no confession, the court recognized that there is no necessity for findings of fact where there is no conflicting testimony offered on the *voir dire.*

In the case of *State v. Conyers, supra,* the trial judge held a preliminary *voir dire* as to the voluntariness of the defendant's alleged confession, and at the conclusion of the *voir dire* entered into the record a statement finding defendant's statement to have been made "freely and voluntarily" . . . The Court, citing *State v.*

Barnes, supra, held the court's declaration to be a statement of its conclusion and improperly entered. In this case there was testimony by the defendant which presented a sharp conflict in the evidence upon the *voir dire.* The holding in *Keith* was recognized and distinguished in *Conyers* on the basis that no conflicting testimony was offered.

Here, the trial judge, upon objection, properly excused the jury and in the absence of the jury conducted a *voir dire* hearing. The court gave both the State and defendants opportunity to offer evidence. The State offered evidence, and defendants chose to offer none. The trial court's finding that defendants were duly warned of their constitutional rights prior to making any statement is supported by competent evidence, and this Court is bound by this finding.

In order to consider fully defendants' contention that the court erred in admitting the statements made by defendants, we must review the court's conclusion that such statements as were made were made voluntarily.

The admissibility of this evidence is to be determined by the facts appearing in evidence when it is received or rejected, and not by the facts appearing in the evidence at a later stage of the trial. *State v. Rogers, supra.*

The rules of law which we have considered to this point have been rules of law laid down by the North Carolina Supreme Court. It is with pardonable pride that we note that for over one hundred forty years the rule enunciated in *State v. Roberts, supra* that "a confession obtained by the slightest emotions of hope or fear ought to be rejected" has been an approved and applied rule of this Court. Thus, the rationale of *Miranda v. Arizona,* 384 U.S. 436, is not new with us, but the broad and far-reaching language, which we must acknowledge as binding on us, has had such a massive impact upon criminal jurisprudence and law enforcement that we must construe and apply its language to the facts of the instant case.

The case of *Miranda v. Arizona, supra,* erects certain safeguards as to the question of "in-custody" suspects which require, in effect, that the suspect be warned: (1) that he has the right to remain silent, (2) that any statement he does make may be used as evidence against him in court, (3) that he has the right to counsel, either appointed or retained, prior to and during the interrogation, and (4) that if he is indigent, counsel will be appointed for him prior to any questioning, if he so desires.

The most compelling argument offered by defendants is based on that portion of the *Miranda* opinion which states:

"Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked."

In considering this argument, the pertinent excerpts from the *voir dire,* taken in the absence of the jury, are as follows:

"COUNSEL FOR DEFENDANT REQUESTS THAT HE BE ALLOWED TO QUESTION THE WITNESS IN THE ABSENCE OF THE JURY.

AT THIS POINT THE JURY WAS EXCUSED FROM THE COURTROOM AND THE FOLLOWING PROCEEDINGS HAD IN THE ABSENCE OF THE JURY:

Q. Did he sign any statement in your presence at that time?
A. He signed this.

Q. Did he sign any written confession?
A. No sir.

Q. Did you make any notes as to what he said?
A. No sir.

Q. Did he refuse to make any statements?
A. With reference to this, yes sir.

Q. That's all.
MR. HOLDFORD, SOLICITOR: Did you talk to Raymond Baskin also that day?
A. Yes sir.

Q. Before talking to him did you advise him of his constitutional rights?
A. Yes sir, I did.

Q. Did you use the same form?
A. Yes sir. (Warning as to constitutional rights substantially the same as quoted on page 4 of this opinion).

. . . .

Q. Did you talk to Lester Thompson?
A. Yes, I did.

Q. Before questioning him did you advise him of his rights?
A. Yes sir.

Q. Did you use the same form that the city of Rocky Mount had given you and which you have testified from before?
A. Yes sir.

Q. What did you advise him?
A. (Warning as to constitutional rights substantially the same as quoted on page 4 of this opinion).

Q. And did you talk to MacArthur McCain?
A. Yes, I did.

Q. Before talking to him did you advise him of his constitutional rights?

A. Yes sir. Lt. Richardson, the Identification officer, was present at that time.

Q. At that time did you use the form provided for you by the city of Rocky Mount Police Department?
A. Yes sir.

Q. State for the record what you advised him?
A. (Warning as to constitutional rights substantially as quoted on page 4 of this opinion).

. . . .

Q. Did either one of these four defendant . . . ask for an attorney at that time?

A. They did not. Each one of them asked to make a telephone call, except one, and right now I am not sure which one that was.

Q. The three that asked, were they allowed to make a telephone call?
A. Yes sir, they were . . .

. . . . .

Q. Did you threaten these defendants in any way to get them to make a statement?
A. No sir, I did not.

Q. Did you offer them any hope of reward to get them to make a statement?
A. No sir, I did not.

Q. Did you tell them the court would go lighter on them to get them to make a statement?
A. No sir.

. . . .

MR. ROSSER: Mr. Winstead, did either one of those four defendants make a voluntary statement at that time with reference to this matter?
A. At that time, no.

Q. They didn't have a lawyer at that time, either, did they?
A. No sir.

Q. Was a lawyer later brought in there to them, about a day later?
A. I understand he was. I don't know it for a fact.

Q. But neither one of them made a statement at that time?
A. No sir.

Q. That is all.
MR. HOLDFORD: Mr. Rosser, do you wish to put on any evidence?
MR. ROSSER: No, sir. If they made no statement I am not hurt.
A. They later did, but not at that time.
MR. ROSSER: Mr. Winstead, will you tell for the record if you thoroughly explained those four questions to each defendant, you think they understood them, don't you?
A. I know they did.

. . . .

MR. HOLDFORD, SOLICITOR: Mr. Winstead, how much later was it that they made the statements to you?
A. Later on in the presence of Lt. Moore and Detective Luper they did make a statement in my presence. Each one of them separately and all together.

Q. How much later was that?
A. The following day, I believe.

. . . .

Q. The following day when they made a statement, before each one of them made a statement, did you or Mr. Moore again advise them of these rights which you had advised before?
A. Yes sir.

Q. Did you go through the same procedure?
A. Yes, sir."

The evidence above quoted and other evidence in the *voir dire* examination reveals that defendants were warned of their constitutional rights before being questioned the first day they were in custody, and that they did not make a statement at that time. The record further indicates that they were not pressed for further statement at that time, and that on the following day, after again being fully warned of their constitutional rights, they then freely made inculpatory statements. It should be noted at this point that it is affirmatively shown that there were no lengthy interrogations, that counsel was offered to defendants, that they were not held incommunicado. (In fact, all defendants used the telephone, except one, and he was offered the opportunity.) The record is replete with the approved warnings, the offer of counsel, and shows no occasion on which any one of the defendants was questioned without the opportunity of having an attorney present.

We do not interpret the portion of the *Miranda* opinion now under consideration to mean that when a defendant is "in custody" and has been duly advised of his constitutional rights, and he states that he does not want to make a statement at the first questioning, that law enforcement officers are forever barred from asking another question. We do interpret it to mean that when a defendant is being interrogated and he indicates that he wishes to remain silent, that interrogation must not then be continued. The vice sought to be removed is the evil of continued, incessant harassment by interrogation which results in breaking the will of the suspect, thereby making his statement involuntary. This interpretation of this particular facet of *Miranda* is seemingly adopted by Justice Clark when in his dissenting opinion he stated:

> "Now, the Court fashions a constitutional rule that the police may engage in no custodial interrogation without additionally advising the accused that he has a right under the Fifth Amendment to the presence of counsel during interrogation and that, if he is without funds, counsel will be furnished him. When at any point during an interrogation the accused seeks affirmatively or impliedly to invoke his rights to silence or counsel, *interrogation must be forgone or postponed.*" (Emphasis ours.)

This conclusion is borne out by the opinion itself when it discusses *in extenseo* certain practices of sustained interrogation and trickery cited in investigatory manuals as having been used by custodial officers. Justice White in his dissenting opinion refers to these procedures as follows: "But even if the relentless application of the described procedures could lead to involuntary confessions,

it most assuredly does not follow that each and every case will disclose this kind of interrogation or this kind of consequence."[2] This statement is footnoted with the following:

> "2. In fact, the type of sustained interrogation described by the Court appears to be the exception rather than the rule. A survey of 399 cases in one city found that in almost half of the cases the interrogation lasted less than 30 minutes. Barrett, Police Practices and the Law — from Arrest to Release or Charge, 50 Calif. L. Rev. 11, 41-45 (1962) Questioning tends to be confused and sporadic and is usually concentrated on confrontations with witnesses or new items of evidence, as these are obtained by officers conducting the investigation. (Citing legal publications.)"

It is to be noted that the above reference to dissenting opinions in *Miranda* is solely for the purpose of showing the interpretation that members of the Court placed on the results reached as to this particular phrase of the opinion.

We do not know what makes criminals confess. Be it apprehension, a desire to rid themselves of their feeling of guilt, braggadocio, or the better side of mankind which demands that truth be spoken. All we know is that it does happen.

The present record shows that adequate safeguard procedures to protect against self-incrimination were used at the interrogation of each of the defendants. Further, the record shows that defendants' alleged statements were, in fact, freely made. Their rights under the Fifth and Fourteenth Amendments were fully protected. We hold that the trial judge correctly admitted statements of the defendants.

The defendants later testified before the jury that they never made any inculpatory statements to the officers. Whether defendants made the statements offered into evidence and the weight, if any, to be given to such statements is solely for determination by the jury. *State v. Walker, supra.*

Defendants also assign as error the admission of testimony concerning search of Baskin's automobile and the items alleged to have been found in the automobile.

Upon objection to this evidence, the court again excused the jury and held an extended *voir dire* examination. The uncontradicted evidence elicited on the *voir dire* is to the effect that officer Patterson asked the driver and person in possession of the automobile for permission to search it. The driver of the automobile, McCain, gave Patterson the keys, and the search was conducted. Further, the *voir dire* did not reveal that the defendant had been taken into custody

or significantly deprived of his freedom of action. The search was conducted in the investigatory stage rather than the accusatory stage.

In the case of *State v. Temple,* 269 N.C. 57, 152 S.E. 2d 206, the defendant's motion to suppress evidence resulting from a search of the defendant's automobile was denied when the *voir dire* evidence disclosed that the police officer told the defendant that he was a suspect in a rape case and that he was searching for a girl's panties and asked permission of the defendant to search his automobile. The defendant granted this permission, and a girl's panties were found in the automobile. The court held that the motion to suppress was properly denied for the reason the defendant voluntarily consented to the search.

"Where the person voluntarily consents to the search, he cannot be heard to complain that his constitutional and statutory rights were violated." *State v. McPeak,* 243 N.C. 243, 90 S.E. 2d 501; *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506; *State v. Williams,* 269 N.C. 376, 152 S.E. 2d 478.

Again, in the case of *State v. Belk, State v. Pearson and State v. Berry,* 268 N.C. 320, 150 S.E. 2d 481, where upon *voir dire,* after motion to suppress the evidence, the *voir dire* evidence tended to show that the owner and operator of an automobile in respect to officer's request that he be allowed to search, stated that he would get the key to the trunk and thereupon did obtain the key and gave it to the officer. The Court held that the consent to search rendered the evidence obtained competent and that the passengers in the automobile could not object to such evidence when the person having possession and control of the vehicle consented to the search.

In the case of *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741, the defendant objected to the admission of evidence of exhibits found in defendant's automobile. The trial court, in the absence of the jury, heard the State's evidence as to the circumstances of the search. The defendant cross-examined State's witness at length, but offered no evidence when given the opportunity to do so. This Court held that the failure of the trial judge to find facts when he overruled defendant's objection was not fatal since his ruling that the evidence was competent was necessarily based on a finding that the search was legal. See also *State v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84.

Since, in the instant case, the officers who made the search had reasonable grounds to believe a felony had been committed, the search preceding the arrest and with defendants' consent, was legal. *U. S. v. Sala,* 1962 D.C. Pa., 209 F. Supp. 956.

There was sufficient evidence presented on *voir dire* to show a free and intelligent consent to the search of the vehicle and to demonstrate that defendants suffered no loss of their constitutional

rights under either the State or Federal Constitution. The trial judge properly overruled defendants' objection.

Defendants' contention that the trial judge erred in overruling their motions for judgments as of nonsuit is without merit.

The naked extra-judicial confession of guilt by a defendant must be supported by evidence *aliunde* which establishes the *corpus delecti*. The *corpus delecti* may be established by direct or circumstantial evidence. *State v. Cope*, 240 N.C. 244, 81 S.E. 2d 773; *State v. Thomas*, 241 N.C. 337, 85 S.E. 2d 300; *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396.

Here, theft of the truck and a breaking and entering of the storehouse was established *aliunde* the confessions. Also, the stolen truck was backed up to the door of the storehouse with the motor running when the officer arrived. Defendants were located in the nighttime a short distance from the storehouse, driving an automobile without having in their possession a registration card. When a permissive search of the automobile was made, the officer found wire cutters, a pistol, and wet shoes. One pair of the wet shoes fitted tracks found along the ditch bank near the storehouse which was broken and entered. This evidence, when taken with the confessions of defendants, is amply sufficient to repel the motions of defendants for nonsuit.

We have carefully examined defendants' other assignments of error and we find no prejudicial error which warrants a new trial.

No error.

ALBERT L. KEZIAH AND WIFE, NORMA P. KEZIAH, AND CLEGG A. KEZIAH AND WIFE, HELEN O. KEZIAH, PLAINTIFFS, V. SEABOARD AIR LINE RAILROAD COMPANY, DEFENDANT.

(Filed 12 January, 1968.)

1. Railroads § 1—

A right of way for railroad purposes may be established by statutory presumption, and the burden is upon the railroad company to show by a preponderance of the evidence that, pursuant to its charter, it entered upon the land and constructed its tracks in the absence of any contract with the owner and that the owner did not apply for compensation within two years from the completion of the road.

2. Railroads § 3—

Where a railroad company has acquired an easement by statutory presumption, such easement extends for the full width of the right of way provided by its charter, and when its charter provides for a 200 foot right of way it may exercise its use of the right of way to its full width for purposes necessary for its railroad business, notwithstanding occu-

pation of a part of the right of way by the owner or any other person, or the registration of subsequent deeds or maps.

3. Constitutional Law § 6—

The policy-making power of the legislature is not within the province of the court, and it will not question the policy, adopted by the legislature in the early history of railroad building in this State, of granting to railroad corporations the right of liberal acquisition of properties.

4. Railroads § 1— Railroad right of way held acquired by statutory presumption.

Uncontradicted evidence that the defendant railroad company was successor in title to an earlier railroad company which had constructed its tracks over the lands of the plaintiff some ninety years before, without any contract with the original land owner, and with no action by the owner for compensation within two years following completion of the road, *is held* sufficient to entitle defendant to a peremptory instruction that it is the owner of a 200 foot right of way under the statutory presumption of a grant from the owner of the land. Private Laws of 1854-55, ch. 225, § 28.

5. Trespass § 1—

Evidence of the plaintiff that the defendant railroad company parked one of its trucks on the plaintiff's land some 125 feet from the center of the railroad track, that the entry upon the land was unauthorized, and that the defendant admitted that its right of way extended only 100 feet from the center of its track, *held* sufficient to go to the jury in plaintiff's action for trespass upon the land, although the damages would seem to be nominal.

6. Same—

Any unauthorized entry on the land in the actual or constructive possession of another constitutes a trespass, irrespective of degree of force used or whether actual damage is done, and such entry entitles the aggrieved party to at least nominal damages.

APPEAL by plaintiffs from *Hall, J.*, August 1967 Session of UNION.

Civil action for alleged trespass upon land and for a permanent injunction. The subject of the controversy is a strip of land lying north of and running parallel with defendant's railroad track, in Union County, North Carolina.

Clegg A. Keziah, one of the plaintiffs, testified in pertinent part as follows: That he and the other plaintiffs purchased the land involved in the controversy in April 1961, that the property purchased lies north of the railroad, and that there was no construction work on the property at the time of the purchase; that in June 1961 he observed Seaboard Air Line Railroad Company equipment cutting a ditch across the property, which ditch was located about 75 to 80 feet from the center line of the main track of the railroad and was being cut so as to run parallel with the railroad track. He requested

the agents of the railroad company to stop digging the ditch and to withdraw the men from the property. His request was not complied with. He further testified that there was a truck belonging to defendant about 125 feet north of the center of the railroad track. He stated that in his opinion the value of the property owned by plaintiffs before the digging of the ditch was $30,000, and that after the ditch was dug the value was $22,000. He identified a map marked "Court Map No. 1" and read the description of the property which plaintiffs claim to own and as set out in the complaint as follows:

> "On the north side of the Carolina Central Railroad, adjoining the property of A. A. Secrest, A. M. Secrest, William Helms and Frances Carnes, and described as follows: Beginning at an iron stake in the center of a road leading to the home of Alice Huntley, corner of Frances Carnes, (said iron stake being South 3 West 322 feet and 4 inches from a stake in the center of the Ansonville Road, northwest corner of Frances Carnes) and running thence South 3-40 West 580.45 feet to an iron stake in the Carolina Central Railroad; thence South 85-45 East 50 feet to an iron stake in the center of the railroad; thence North 3-30 East 35 feet to an iron stake; thence parallel with the railroad about North 86-15 East 511-5 feet to a stake; thence North 11 West 198 feet to a stake by a pine and a white oak; thence North 22 West 396 feet to a stake by a pine and post oak in the line of William Helms; thence with his line North 84 deg. West 126.5 feet to an iron stake in the line of Frances Carnes by a B. J. pointer; thence with two lines of Frances Carnes as follows: 1st, South 8-30 East 53.25 feet to an iron stake and 2nd, North 85-30 West 229 feet to the beginning, containing 5⅝ acres, more or less."

Neither the deed nor the map shows a 100-foot railroad right of way from the center of the railroad in either direction.

The parties stipulated that defendant was successor in title to all property and property rights owned by Carolina Central Railroad Company in Union County, North Carolina, and that Carolina Central Railroad Company had the same rights to acquire property and property rights and had the same presumptions of acquisition of property and property rights which were granted to the Wilmington and Charlotte Railroad Company by Chapter 225 Private Laws of North Carolina, Session 1854-1855.

The Wilmington and Charlotte Railroad Company was incorporated by the Private Laws of North Carolina in the 1855 Session by Chapters 225 and 226. Pertinent portions of the statute which affect this appeal are as follows:

In Section 26 it is provided: ". . . That when any lands or right of way may be demanded by said company, for the purpose of constructing their road, and for the want of agreement as to the value thereof, or from any other cause the same cannot be purchased from the owner or owners, the same may be taken at a valuation to be made by five commissioners or a majority of them, to be appointed by any court of record, having common law jurisdiction, in the county where some part of the land or right of way is situated . . . and the lands or right of way so valued by the said commissioners, shall vest in the said company so long as the same shall be used for the purposes of said railroad, so soon as the valuation may be paid, or when refused, may have been tendered: . . . That the right of condemnation herein granted, shall not authorize the said company to invade the dwelling house, yard, garden, or burial ground of any individual without his consent."

It is provided by Section 27: "That the right of said company to condemn lands in the manner described in the 26th section of this act, shall extend to condemning of one hundred feet on each side of the main track of the road, measuring from the centre of the same. . . ."

By Section 28 it was further enacted: ". . . That in the absence of any contract or contracts in relation to the land through which said road or any of its branches may pass, signed by the owner thereof, or his agent, or any claimant or person in possession thereof, which may be confirmed by the owner thereof, it shall be presumed that the land over which said road or any of its branches may be constructed, together with the space of one hundred feet on each side of the centre of said road has been granted to said company by the owner or owners thereof; and the said company shall have good right and title thereto, and shall have, hold, and enjoy the same so long as the same shall be used for the purposes of said road and no longer, unless the person or persons owning the land at the time that part of the said road which may be on said land was finished or those claiming under him, her or them, shall apply for an assessment of the value of said lands as hereinbefore directed within two years next after that part of said road which may be on the said land was finished; and in case the said owner or owners, or those claiming under him, her or them, shall not apply within two years next after the said part was finished, he, she or they shall forever be barred from recovering said land, or having any assessment or compensation therefor: Provided, that nothing herein contained shall effect the rights of *feme* coverts or in-

fants until two years after the removal of their respective disabilities."

That part of defendant's railroad tracks involved in the instant litigation was constructed between 3 May 1873 and 15 December 1874.

By Chapter 75 of the Public Laws of 1873 the Carolina Central Railroad Company, predecessor in title to the Seaboard Air Line Railroad Company, was incorporated. This act, by sections 9, 10 and 11, contained basically the same provisions as contained in sections 26, 27 and 28 of Chapter 225 of the Private Laws of the 1855 Session.

Defendant offered the deposition of M. A. Niegro, which was admitted into evidence. By his deposition Mr. Niegro testified that he was the general real estate agent for Seaboard Coast Line Railroad Company and was formerly real estate agent for Seaboard Air Line Railroad Company before the merger on 1 July 1967 between it and the Atlantic Coast Line Railroad Company; that he was the official custodian of all deeds and other muniments of title of right of way of Seaboard Coast Line Railroad Company. He certified there was no deed or muniment of title among the official records of the railroad company affecting the 200-foot charter-grant right of way of the railroad which crossed plaintiffs' property in Union County; that there had been no modification in the 200-foot right of way granted in the charter to the railroad by the North Carolina General Assembly, and that there had been no change in the location of defendant's main-line track in the vicinity of plaintiffs' property since it was originally laid; further, that an examination of the official deeds, muniments of title and records of defendant railroad revealed no record of condemnation or any record of contracts affecting defendant railroad's right of way across plaintiffs' property.

Koy E. Dawkins, an attorney at law of Monroe, North Carolina, testifying for defendant, stated he had examined the public records of Union County to determine plaintiffs' predecessors in title during the years 1870 to 1876. His examination of the record title to plaintiffs' property disclosed there were no deeds or contracts affecting the charter-grant right of way claimed by defendant, nor was there of record any lawsuit, including condemnation proceedings, between the predecessor record title holders to plaintiffs' property and defendant's predecessors in title prior to 1880. In tracing plaintiffs' title to the land, Dawkins stated that plaintiff's property was formed from two tracts of land; that one tract, forming the western boundary, commenced at the center line of defendant's railroad track, extended east along the center line of the track for 50

feet, and then continued in a northerly direction. The second tract, east of and adjoining the other tract, had a southern boundary 35 feet north of the center line of defendant's railroad track, and extended in an easterly direction. The description of the second tract did not state the relationship of the southern boundary of plaintiffs' property to defendant's railroad track.

Joe P. Porcher, Assistant Division Engineer for defendant railroad company, testified that he was in direct charge of the construction of the ditch on the Keziah property. He stated that Mr. Keziah told him he was on his property and that he was going to obtain an injunction to stop the work. He continued with the work. He stated that the full extent of the drainage ditch is within 100 feet north of the center line of the main-line track of the railroad and nothing was done on the property beyond 100 feet north of the center line.

Plaintiffs recalled Clegg A. Keziah, who testified in effect that there was no drainage problem within 200 feet of the main line of the railroad on the Keziah property prior to the digging of the ditch.

At the close of all the evidence, upon motion of defendant for judgment as of nonsuit, the motion was allowed. Plaintiffs appealed.

Clark and Huffman for plaintiff appellants.
Cansler & Lockhart for defendant appellee.

BRANCH, J. The first and principal question for decision is whether the charter granted to Wilmington and Charlotte Railroad Company by the 1854-1855 Session of the General Assembly by Chapter 225 granted a right of way 100 feet wide on each side of defendant's main track, measuring from the center of same.

It is of interest to note that in the case of *R. R. v. McCaskill*, 94 N.C. 746, one of defendant's corporate predecessors was plaintiff and the act before us in the instant case was therein construed. In that case the railroad brought an action in ejectment to recover possession of property located within 100 feet of the center line of the railroad company's track. Defendant claimed the property it occupied by virtue of deeds of conveyance. Affirming the judgment of the lower court for the plaintiff, this Court stated:

> "It is not material to inquire into the source from which the defendant derives his title, beyond his mere occupancy, since the plaintiff must establish its right to the possession of the premises, in order to a judgment of ejection. In whomsoever the estate was vested, there being no suggestion that they were under disabilities, it was, under the statute, as soon as the road was constructed and *toties quoties* as it progressed towards con-

clusion, transferred to the corporation, of the required width of 100 feet on either side, to be paid for as directed, when no written contract has been entered into for the purchase. In such case, the inaction of the owner in enforcing his demand for compensation for land taken and appropriated after the finishing of the construction of the road thereon, for the space of two years thereafter, raises, under the statute, a presumption of a conveyance and of satisfaction, and hence becomes a bar to an assertion by legal process, of such claim.

"These conditions unite in this case, and not only does the title vest in the corporation, but the remedy given the owner, under no disability, has been lost by lapse of time.

. . . .

"The presumption of the conveyance arises from the company's act in taking possession and building the railway, when in the absence of a contract, the owner fails to take steps, for two years after it has been completed, for recovering compensation. It springs out of these concurring facts, and is independent of inferences which a jury may draw from them. If the grant issued, it would not be more effective in passing the owner's title and estate. Thus vesting, it remains in the company as long as the road is operated, of the specified breadth, unaffected by the ordinary rules in reference to repelling presumptions,

. . .

. . . .

". . . the statute does not require the occupation and direct use of every foot of the condemned area, for building embankments and the like, but preserves the property in the company, so long as the road runs over the land and is operated by the company. A permissive use of part of it by another, when no present inconvenience results to the company, is not a surrender of rights of property, and, indeed, to expel an occupant under such circumstances, would be a needless and uncalled for injury. This may suspend, but does not abridge the right of the company to demand restoration, when the interests of the road may require its use."

The *McCaskill* case was modified in the case of *R. R. v. Sturgeon,* 120 N.C. 225, 26 S.E. 779, where the Court considered similar conditions and the same statutory language as in *McCaskill,* and held that the railroad did not acquire a title to the land, but acquired an easement which entitled it to possession of the whole right of way

only when it should appear that it was necessary for the conduct of its business.

In the case of *R. R. v. Lissenbee,* 219 N.C. 318, 13 S.E. 2d 561, the railroad brought action to require defendant to remove obstructions around its signal and switching system, and to restrain defendant from interfering with its equipment. Defendant contended the right of way of plaintiff was limited and it had no rights on places where the electric signal was situated. Plaintiff contended that its charter granted by statutory presumption a right of way 100 feet on each side of the center line of its track and over the property of the defendant. Plaintiff's charter contained a section substantially the same as section 28 of Chapter 225, Session 1854-1855, hereinbefore set out. The Court, affirming judgment in favor of plaintiff, stated:

> "Provisions of similar character and like effect, to this quoted portion of section 29, appearing in the charters granted by the General Assembly to other railroad companies in the early era of railroad building in North Carolina have been considered in numerous decisions of this Court, among which are these: *Vinson v. R. R.,* 74 N.C. 510; *R. R. v. McCaskill,* 94 N.C. 746; *R. R. v. Sturgeon,* 120 N.C. 225, 26 S.E. 779; *Dargan v. R. R.,* 131 N.C. 623, 42 S.E. 979; *Barker v. R. R.,* 137 N.C. 214, 49 S.E. 115; *R. R. v. Olive,* 142 N.C. 257, 55 S.E. 263; *Earnhardt v. R. R.,* 157 N.C. 358, 72 S.E. 1062.
>
> "The tenor of these decisions is expressed in *Barker v. R. R., supra,* in this manner: 'This mode of acquisition is not an exercise of the right of eminent domain; it is based upon a purely statutory presumption. The concurring conditions are (1) entry and construction of the road, and (2) the failure of the owner to prosecute an action for two years. These concurring conditions existing, the statute fixes the term of two years within which the owner may prosecute his action, and in default of which the road acquires the easement described, to wit: "100 feet on each side of the center of the road" with the limitation fixed as to time and use.'
>
> "Again, in *Earnhardt v. R. R., supra,* it is said: 'The effect of inaction on the part of the owner for a period of two years after the completion of the road has been considered in several cases in this Court, under charters similar to the one before us, and without difference of opinion, it has been held that under such circumstances, a presumption of a grant from the owner arises for the land on which the road is located and for the right of way provided for in the charter.'

"This presumption, however, only arises in the absence of contract in relation to the lands through which the railroad may pass. Hence, the burden is upon the party claiming the benefit of such presumption to show every fact out of which it arises. *Barker v. R. R., supra.*"

Again, in the case of *R. R. v. Manufacturing Co.*, 229 N.C. 695, 51 S.E. 2d 301, the Court considered provisions in a charter similar to those pertinent to the instant case, and held:

"It is generally held that where a common carrier by railroad, under provision of its charter, enters upon land and builds a railroad, without grant or condemnation of the right of way, and no action or proceeding is commenced by the landowner within the statutory period for recovering compensation, a presumption of a grant or conveyance arises from the concurrence of these circumstances, and this presumption extends to the limits which the railroad company might have taken by condemnation and for which the landowner could have recovered compensation had he brought his action within the prescribed period of time. *Earnhardt v. R. R.*, 157 N.C. 358, 72 S.E. 1062. In such circumstances the railroad is said to acquire its right of way by implied grant or by operation of law. *R. R. v. McCaskill*, 94 N.C. 746; *R. R. v. Sturgeon*, 120 N.C. 225, 26 S.E. 779; *R. R. v. Olive*, 142 N.C. 257, 55 S.E. 263, and cases there analyzed and reviewed."

Appellants correctly contend that when defendant relies on a statutory presumption to establish its right of way, the burden is upon defendant to show by a preponderance of the evidence every fact out of which the presumption arises, *i.e.*, that defendant entered upon the land and constructed its tracks in the absence of any contract with the owner and that the persons owning the land when the road was finished did not apply for compensation within two years, as provided by statute. *Barker v. R. R., supra; Earnhardt v. R. R., supra.*

Here, defendant railroad company offered uncontradicted evidence of entry and construction of the railroad over ninety years ago, without any contract with the owner or owners. Plaintiffs neither by allegation nor proof controverted this evidence. Manifestly, sufficient time has long since elapsed for acquiring the right of way by statutory presumption.

Other than evidence of the alleged trespass, the essence of appellants' evidence was that there were Western Union poles on the

property in controversy and that there was a fence within 80 feet of defendant railroad company's main track; that certain conveyances tend to show that the southern boundary of plaintiffs' line is 35 to 50 feet from the center line of the track, and that other adjoining land appears about 50 feet from the center of the track.

It is well settled by statute and precedent in this jurisdiction that when a railroad has acquired and entered upon the enjoyment of its easement, the further appropriation and use by it of the right of way for necessary railroad business may not be destroyed or impaired by reason of the occupation of it by the owner or any other person. G.S. 1-44; *R. R. v. McCaskill, supra; R. R. v. Bunting,* 168 N.C. 579, 84 S.E. 1009.

Further, the fact that others own fee in the right of way and such ownership is indicated by deed or map appearing in the public registry presents no evidence of probative force that the right of way does not belong to the railroad, since it only has an easement which it may exercise to the full extent when in its judgment the necessities of its business so require.

Appellants argue that the presumption created by charter granted in Chapter 225, Private Laws of 1854-1855, cannot apply to a tract of land over which the railroad is not constructed. In this connection, appellants rely strongly on the case of *Wearn v. R. R.*, 191 N.C. 575, 132 S.E. 576, which states:

> "The law of North Carolina as declared in many decisions is to the effect that if a railroad company enters upon land under a deed or grant from the owner which purports to convey an unrestricted right of way and no definite quantity or width of land is specified, and thereafter constructs its road thereon, then it is presumed that the owner has granted to the company the width designated in the charter or in the general statute. This statutory presumption therefore applies: (1) In the absence of a contract between the parties; (2) where the contract purports to convey an unrestricted right of way and no definite quantity or width is specified; (3) only against owner across or over whose land the track is constructed."

Appellants, of course, rely on subsection (3) quoted above to sustain their position.

The facts in the *Wearn* case, on which appellants rely, are distinguishable from the instant facts, in that in *Wearn* the defendants claimed an easement by virtue of a grant from the Town of Charlotte and from one Peter M. Brown, and also by virtue of the statutory presumption. In *Wearn* it is stated: "It has also been deter-

mined that a railroad company cannot claim under a deed and also under a statutory presumption." *Hickory v. R. R.*, 137 N.C. 189, 49 S.E. 202. The *Wearn* case further stated:

> ". . . When the defendant accepted the deed restricting and limiting the amount of land to be used for railroad purposes, it cannot be permitted to extend its user or easement beyond that portion of said land actually used and occupied. This construction of the deed in question and the effect of the restrictive clause referred to is established in the decision of *Tighe v. R. R.*, 176 N.C. p. 239. In the *Tighe* case there was a restrictive clause and evidence to show that only a portion of the land was used and occupied by the railroad company under said restrictive clause, and the finding of the jury as to the extent of the easement and judgment thereon was upheld."

The *Tighe* case, cited above, is a case in which the defendant railroad company acquired by deed a less width of land as a right of way than that authorized by its charter, and action was brought to recover damages for alleged encroachment upon the property of the plaintiffs in the construction of defendant's track. There was evidence which tended to show that only one-quarter of an acre was used and occupied by the railroad company. The Court, holding that only by condemnation and payment of compensation to the owner could the railroad company occupy more than was conveyed by deed, stated:

> "Indeed, our decisions are uniform that when a railroad company has acquired the right of way by condemnation or by purchase of the right of way, the deed not limiting the conveyance to less than the statutory width (as in *Hendrix v. R. R., supra* (162 N.C. 9)), or has entered upon the land and acquired it without condemnation and without conveyance, by reason of the acquiescence of the owner for the statutory time — in all these cases, while the railroad can use only the part actually occupied (the adjacent proprietor using the rest of the right of way *sub modo*, that is, subject to the easement of the railroad), still in all these cases, whenever the necessities of the company require it, it can extend its user of the right of way to the extent of the statutory right for additional tracks or other railroad purposes. This matter has been fully discussed and uniformly decided in many cases." Citing *R. R. v. Olive*, 142 N.C. 264; *R. R. v. Sturgeon*, 120 N.C. 225; *R. R. v. McCaskill*, 94 N.C. 746; *Barker v. R. R.*, 137 N.C. 214.

"The present case, however, is distinguished from the above, for here the defendant railroad did not acquire the right of way either by condemnation or by occupation, without objection, for the statutory time, nor by a deed for the 'right of way,' all of which would be presumed to give an easement to the full width of the right of way allowed by the charter or the general law; but the defendant railroad was content to accept a deed specifying as the boundary 'according to the survey made by Ed. Myers, civil engineer,' and the jury find that this did not embrace the *locus in quo*. The defendant therefore is restricted to the boundary described in its deed."

Here, defendant railroad did not acquire the right of way in dispute by a restricted conveyance, nor did it rely on both a conveyance and a statutory presumption. It claims only by virtue of the statutory presumption authorized by its charter, which presumption is not restricted to the owner or owners over whose land the track is constructed.

In light of presentday land values, the density of the population and the highly developed state of our economy, we might, at first glance, question the policy of liberal acquisition of properties granted to railroad corporations by the legislature. However, the policy-making power of the legislature is not within our province, and the policy adopted by the legislature in the early history of railroad building in this state is justified in the case of *R. R. v. Olive, supra,* from which we quote:

". . . The point of view from which charters for railroads were drawn in this State fifty years ago must not be lost sight of in construing them in the light of present conditions. If, to induce the investment of capital in the construction of railroads and development of the country, large privileges were conferred, not inconsistent with the exercise of the sovereign power of the State in controlling them, we may not construe them away without doing violence to sound principle and fair dealing. When these rights-of-way were granted, or statutes enacted permitting their acquisition in the exercise of the right of eminent domain, it was contemplated that they should be sufficient width to enable the company to safely operate the road and protect the adjoining lands from fire communicated by sparks emitted by the engines. Land was cheap and population sparse. The railroads, as the charters show, were to be built by the citizens of the State, the capital stock to be subscribed by large numbers of people; legislatures were ready to make broad

> concessions to these domestic corporations, and, as shown by the record in this and other cases in this Court, the owners of lands, because the 'benefits which will arise from the building of said railroads to the owners of the land over which the same may be constructed will greatly exceed the loss which may be sustained by them,' were 'desirous to promote the building' thereof and to that end to give to them rights-of-way over their lands. When the road has been constructed and the benefits enjoyed, although new and unexpected conditions have arisen, the rights granted may not be withdrawn, although the long-deferred assertion of their full extent may work hardship."

Defendant had the burden of proof to establish all the facts giving rise to the statutory presumption, *i.e.*, entry and construction of the road in absence of any contract in relation to the land, and inaction on the part of the owner of the land for over two years after building of the road. All the evidence, without conflict, tends to support its claim that the statutory presumption has arisen. Thus, defendant was not entitled to a nonsuit, but was entitled, upon proper issues being submitted to the jury, to a peremptory instruction that it is the owner of a right of way over the land in controversy to the extent of the land over which said road was constructed, together with a space 100 feet on each side of the center of said road, for railroad purposes, whenever and to the extent necessary for the operation of its trains or the performance of its duties and obligations to the public as a common carrier.

Further, plaintiffs contend that the trial judge erred in allowing defendant's motion for judgment as of nonsuit because there is testimony in the record that defendant parked one of its trucks 125 feet from the center of the railroad track (which is admittedly beyond the right of way claimed by defendant), and that the entry upon the land of plaintiffs was unauthorized.

Any unauthorized entry on land in the actual or constructive possession of another constitutes a trespass, irrespective of degree of force used or whether actual damage is done. Such entry entitled the aggrieved party to at least nominal damages. *Schafer v. R. R.*, 266 N.C. 285, 145 S.E. 2d 887; *Letterman v. Mica Co.*, 249 N.C. 769, 107 S.E. 2d 753; *Matthews v. Forrest*, 235 N.C. 281, 69 S.E. 2d 553; *Whitley v. Jones*, 238 N.C. 332, 78 S.E. 2d 147.

Considering the evidence in the light most favorable to plaintiffs, as we are required to do on motion for nonsuit, and construing the pleadings in the light most favorable to plaintiffs, there appears to be sufficient evidence to carry the case to the jury, although the damages shown would seem to be only nominal.

For reasons stated, we hold that the trial judge erred in granting defendant's motion for nonsuit.

Reversed.

STATE v. JOSEPH MICHAEL PINYATELLO.

(Filed 12 January, 1968.)

1. Statutes § 10—

Penal statutes must be construed strictly against the State and liberally in favor of the citizen with all conflicts and inconsistencies resolved in his favor, but the court will not adopt an interpretation which will lead to a strained construction of the statute or to a ridiculous result.

2. Safecracking § 1—

The elements of the offense defined by G.S. 14-89.1 include (1) the felonious opening by explosives or tools of a safe used for storing money or valuables, or (2) the felonious picking of the combination of a safe containing money or other valuables, and it is not a prerequisite to a prosecution under the statute that the safe broken into have a combination lock.

3. Indictment and Warrant § 9—

An indictment is sufficient in form if it expresses the charge against the defendant in a plain, intelligible and explicit manner and contains sufficient matter to enable the court to proceed to judgment and to protect the defendant from a subsequent prosecution for the same offense.

4. Safecracking § 2—

The indictment in this case *held* sufficient to charge the offense of safecracking, G.S. 14-89.1, and it was not necessary to allege that the safe broken into possessed a combination lock.

5. Criminal Law § 61—

Evidence of shoe print evidence is properly admissible for the purpose of identifying the accused as the guilty party when the attendant circumstances show that the prints were found at or near the place of the crime, were made at the time of the commission of the crime, and correspond with the shoes worn by the accused at that time.

6. Same—

Evidence by an expert witness that a latent heel print on an envelope found near the scene of a safecracking possessed some 35 points of similar characteristics, and no points of dissimilarity, with the heel of a shoe worn by defendant at the time of his arrest four days after the offense is competent when there is evidence that the shoe was worn by defendant at the time of the commission of the crime.

7. Robbery § 4— Shoe print evidence held sufficient to show defendant guilty of safecracking.

The State's evidence tended to show that a safe was broken into by an axe and crowbar and that a sum of money was taken therefrom, that a white envelope left in the safe by the proprietor was found on the floor following the robbery with a latent heel print thereon, and that a comparison by an expert of the heel print on the envelope and the heel of a shoe worn by defendant at the time the crime was committed and at the time of his arrest four days later revealed some 35 points of similar characteristics and no points of dissimilarity. *Held:* The evidence was sufficient to go to the jury on the issue of defendant's guilt of safecracking in violation of G.S. 14-89.1.

8. Criminal Law § 104—

Evidence of the State that the defendant had a fifty dollar bill and a one hundred dollar bill on his person when he was arrested and that the victim of the safecracking testified that the largest bill in his safe was a twenty dollar bill, but that there were other numerous bills of lesser denominations, does not, standing alone, justify a compulsory nonsuit.

9. Criminal Law § 106—

Whether there is substantial evidence, direct or circumstantial, of each essential element of the offense, is a question of law for the court; whether circumstantial evidence points unerringly to defendant's guilt and includes every other reasonable hypothesis, is a question for the jury.

10. Same—

Motion to nonsuit should be denied if there is substantial evidence tending to prove each essential element of the offense charged.

11. Criminal Law § 158—

Where the charge of the court is not in the record, it will be presumed that the court correctly instructed the jury on every phase of the case with respect to both the law and the evidence.

APPEAL by defendant from *Canaday, J.*, 2 May 1967 Regular Criminal (2nd week) Session of WAKE.

Criminal prosecution on the following indictment:

"That Joseph Michael Pinyatello late of the County of Wake, on the 21st day of November, in the year of our Lord one thousand nine hundred and sixty-six, with force and arms, at and in the County aforesaid, unlawfully, wilfully and feloniously by the use of an axe and two crowbars and other tools did unlawfully force open and attempt to force open a safe and vault, the property of William McLaurin t/d/a McLaurin Parking Company located at 310 S. Salisbury Street, Raleigh, said safe and vault being used by said William McLaurin t/d/a McLaurin Parking Company for storing money and other valuables against the form of the statute in such case made and provided and against the peace and dignity of the State."

Defendant, who was represented by his present attorney of record, entered a plea of not guilty. Verdict: Guilty as charged of safecracking.

From a judgment that defendant be imprisoned in the State's prison for a term of not less than 20 years nor more than 25 years, he appeals.

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

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

PARKER, C.J. Defendant assigns as error the denial by the court of his motion to quash the indictment made before pleading.

The indictment is based upon G.S. 14-89.1, which reads:

> "Safecracking and safe robbery. — Any person who shall by the use of explosives, drills, or other tools unlawfully force open or attempt to force open or 'pick' the combination of a safe or vault used for storing money or other valuables, shall, upon conviction thereof, receive a sentence, in the discretion of the trial judge, of from ten years to life imprisonment in the State penitentiary."

Defendant contends in his brief that the indictment is defective because a strict construction of G.S. 14-89.1 requires that the safe or vault broken into would be required to have a combination and that the indictment should at least read: "that the defendant did unlawfully, wilfully, and feloniously, by the use of an axe and two crowbars and other tools, force open and attempt to force open the combination of a safe and vault, the property of. . . ."

It is true that penal statutes are construed strictly against the State and liberally in favor of the private citizen with all conflicts and inconsistencies resolved in his favor. *S. v. Scoggin,* 236 N.C. 1, 72 S.E. 2d 97. Construing G.S. 14-89.1, it is manifest that the statute condemns (1) the felonious opening or attempting to force open a safe or vault used for storing money or other valuables by explosives, drills, or other tools, or (2) to pick feloniously the combination of a safe or vault used for storing money or other valuables. The felonious picking of a combination of a safe or vault is a safe robbery condemned by our statute. The word "pick" has a distinct meaning well understood by policemen, laymen, and courts alike. To adopt the reasoning of defendant would mean there can be no safecracking or safe robbery unless the safe or vault has a combination, which would lead to a strained construction of the statute and a ridiculous result, and it would mean that safes or vaults without combinations could

not be the subject of safecracking or safe robbery under G.S. 14-89.1. We have repeatedly held that all that is required in an indictment, since the adoption of G.S. 15-153, is that it be sufficient in form to express the charge against the defendant in a plain, intelligible, and explicit manner, and to contain sufficient matter to enable the court to proceed to judgment and thus bar another prosecution for the same offense. *S. v. Anderson,* 259 N.C. 499, 130 S.E. 2d 857; 2 Strong's N. C. Index, Indictment and Warrant, § 9. The indictment here accurately and clearly alleges all the constituent elements of the crime of safecracking condemned by G.S. 14-89.1 almost verbatim in the language of the statute. The court properly denied the motion to quash the indictment.

The State offered evidence; defendant offered none. Defendant assigns as error the denial of his motion for a judgment of compulsory nonsuit made at the close of the State's evidence.

The State's evidence tends to show the following facts: On 21 November 1966 William McLaurin, d.b.a. McLaurin Parking Company, owned and operated eight parking lots in Raleigh, one of which is situated at 310 S. Salisbury Street. The building on South Salisbury Street contains the central office of McLaurin Parking Company. In the back office of the South Salisbury Street premises there was a safe used for storing money. About 3 p.m. on Sunday, 20 November 1966, McLaurin went to this place of business and was there alone checking on Friday's and Saturday's receipts until about 5 p.m. The parking lot was not open for business at that time. Before leaving he placed in this safe various checks, an undetermined amount due employees for a day or two of work, about $200 due employees for the prior week's work, and $1,303 in parking receipts. He then locked the safe as was customary. There was one door opening into the inner office where the safe was, and it was locked when he left at 5 p.m. that afternoon. The money he locked up in his safe consisted of ones, fives, tens, twenties, and coins. He does not recall any bills larges than a twenty.

At approximately 7:30 a.m. the following morning an employee who opened the place of business telephoned McLaurin, and he arrived there shortly thereafter. The door to the office in the building where the safe was situated had been pried open. The door of the safe had been torn off and was lying about two feet from the safe itself. Both the interior and exterior of the safe were totally demolished. There was nothing in the safe and his money was gone. Drawers in the safe had been taken out and searched, and the papers therein thrown about the office. He was shown an envelope marked for identification as State's Exhibit No. 1. This envelope was white and clean when he locked it in his safe the Sunday afternoon before.

It had contained $50 belonging to the wife of a former employee, Cliff Peele. The door to the office in which the safe was kept was pried open with the "figure" of a crowbar stuck in it. He had a safe in the ticket office. This safe was not torn up nor did it show any signs of damage. On this particular occasion there was not anything of value in that safe.

About 1 a.m. on the morning of 23 November 1966 at the corner of Holden and Watauga Streets in the city of Raleigh, Calvin Heath, a member of the Raleigh police department, arrested defendant for public intoxication and carried him to the county jail. He asked defendant to remove his shoes, which he did. A cardboard tag was marked and attached to the shoes which were then turned over to the county jailer. Defendant's shoes were introduced in evidence and marked State's Exhibit No. 2.

J. H. Ross is a Raleigh police officer and has been a member of the City-County Bureau of Identification since September 1966. He went to the McLaurin Parking Company building located on South Salisbury Street about 7:30 a.m. on 21 November 1966. He was the first officer to arrive at the scene. He found the safe in the inner office torn open, papers scattered on the floor, and a general disarray. He proceeded to check the safe and the papers for evidence. He dusted papers with fingerprint powder, and a heel print appeared on an envelope among the papers on the floor. This envelope was on the floor about two feet from the safe when he picked it up. It had on the front of the envelope "McLaurin Parking Company." On the back of the envelope was the heel print. The heel print was on the side opposite the one on which "McLaurin Parking Company" was written. He took that envelope and secured it. It was marked State's Exhibit No. 1. It is in substantially the same condition now as when he took it in his possession. When he put the fingerprint powder on the envelope, it made the print and at the same time soiled the paper. He saw on this envelope a heel print with a cat's face. He did not know how long the heel print had been on the envelope. He secured no fingerprints. He took in his possession at the scene of the robbery an axe and a crowbar.

M. L. Stephenson, a detective with the Raleigh police department, was assigned to investigate the safe robbery at McLaurin Parking Company. He got State's Exhibit No. 1 (the envelope) from Ross and State's Exhibit No. 2 (defendant's shoes) from the jailer. He carried them to Steve Jones of the State Bureau of Investigation. He knows Clifford Peele and his brother. He saw defendant and Lewis Morgan going into and coming out of a house at 701 East Franklin Street on numerous occasions. He does not know which one of them owned the house or rented it. He personally observed that

house for about three weeks on several different occasions all night long. He observed Clifford Peele and his brother and defendant going and coming from that address. He did not sign any warrants for the two Peele brothers. To his knowledge they have never been charged with this offense or any complicity in it. He has never talked to the Peele brothers. He has seen the defendant with either one or both of them several times during November. The two Peele brothers had worked for McLaurin.

Steve Jones testified in substance: He is in charge of the identification of the photography section of the State Bureau of Investigation in Raleigh. He has been with that Bureau for four years and five months. He received State's Exhibits Nos. 1 and 2 on 23 November 1966 from Detective Sergeant M. L. Stephenson, and they have been in his possession since their receipt. He has had three months intensive training with the Federal Bureau of Investigation at Washington, D. C., in the field of identification. He worked for the Federal Bureau of Investigation in Washington for two years and six months, and he has been engaged actively in identification work with the State Bureau of Investigation in Raleigh in fingerprints, palm prints, shoe tracks, etc., for the past four years and five months. Since he has been with the State Bureau of Investigation, he has had occasion to make comparisons of latent shoe prints with the actual shoes themselves. For the past six months, starting in October 1966 through March 1967, he has had for examination an average of 1,869 prints per month. On 23 November 1966 he made a visual comparison of State's Exhibit No. 1 with the heel of the shoe, State's Exhibit No. 2, by using a "five power magnifier to pick out certain characteristics of wear on the shoe and on the impression left on the paper and by using a divider to measure my distances and pointer to keep with the exact location in which I was working with." The court held that Steve Jones was an expert in the field of shoe prints and heel prints and in comparing them for identification purposes. He testified as follows:

> "It is my opinion that the item submitted as State's Exhibit 2 did make the impression left on the envelope submitted as State's Exhibit 1; and specifically, I refer to the heel of the shoe, State's Exhibit 2. The things that caused me to form this opinion were: the wear, the location on the heel print which is on the shoe shows wear in several locations and which it does not show wear; there are several scars or cut places on this heel print which show up on the impression left on the envelope in the same location with the same distance measured by dividers, as on the heel of the shoe and measuring from different points

on the heel of the shoe and measuring the same point on the envelope, all the measurements came out the same.

"Q. Now, Mr. Jones, can you classify the points that you used for identification with respect to whether or not they are part of the heel as opposed to having been not as a part of the heel but placed on there for some other fashion?

"A. The points I used mainly for my identification are the points that are not part of the heel as it is made by the factory —

* * *

"A. That is shown in the wear and cuts where there are rocks or glass still embedded within this shoe heel.

"I did say that I examined this under a five power magnified glass. To point out to the jury some of the markings on this shoe used for the purpose of identification that were not built into the heel, we have wear coming to here, which we have a ridge coming around here, here we have a point which is eat out; we have a crest here which has been cut out of this section; we have two located at this circle; we have this large cut here showing a piece of glass or rock or something, of which I did not dig out; we have our wearing on around here covering two or three dots or circles which are imprinted here; we have some wear which shows on these three toes of the cat's paw, on the upper left ear as it faces you; we have wear shown which is not shown on any portion of the ear, on the top of the head to the tip, there the tip shows wear, which is located and shown on this envelope. There are several points on here which are in the design which I also used to help me make this identification, such as the impression — not the impression, indentation of this area here and around in this area. (The witness was then asked to point it out to the jury at the other end of the jury box.)

"As I was pointing out here showing the wear, stopping here; this indentation of where it seems to be dug out, also a crest across this portion of the rubber circle, where the nail hole is; two cuts or crests across the rubber circle on this nail hole; a larger cut, scar with a piece of glass or rock embedded here around this circle of rubber and the wear on this portion where you can see this ridge coming around and you have the three cat's paw showing wear. The fourth one does not show wear. The tip of the ear shows wear but in here it does not. (The witness was then asked to point out these areas to the jury in the center of the jury box.)

"As I stated coming to right here, where this crest stops shows wearing beginning, one cut crest across here, on this rubber circle around the nail hole, two here, one here, cut places, cuts or crests. Wear continues to show all the way around and right here we have a big cut, piece of glass or rock embedded shown; we have the wear coming on around here; also have another line or crest which comes here showing wear; this crest down, we have three cat's paws out of the four showing wear, the other one does not; we have the tip of the ear that shows wear which does not show up here.

"Concerning the nail holes and the circular portion around the nail hole, I was able to observe that this shoe has 8 nail holes; the third one on your right, as you are looking at this heel, is wider on the front side than it is on the back side, which has this crest that I pointed out at the second point, which also shows up on this impression represented on State's Exhibit 1, the envelope.

"This one which would be the second one from the front of the heel on the left side as you face it, my right, is indented so as it does not leave but just a very faint edge on the impression on the envelope which it does not show any wear here.

"To the best of my knowledge, there are 11 different identifying points or marks there that were not built into the shoe heel but occurred by some other method I used in making or reaching the opinion that the heel on State's Exhibit 2 made the print on State's Exhibit 1. I counted somewhere between 20 and 25 points that were built into the shoe heel or a part of the shoe heel as opposed to some mark or points made by extraneous manner that I used in the identification of this print; this would make a total of 35 to 36 total characteristics. I did not count every little item that I come across but these are the main characteristics which I used. I do not depend upon the magnifying glass to bring this out enough so I could see it, not entirely; I examined it with my naked eye first.

"(The witness was asked to show to the jury the back of the heel print and the front of the heel print of State's Exhibit 1, the envelope, as it corresponds with the back of the heel of the shoe and the front.) This would be the back of the shoe, across here would be the front of the shoe showing the cat's face, cat's paws and the writing down here. You can see a S and P, a profile, and you will notice, if you look at this that it shows the cat's paw pointing to the right. On this the cat's paw is pointing to the left. This is reversible because it is a shoe track on an

object. When you put the shoe down, you can set it down and it will fit squarely on top the shoe track. To make your comparison, you have to look at your shoe and remember that this side of the shoe corresponding with this side of the latent, of the impression left on this. Therefore, this is why the difference in the way the cat's paw is pointing and in the difference in which ear shows the wear but this impression was made by the left heel and not the right heel because of the design of this shoe.

"Your right heel has this high point on the outside also. I was able to determine that it was the left shoe that made the impression prior to the time that other shoe was sent to the Federal Bureau of Investigation. As to your question was that because of the way the cat's paw was pointing and I knew it was upside down and the other things, to the best of my knowledge Mr. Stephenson had both of the shoes at the lab at this time. I did just keep only one shoe.

"I did measure the location of those points of identification, that were not built into the shoe or heel but were put there by some extraneous fashion, in relation to each other on both the heel and on the print on State's Exhibit 1; I went into this prior — I did measure on the heel print, on the shoe, I measured from one point to the other, certain other points all the way around this one point to make sure they were all the same. Doing the same thing on the impression of the envelope with the dividers. These measured distances on the heel did come out to be the same as the measured distances on the envelope. That was a part of what caused me to form the opinion."

He testified as follows on recross-examination:

"I could not find any points of dissimilarity. The pointer did not show any dissimilarity; I have been over it thoroughly. I cannot distinguish it. I would say that is a fairly good print; it is one of the better ones I have examined."

When defendant was arrested, there was taken from his person $572 in United States money in denominations of ones, fives, tens, twenties, fifty and hundred. There was one fifty dollar bill and one one hundred dollar bill, and the rest in small bills. This money was kept for defendant while he was in jail by the jailer.

Footprint evidence, like fingerprint evidence, is usually offered and admitted in evidence for the purpose of identifying the accused as the guilty party and to connect him with the crime. In respect to footprint evidence, Ervin, J., said for the Court with his customary clarity and accuracy in *S. v. Palmer,* 230 N.C. 205, 52 S.E. 2d 908:

"In the nature of things, evidence of shoeprints has no legitimate or logical tendency to identify an accused as the perpetrator of a crime unless the attendant circumstances support this triple inference: (1) That the shoeprints were found at or near the place of the crime; (2) that the shoeprints were made at the time of the crime; and (3) that the shoeprints correspond to shoes worn by the accused at the time of the crime. [Citing numerous authority.] Similar criteria apply to evidence of automobile tracks offered to identify the owner of a motor vehicle as the perpetrator of an offense. [Citing authority.]

"Moreover, the bare opinion of a witness that a particular shoeprint is the track of a specified person is without probative force on the question of identification. [Citing authority.] Wharton's Criminal Evidence (11th Ed.), section 934. The great master, Dean Wigmore, had this to say on this phase of the law of evidence: 'No doubt a witness to identity of footmarks should be required to specify the features on which he bases his judgment of identity; and then the strength of the inference should depend on the degree of accurate detail to be ascribed to each feature and of the unique distinctiveness to be predicated of the total combination. Testimony not based on such data of appreciable significance should be given no weight.' Wigmore on Evidence (3rd Ed.), section 415."

In *S. v. Walker,* 226 N.C. 458, 38 S.E. 2d 531, the defendant was guilty of raping a thirteen-year-old girl. He was found guilty by the jury of rape as charged in the bill of indictment and sentenced to death by asphyxiation. On his appeal this Court found no error in the trial. What the Court said in its opinion about footprints is relevant here:

"Assignment of error No. 6 is based on an exception to the action of the trial court in allowing a Deputy Sheriff to testify that near the scene of the attack footprints were seen which the officers followed to a tobacco barn at which the defendant said he had been curing tobacco. From the tobacco barn the footprints led to the defendant's home. The right-hand print was made by a shoe which was broken across the toe. The left-hand print was made by a smooth shoe with a worn heel containing two tacks. Shoes found at the home of the defendant were fitted into these prints at various places between the home of the defendant and the place of the alleged assault.

"The evidence which tended to show that the tracks into which the shoes of the defendant were fitted, were made by him, was competent. [Citing numerous authority.]"

In *S. v. Cox,* 201 N.C. 357, 160 S.E. 358, defendant was tried and convicted of highway robbery. What the Court said in its opinion about foot tracks is relevant here:

> "G. H. Ballard, husband of the prosecutrix, testified as a witness for the State. Soon after his wife cried out that she had been assaulted and robbed, this witness went to the place where she said that the assault and robbery occurred. He there found the tracks of two men, and a woman. He measured, with care, the tracks of the two men and testified in detail as to the measurements of each track. After the defendant Elmer Whitley was arrested, the witness measured his shoe. He testified over the objection of the defendants that the measurements of Whitley's shoe 'exactly checked with those of the larger track.' He further testified in detail as to the measurements made by him of Whitley's shoe. These measurements were identical. Defendants' objections were properly overruled. If there was error in overruling the objection to the statement of the witness that the measurements of Whitley's shoe exactly checked with those of the larger track, the error was harmless, in view of the subsequent testimony of the witness, as to the measurements made by him of the shoe. Of course, it was for the jury to determine from the evidence whether or not the measurements of Whitley's shoe exactly checked with those of the track at the place where the robbery was committed."

In the trial the Court found no error.

In *S. v. Warren,* 228 N.C. 22, 44 S.E. 2d 207, the Court said, which is pertinent here:

> "The defendant Brown assigns as error the admission of evidence tending to show that one of the shoes worn by him when he was arrested had a sole worn down to the canvass, that the shoe made a peculiar mark on the ground, and that this shoe fit perfectly into tracks found in the cornfield where Broyhill slept on the night of 15 July 1946. This evidence was competent and the assignment of error cannot be sustained."

In *S. v. Morris,* 84 N.C. 756, defendant was convicted of murder, and this Court found no error in the trial. As correctly stated in the first headnote in our Reports, the Court held:

> "On a trial for murder where the prosecution relies upon circumstantial evidence, it is competent to prove that certain tracks were measured and on comparison corresponded with the boot of the prisoner in size and shape; and this, where the measure-

ment and comparison are made without the presence of the prisoner or previous notice to him. It is not necessary that a witness should be an expert to entitle him to testify as to the identification of tracks. *State v. Reitz,* 83 N.C. 634."

In *S. v. Ragland,* 227 N.C. 162, 41 S.E. 2d 285, the Court said:

"It is well settled with us that the similarity of footprints is admissible in evidence as tending to identify the accused as the one who perpetrated the crime. The probative value of such evidence depends upon the attendant circumstances."

To the same effect see *S. v. Mays,* 225 N.C. 486, 35 S.E. 2d 494.

In *State v. Burley,* 95 N.H. 77, 57 A. 2d 618, defendant was indicted and convicted of burglary. The trial in the lower court was upheld. In that case the Court held that in a burglary prosecution permitting the State to establish defendant's guilt by identifying human fecal matter which was found on the insteps of both of defendant's rubbers which lay beside the bed where he slept in his home the morning after the burglary was committed, with such matter smeared and tracked over the floor of the burglarized store and bearing the imprints of the rubber, was proper. The Court further held that in this burglary prosecution expert testimony that markings or striations in the imprint on the floor of the burglarized store were consistent with the defendant's rubber was properly admitted to establish defendant's guilt.

In *State v. Mihoy,* 98 N.H. 38, 93 A. 2d 661, 35 A.L.R. 2d 852, a verdict of breaking and entering a diner in the nighttime was approved by the Supreme Court of New Hampshire. The evidence consisted in part of photographs and plaster casts of shoe marks at the scene of the crime and their correspondence to shoes worn by the accused at the time of his arrest. The Court, speaking by Kenison, C.J., said:

"Since there were no fingerprints to implicate the defendant and he was not placed inside the diner by an eye-witness, it is urged that his motion for a directed verdict of not guilty should have been granted. It is a well settled proposition that crimes involving theft may be proved by circumstantial evidence. *State v. Burley,* 95 N.H. 77, 57 A. 2d 618; Underhill, Criminal Evidence (4th ed.) 1202; *State v. Gobin,* 96 N.H. 220, 222, 73 A2d 430. Photographs and other reproductions of footprints and shoe marks were properly admissible to show their correspondence with the shoes that were worn by the defendant at the time of his arrest. Annotation 31 A.L.R. 204; Scott, Photographic Evidence (supp.) § 721. The trademark 'Ritz' on the heel of the

> footprints outside the diner and on the heel of the shoe worn by the defendant, together with the distinctive impression made by the outside sole of the shoes worn by the defendant, were competent evidence for the jury on the identity of the defendant."

See an elaborate annotation in 35 A.L.R. 2d 856-891, entitled "Footprints as evidence."

S. v. Batts, 269 N.C. 694, 153 S.E. 2d 379, relied upon by defendant in his brief is factually distinguishable. The State's evidence in that case considered in its strongest light merely showed the morning following the loss of the property that shoe tracks which were made by the defendant's shoes, or ones identical to them, were found where the stolen property was discovered. These tracks started in a cornfield adjoining the prosecuting witness's yard, but could not be traced (if they were present) through the grass in her yard to her house. The Court in that case properly held that the evidence was insufficient to convict the defendant. The evidence in that case is a far cry from the evidence in the instant case.

In *S. v. Thorp,* 86 N.H. 501, 171 A. 633, 172 A. 879, a conviction of murder was upheld where evidence was introduced, along with other evidence, to show that footprints were found on the blood-stained linoleum where the deceased was killed, such footprints matching the soles and heels of defendant's shoes, which had rubber heels on which was stamped a trademark consisting of a shield and the word "Regent," and there were also distinctive marks on the soles of the shoes.

In *Keller v. People,* 153 Colo. 590, 387 P. 2d 421, the People established that the method of entry into the clothing store was through a glass skylight which had been broken. Beneath the skylight is an air-conditioning or heating unit and a conduit running parallel to the ceiling. Below these structures and some three feet north of the skylight a clothes rack was positioned on the top of which was a board. In the dust on the board a heel print was found. The right shoe which the defendant was wearing at the time he was apprehended and the portion of the board containing the heel print were sent to the laboratory of the Federal Bureau of Investigation in Washington, D. C. At the trial, a special agent employed in the laboratory of the Federal Bureau of Investigation as an examiner of shoeprints and tire treads testified that in his opinion the heel print on the board was made by the heel of the defendant's right shoe and no other. The Court held as stated in the first headnote of the Pacific Reporter: "Circumstantial evidence supported burglary conviction of defendant whose right shoe had made heel print on board in premises broken into and who was apprehended about 100

feet from where suitcase and contents taken from burglarized store were found."

It seems to be indubitable from the totality of the evidence that the State established these basic facts: (1) McLaurin's safe situated in a back office of his premises on South Salisbury Street was broken open by an axe and crowbar between 5 p.m. on Sunday, 20 November 1966 and 7 a.m. on Monday, 21 November 1966, and the contents therein consisting of more than $1,300 were stolen at that time. (2) About 1 a.m. on Wednesday, 23 November 1966 defendant was arrested at the corner of Holden and Watauga Streets in the city of Raleigh for public intoxication by Calvin Heath, a member of the Raleigh police department. (3) At the time of his arrest defendant was wearing shoes which were introduced in evidence and marked State's Exhibit No. 2. (4) When defendant was arrested there was taken from his person $572 in United States currency in denominations of ones, fives, tens, twenties, one fifty dollar bill and one hundred dollar bill. J. H. Ross, a Raleigh police officer and a member of the City-County Bureau of Identification, the first officer to arrive at the scene of the safe robbery, found papers scattered over the floor of the inner office where the broken-open safe was situated, and by the use of fingerprint powder he found the heel print of a shoe on the back of an envelope lying on the floor, which heel print was introduced in evidence and marked State's Exhibit No. 1. McLaurin locked this letter up in his safe Sunday afternoon, 20 November 1966, and at that time this envelope was white and clean.

Applying the rule laid down by Justice Ervin in *S. v. Palmer, supra,* it seems indubitable that (1) the heel print was found at the place of the safe robbery, and (2) that the heel print was made at the time of the safe robbery. The trial court correctly found that Steve Jones, a member of the State Bureau of Investigation, was qualified by training and experience as "an expert in the field of shoe prints and heel prints." Stansbury's N. C. Evidence 2d § 132 *et seq.* His testimony is set forth above *in extenso,* and he testified as to the features of the heel print and the heel of defendant's shoe he was wearing when he was arrested. He testified in minute detail to the said features, and the unique distinctiveness to be predicated of the total combination. He testified as follows:

> "To the best of my knowledge, there are 11 different identifying points or marks there that were not built into the shoe heel but occurred by some other method I used in making or reaching the opinion that the heel on State's Exhibit 2 made the print on State's Exhibit 1. I counted somewhere between 20 and 25 points that were built into the shoe heel or a part of the shoe

> heel as opposed to some mark or points made by extraneous manner that I used in the identification of this print; this would make a total of 35 to 36 total characteristics. . . . I could not find any points of dissimilarity. The pointer did not show any dissimilarity; I have been over it thoroughly. I cannot distinguish it. I would say that is a fairly good print; it is one of the better ones I have examined."

Applying the third test laid down by Justice Ervin, the expert testimony of Steve Jones would permit a jury to find a reasonable inference from his testimony that the heel print on the letter or envelope corresponds to a shoe worn by the accused at the time of the crime. It is true as contended by defendant that the State's evidence showed that when he was arrested he had on his person a fifty dollar bill and a hundred dollar bill and that McLaurin testified that he had no bill larger than a twenty locked in his safe the night it was robbed. It is true as contended by defendant that the safe in the ticket office which was empty was not broken open and that Cliff Peele might have known which safe contained money and which safe was empty of money. For all the record shows, defendant may have had the same knowledge. The weight and credibility of the testimony was for the jury and these contentions could well be argued before the jury by the defendant's counsel, as no doubt they were, but that standing alone would not justify a compulsory nonsuit of the State's case.

The State's evidence is circumstantial. The rule in respect to the sufficiency of circumstantial evidence to carry the case to the jury is correctly stated in an excellent opinion by Higgins, J., in *S. v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431, as follows:

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

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

Considering the State's evidence in the light most favorable to it and giving it the benefit of every reasonable and legitimate inference to be drawn therefrom, it is plain that the total combination of facts shown by the State's evidence shows substantial evidence of all essential elements of the felony charged in the indictment and is amply sufficient to carry the case to the jury. The trial court properly overruled defendant's motion for judgment of compulsory nonsuit.

Defendant has numerous assignments of error. The Court has carefully examined all defendant's assignments of error which have been brought forward and discussed in the brief, and none of them shows error sufficient to disturb the judgment and verdict below. All are overruled.

The charge is not in the record. When the charge of the court is not in the record, it will be presumed that the court correctly instructed the jury on every phase of the case, with respect to both the law and the evidence. 3 Strong's N. C. Index 2d, Criminal Law, § 158.

In the trial below we find

No error.

STATE v. ERNEST MEADOWS, DEFENDANT.

(Filed 12 January, 1968.)

1. Assault and Battery § 5—

The offense of felonious assault under G.S. 14-32 consists of an assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death.

2. Homicide § 1—

An accused may not be placed in jeopardy for homicide until the death of the injured victim has occurred.

3. Homicide §§ 4, 5—

A specific intent to kill, while a necessary constituent of the elements of premeditation and deliberation in first degree murder, is not an element of murder in the second degree or manslaughter.

4. Criminal Law § 23—

A plea of guilty is equivalent to a conviction.

5. Criminal Law § 26—

If, after a prosecution for an offense, a new fact supervenes for which the defendant is responsible and which changes the character of the offense and, together with the previous facts, constitutes a new and distinct crime, a conviction of the first offense is no bar to an indictment for the other distinct crime.

6. Criminal Law § 26; Homicide §§ 1, 12—

Defendant, prior to his victim's death, pleaded guilty to an indictment charging a felonious assault, G.S. 14-32, and was sentenced therefor. Subsequently, upon the victim's death, defendant was indicted for murder in the second degree, and defendant entered a plea of *autrefois convict* to the charge. *Held:* Defendant's plea in bar of "former conviction" was properly overruled, since at the time of his conviction for felonious assault the defendant could not have been placed in jeopardy for homicide.

7. Criminal Law § 176—

Where defendant introduces evidence, only the correctness of the denial of the motion to nonsuit made at the close of all the evidence is presented on appeal.

8. Homicide § 20—

Evidence of the State tending to show that the defendant and the deceased had a quarrel in the defendant's yard, that the defendant got a shotgun from his house and fired at the unarmed deceased, wounding him in the neck, resulting in his death some four and one-half months later, *held* sufficient to be submitted to the jury on the issue of defendant's guilt of murder in the second degree or of manslaughter.

9. Homicide § 13—

When the evidence of the State amply supports a jury finding that the defendant intentionally shot the deceased with a deadly weapon and thereby proximately caused his death, the presumptions arise that the killing was unlawful and with malice, constituting the offense of murder in the second degree.

10. Criminal Law §§ 75, 86—

Under the decision of *Miranda v. Arizona*, 384 U.S. 436, it is clear that an involuntary or not properly qualified confession may not be used to impeach a defendant who takes the stand in his own behalf.

11. Same—

Evidence of the State that the defendant, surrounded by family and friends in his yard, made inculpatory statements, amounts to a confession to police officers immediately following the shooting of the deceased by defendant, *held* properly admitted in evidence to impeach the testimony of defendant on trial, although the officers failed to advise de-

fendant of his rights as required by *Miranda v. Arizona*, it appearing that the statements were the result of a general police investigation to determine if a crime had been committed, and not the result of an in-custody interrogation.

12. Assault and Battery § 17—

A judgment imposing a prison sentence of five years upon a conviction of felonious assault is authorized by G.S. 14-32.

13. Homicide § 30—

A judgment imposing a prison sentence of not less than 12 nor more than 15 years upon conviction of manslaughter is authorized by G.S. 14-18.

14. 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.

15. Criminal Law §§ 138, 146—

Defendant pleaded guilty to a charge of felonious assault and began a sentence of five years imprisonment. Upon the death of the victim of the assault, defendant was convicted of manslaughter and sentenced to a period of imprisonment for not less than 12 nor more than 15 years, the sentence to run concurrently with the first. *Held:* The Supreme Court, in the exercise of its general supervisory jurisdiction, North Carolina Constitution Art. IV, § 10, orders that the defendant be given credit for the time served under the first sentence of imprisonment in computing the length of imprisonment in the judgment for manslaughter.

APPEAL by defendant from *McLaughlin, J.*, October-November 1966 Session of UNION.

At February 1966 Session, the grand jury of Union County returned a bill of indictment charging that defendant on February 5, 1965, murdered one Ellis Newman. At February 1966 Session, Gambill, J., appointed Koy E. Dawkins, Esq., of the Union County Bar, to represent defendant in respect of said murder indictment. At May 1966 Session, Mr. Dawkins, representing defendant, before entering any other plea, entered a plea of "former conviction" to said murder indictment and filed a brief in support of this plea. Thereafter, by order of Brock, J., dated May 4, 1966, the court, being advised that "the family" of defendant had retained other counsel to represent him, permitted Mr. Dawkins to withdraw from the case. Defendant's said plea of "former conviction" was heard by Brock, J., at said May 1966 Session. His order overruling defendant's plea of "former conviction" is based on the findings of fact set forth therein, to wit:

"That on February 5, 1965, during an altercation in the home of the defendant, the deceased, Ellis 'June' Newman, was allegedly shot with a shotgun by the defendant; that a warrant was issued and a

Bill of Indictment returned at the May 1965 Session charging the defendant with a felonious assault on Ellis 'June' Newman with a deadly weapon, to wit, a 12 gauge shotgun, with intent to kill Ellis 'June' Newman, inflicting serious bodily injury not resulting in death; that at the May 1965 Session the defendant, through counsel, entered a plea of guilty as charged and was sentenced by the presiding Judge to a term of five (5) years in the State Prison; that thereafter on the 31st day of May, 1965, Ellis 'June' Newman died allegedly as a result of the gunshot wound received on February 5, 1965; that at the February 1966 Session of Superior Court of Union County the Grand Jury returned a true bill charging the defendant with the murder of Ellis 'June' Newman, and the case was set for trial at the May 2, 1966, Session."

Defendant excepted generally "(t)o the foregoing findings of fact, conclusions of law and entry of the foregoing order denying defendant's plea in bar . . ."

After the entry of Judge Brock's order, and by and with the consent of the solicitor, trial of defendant on said murder indictment was continued for the session.

Trial on said murder indictment was before McLaughlin, J., and a jury, at said October-November 1966 Session. Defendant was represented by Byron E. Williams, Esq., privately retained counsel. The jury returned a verdict of guilty of manslaughter. Thereupon, the court pronounced judgment imposing a prison sentence of not less than twelve nor more than fifteen years. Defendant excepted and gave notice of appeal.

Orders entered by McConnell, Resident Judge, in July and August, 1967, provide: (1) Failure to perfect the appeal in apt time was "through no fault or neglect on the part of the indigent defendant," and defendant was allowed to perfect his appeal; (2) R. Roy Hawfield, Esq., a member of the Union County Bar, was appointed counsel for defendant, an indigent, to perfect the belated appeal; and (3) Union County was required to pay the costs of mimeographing the record and defendant's brief incident to his appeal.

Attorney General Bruton, Assistant Attorney General McDaniel and Staff Attorneys Jacobs and Wood for the State.

R. Roy Hawfield for defendant appellant.

BOBBITT, J. Defendant assigns as error the overruling of his plea of "former conviction" by Brock, J., at May 1966 Mixed Session.

Defendant based his plea of "former conviction" on the fact the indictment for felonious assault to which he pleaded guilty at May 1965 Session, and the indictment for murder returned at February

1966 Session and on which defendant was tried at the October-November 1966 Session, arose out of the same transaction, namely, the alleged shooting of Ellis Newman by defendant on February 5, 1965.

Defendant pleaded guilty to the said crime of felonious assault and was sentenced therefor prior to May 31, 1965, the date of the death of Ellis Newman.

Although identical in respect of certain elements, the crimes charged in the two bills of indictment are distinct offenses both in law and in fact.

The crime of felonious assault, created and defined by G.S. 14-32, consists of these essential elements: (1) An assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) *not resulting in death. State v. Hefner,* 199 N.C. 778, 155 S.E. 879; *State v. Birchfield,* 235 N.C. 410, 70 S.E. 2d 5; *State v. Jones,* 258 N.C. 89, 128 S.E. 2d 1.

In felonious assault, "(t)he injury must be serious but it must fall short of causing death." *State v. Jones, supra.* Too, a specific intent *to kill* is an essential element of felonious assault. *State v. Ferguson,* 261 N.C. 558, 135 S.E. 2d 626.

With reference to the murder indictment, this statement by Mr. Justice Van Devanter in *Diaz v. United States,* 223 U.S. 442, 32 S. Ct. 250, 56 L. Ed. 500, is apposite: "The death of the injured person was the principal element of the homicide, but was no part of the assault and battery. At the time of the trial for the latter the death had not ensued, and not until it did ensue was the homicide committed. Then, and not before, was it possible to put the accused in jeopardy for that offense."

The trial on said murder indictment was for second degree murder or manslaughter as the evidence might warrant. "A specific intent *to kill,* while a necessary constituent of the elements of premeditation and deliberation in first degree murder, is not an element of second degree murder or manslaughter." *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322.

"If, after a prosecution for an offense, a new fact supervenes for which the defendant is responsible, and which changes the character of the offense, and, together with the previous facts, constitutes a new and distinct crime, an acquittal or conviction of the first offense is no bar to an indictment for the other distinct crime." 1 Wharton's Criminal Law and Procedure, § 145, p. 353. Accord: 21 Am. Jur. 2d, Criminal Law § 186; 22 C.J.S., Criminal Law § 287c, p. 753.

A plea of guilty is "equivalent to a conviction." *State v. Brinkley,* 193 N.C. 747, 138 S.E. 138; *Harrell v. Scheidt, Comr. of Motor*

Vehicles, 243 N.C. 735, 92 S.E. 2d 182; *State v. Stone,* 245 N.C. 42, 95 S.E. 2d 77.

The plea in bar asserted by defendant is *autrefois convict,* "formerly convicted." Decision on this appeal relates exclusively to such plea. We do not consider or decide whether an acquittal of defendant after trial on the felonious assault bill of indictment would constitute a bar to the subsequent prosecution for homicide.

In *Commonwealth v. Vanetzian,* 350 Mass. 491, 215 N.E. 2d 658 (1966), a defendant, prior to the victim's death, was indicted for assault and battery by means of a dangerous weapon, and pleaded guilty to and was sentenced for this criminal offense. Subsequently, when placed on trial for murder, the defendant pleaded *autrefois convict.* In overruling defendant's said plea, the Supreme Judicial Court of Massachusetts, in opinion by Spalding, J., said: "Both the common law and our statutes provide that a person may not be twice put in jeopardy for the same offence. (Citations.) But it is clear that this principle can have no application where, as here, at the time of the first indictment the facts upon which the second indictment is based had not yet occurred. (Citations.)"

In *Commonwealth v. Maroney,* 417 Pa. 368, 207 A. 2d 814 (1965), the defendant, prior to the victim's death, had pleaded *nolo contendere* to an indictment charging aggravated assault and robbery. Later he was indicted and adjudged guilty of murder in the first degree and sentenced to life imprisonment. In *habeas corpus* proceedings, he sought relief on the ground his plea of *nolo contendere* to aggravated assault and robbery constituted a bar to the subsequent prosecution for homicide. In rejecting defendant's plea of *autrefois convict,* the Supreme Court of Pennsylvania, in opinion by Eagen, J., said: "If, on the day he was convicted of aggravated assault and battery, the victim had already died and the appellant was *then* guilty of murder, his prosecution and conviction for the assault and battery would have barred his subsequent prosecution for murder. . . . However, when the first conviction occurred, the appellant was not then guilty of murder and could not have been prosecuted for that crime, since no such crime had as yet been committed. When the death occurred, a new and distinct crime was consummated for which he was not before guilty or prosecuted. The case of *Commonwealth v. Ramunno,* 219 Pa. 204, 68 A. 184, 14 L.R.A., N.S., 209 (1907), is factually identical and controlling."

Decisions in accord include the following: *State v. Wilson,* 85 Ariz. 213, 335 P. 2d 613; *State v. Randolph,* 61 Idaho 456, 102 P. 2d 913; *Hill v. State,* 149 S.W. 2d 93 (Tex.); *Powell v. State,* 42 So. 2d 693 (Ala.); *State v. Wheeler,* 173 La. 753, 138 So. 656. No decision reaching a contrary result has come to our attention. Both reason

and authority support Judge Brock's ruling in respect of defendant's said plea of "former conviction."

Defendant also assigns as error the denial of his motion(s) for judgment as in case of nonsuit. Defendant having offered evidence, the only question is whether the court erred in the denial of the motion made by defendant at the close of all the evidence. G.S. 15-173; *State v. Leggett,* 255 N.C. 358, 121 S.E. 2d 533.

The State's evidence consists of the testimony of Elree Robinson, Elgee Gray, Ben Stewart, and Eugene F. Hamer.

The testimony of Dr. Hamer, a medical expert, relates solely to the injuries sustained by Newman on February 5, 1965, and the cause of his death on May 31, 1965. Dr. Hamer testified: "The cause of (Newman's) death on May 31, 1965, was from complications, indirectly as a result of the gunshot wound of the neck which caused total paralysis from the neck down. The wound was on his neck, on one side."

Robinson testified in substance as follows: Robinson, "half-brother" of defendant, drove his car to defendant's house on Friday, February 5, 1965, about 10:00 p.m., in order to try to crank defendant's car. Newman went with him. Robinson parked his car in defendant's yard in position to connect jumper cables to the batteries of the two cars. While they were trying, unsuccessfully, to crank defendant's car, Newman and defendant "had some words about a hat." Newman told defendant he had better leave the car alone; that he could crank it the next day when they came home from work; and that defendant had been "in some of that man's gin anyway" and would not know what he was doing that night. Defendant then left, saying, "Wait a minute, I'll be right back." Defendant went into the house, came to the door with a shotgun, fired it once, the load from the gun hitting Newman in the neck. When shot, Newman was "beside the car," facing Robinson. Robinson asked defendant what was wrong. Defendant cursed and went back into the house. He came out again, without the shotgun, and said, "The damn rascal ain't dead?" Robinson replied, "No, he's not dead." Robinson asked Newman whether he could help him. Newman said, "No," and "slid back by the car with his head against the left wheel of (defendant's) car." The porch light at defendant's house was on. Newman did not have a knife in his hand. Robinson did not see Newman "have a piece of iron or hammer." After the shooting, Robinson "ran over to (his) mother's and had her call an ambulance and the Police Department." Two police officers answered the call.

Gray and Stewart, police officers, testified in substance as follows: Upon arrival, they found Newman lying on the ground, lean-

ing back against some old tires and the front wheel of a car that was parked in the yard. Newman was shot in the neck. He was "bleeding in the back of the neck where there was a wound." Newman "was talking but not moving any." Stewart, on cross-examination, testified: "I remember seeing a hammer somewhere but not where Newman was. I think there were about three or four feet between the porch and the car. It seems to me there was a hammer on the porch." Gray, under cross-examination, testified: "I did not see any hammer."

Defendant's evidence consists of his own testimony. He testified in substance as follows: He had told Robinson, "(his) brother," to come to his house Friday night, February 5, 1965, to help him start his car. Robinson got there about 10:30 p.m., accompanied by Newman. Defendant's car was "about three feet" from his porch. Defendant took his tool box, went to his car, "took the hammer and pounded the wire on the post of the battery," and then "laid the hammer down on the fender of the car." Robinson was in his car, "with the lights on and the motor running." Newman switched on the motor of defendant's car. Whereupon defendant hollered, "I ain't ready yet," and "Man, are you crazy?" The fan on the motor had cut defendant's wrist. Whereupon Newman cursed defendant and his car. Defendant told Newman to leave. Newman refused and said, "I want to whip hell out of you anyhow." While Newman was cursing, abusing and threatening defendant, defendant went to his house and was standing in the door. The shotgun "was setting right beside of the door facing as you come in the door." Defendant got his shotgun with his left hand. Newman came up on defendant's doorstep. Defendant told him "to go on." When Newman put his foot on the porch and drew the hammer back, defendant grabbed the shotgun and shot him. Defendant testified: "When I come down with the gun, he was coming down with the hammer." He also testified: "He was coming on me in my house, and I was not able to do anything with a man like that in my condition and him with that hammer coming at me." Defendant testified that "(a)bout seven months before (he) had two ribs removed and a lung operation," and that his back was broken in the service and he was still on crutches.

There was ample evidence to support a jury finding that defendant intentionally shot Newman with a deadly weapon, to wit, a shotgun, and thereby proximately caused Newman's death. Upon such finding, two presumptions arise: (1) That the killing was unlawful; (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree. *State v. Gordon, supra.* This being so, defendant's motion for judgment as in case of nonsuit was properly denied.

After defendant had testified, the State recalled Gray and Stewart. Defendant assigns as error the admission of their testimony, upon recall, as to statements made by defendant at the scene of the shooting.

Their testimony tends to show that these officers had received a call that a shooting had occurred at 718 Boyce Street; that they proceeded to this address to investigate; that, upon arrival, they found Newman, shot "on the neck with a shotgun," bleeding, in defendant's yard; that "there were several persons around there," including defendant's "brother"; and that defendant was there and talked with them.

Stewart testified he asked defendant what had happened, and that defendant replied, "I shot him"; that, when asked why, defendant stated he had told Newman to leave; and that when asked about the weapon, defendant and Gray went to the back bedroom of defendant's house and got the shotgun. In further conversation, according to Stewart, "after the ambulance come to take (Newman) away," defendant told Stewart that Newman "had a knife on him — that he pulled a knife." Stewart testified he saw no knife.

When defendant's counsel objected to testimony by Stewart as to what defendant told him, the court inquired of Stewart: "Was (defendant) a suspect at that time?" Stewart answered: "I didn't know what happened. When I got there — I asked him what happened and that's when he told me." Thereupon, the court, apparently basing his ruling on his finding that defendant was not "a suspect" at that time, overruled defendant's objection and admitted the testimony of Stewart summarized above.

Gray, when asked by the court whether defendant was a suspect *at the time of the investigation,* answered, "Yes, sir." Defendant's objection to this question by the court was overruled and defendant excepted. Whereupon, the solicitor asked: "What did you (Gray) say to him (defendant)?" No objection was interposed by defendant. Defendant answered: "When I walked up to the house where Ernest was, Ernest said he shot 'Jum' on account of a hat he had borrowed." Defendant made no motion to strike this unresponsive answer.

The testimony of defendant that he shot Newman, and the testimony of Stewart, *upon recall,* that defendant advised him at the scene of the shooting that he had shot Newman, are in full accord. Statements attributed to defendant that Newman had had a knife and that he had shot Newman "on account of a hat he had borrowed" are in conflict with defendant's testimony at trial. Hence, to whatever extent it may be considered prejudicial, the impact of this testimony bears upon defendant's credibility as a witness.

Prior to the decision of the Supreme Court of the United States in *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R. 3d 974, the rule supported by the weight of authority was "that an involuntary or not properly qualified confession may not be used to impeach an accused person who takes the witness stand in his own behalf . . ." Annotation, 89 A.L.R. 2d 478, pp. 479-480. Under *Miranda,* it seems clear an involuntary or not properly qualified confession or admission may not be used as evidence for any purpose.

Ordinarily, the failure of defendant's counsel to move to strike Gray's unresponsive answer would be sufficient to dispose of defendant's assignment of error (unsupported by an exception) with reference thereto. However, we prefer to consider the challenged evidence on the merits rather than on procedural grounds.

There is no contention that defendant was warned as to any of the constitutional rights set forth in *Miranda* prior to making the statements attributed to him. The question is whether, under the circumstances, such warning was necessary.

In *Miranda,* the majority opinion, delivered by Mr. Chief Justice Warren, states that the constitutional issue decided "is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way." Repeatedly, reference is made to "custodial interrogation." Thus, the opinion states: "(T)he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." The opinion stated further: "Our decision is not intended to hamper the traditional function of police officers in investigating crime. See *Escobedo v. Illinois,* 378 U.S. 478, 492, 12 L. Ed. 2d 977, 986, 84 S. Ct. 1758. . . . Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of incustody interrogation is not necessarily present." The opinion also states: "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

As stated in *Gaudio v. State,* 1 Md. App. 455, 230 A. 2d 700: "In the opinion (in *Miranda*) the Court discussed 'custodial interrogation' at great length and the dangers against which the specific procedural safeguards are a shield were more definitively set forth in the discussion explaining the meaning above stated. The four cases decided by *Miranda* shared salient features, among which was 'incommunicado interrogation of individuals in a police-dominated atmosphere.' The Court referred to the Wickersham Report in the early 1930's and to the 'third degree' which flourished at that time and to cases thereafter decided by the Court in which police resorted to 'physical brutality — beatings, hanging, whipping — and to sustained and protracted questioning incommunicado in order to extort confessions.' It found that the use of physical brutality and violence is not relegated to the past or to any part of the country and stated that, 'Unless a proper limitation upon custodial interrogation is achieved — such as these decisions will advance — there can be no assurance that practices of this nature will be eradicated in the foreseeable future.' It stressed that the modern practice of in-custody interrogation is psychologically rather than physically oriented so that coercion can be mental as well as physical. It referred to police manuals and texts in which police officers are told that the 'principal psychological factor contributing to a successful interrogation is privacy — being alone with the person under interrogation.' "

"In-custody interrogation" is not involved in the factual situation here considered. Defendant was at his own home. He was living with his wife, his three children and his wife's mother. Robinson, his brother or half-brother, was present. Newman was lying in his yard. Others, presumably neighbors, had gathered at the scene of the shooting.

Defendant was not under arrest or in custody when the statements attributed to him were made. As to whether defendant was then a "suspect," the only reasonable conclusion to be drawn from the evidence is that defendant was then suspected, indeed it was manifest, that he, on his own premises, had shot Newman. The officers were seeking information as to the circumstances to determine whether and, if so, by whom, a crime had been committed. Whether they would conclude a crime had been committed depended upon the results of their investigation. Defendant was not taken into custody until after the officers had completed their investigation.

A general investigation by police officers, when called to the scene of a shooting, automobile collision, or other occurrence calling for police investigation, including the questioning of those present, is a far cry from the "in-custody interrogation" condemned in *Miranda.* Here, nothing occurred that could be considered an "incom-

municado interrogation of individuals in a police-dominated atmosphere." Defendant's assignment of error with reference to the testimony of the officers as to statements made by defendant at the scene of the shooting is without merit.

The views expressed herein are in accord with those stated in the following cases: *Duffy v. State,* 243 Md. 425, 221 A. 2d 653; *Gaudio v. State, supra; Dixon v. State,* 1 Md. App. 623, 232 A. 2d 538; *Ison v. State,* 200 So. 2d 511 (Ala.); *State v. Phinis,* 199 Kan. 472, 430 P. 2d 251.

In *Ison v. State, supra,* police officers stopped behind a car and found therein a person who was slumped over and had been shot in the head. One of the officers attended the wounded man while the other contacted police headquarters over the police car radio. The officer attending the wounded man testified that defendant approached with a pistol in his hand and in response to a question as to whether he had done the shooting made the inculpatory statement that he had shot the deceased. The Court, in opinion by Harwood, J., said: "We can conceive of no set of circumstances where it could be more unlikely that a statement by a person was coerced, than in the present situation where that person left his home, approached an investigating officer, and while standing in his own yard with a pistol in his hand, and not yet even in custody, replied to a question by the officer then engaged in ministering to a wounded man, as to whether he had shot the victim."

In *State v. Phinis, supra,* the sheriff, in response to a call, went to a service station and talked with one Hill who had been injured. The sheriff took Hill to a medical center for treatment of his injury, apparently a gunshot wound. Thereafter the sheriff and a patrolman went to a cabin occupied by the defendant and three others. During general questioning by the officers, in the course of their investigation, defendant stated she had fired a shot into the floor to scare Hill, who had been drinking and refused to leave, but that the bullet did not hit Hill. After their general investigation, the officers took defendant and one of the other occupants to the police station. With reference to testimony as to statements made by defendant during the general investigation at the cabin, the Court said: "At that stage of the investigatory process the general inquiry was of a nature and for the purpose of determining if a crime had been committed upon the person of Eddy Hill who claimed he had been shot by someone in the cabin. The nature of the crime had not been determined and the inquiry into such had not focused on any particular suspect. Clearly the investigation was not the custodial interrogation referred to in *Escobedo* and *Miranda.* The surroundings or place of the investigation, the circumstances giving rise to the in-

quiry and the presence of friends of the defendant indicate it was an 'on-the-scene' investigation. No advice of rights was required at that step of the investigation. The officers were not certain a crime had been committed by anyone."

For a comprehensive discussion of the impact of *Miranda* on police practices, see article by Thomas C. Lynch, Attorney General of the State of California, 35 Fordham Law Review 221 *et seq.*

The judgment for felonious assault pronounced at said May 1965 Session, which imposed a prison sentence of five years, is authorized by G.S. 14-32; and the judgment for manslaughter pronounced at said October-November 1966 Session, which imposed a prison sentence of not less than twelve nor more than fifteen years, is authorized by G.S. 14-18. Each judgment is complete within itself; and, there being no order to the contrary, the two sentences run concurrently. *State v. Efird,* 271 N.C. 730, 157 S.E. 2d 538, and cases cited. However, defendant had served a portion of the sentence imposed in the felonious assault case prior to pronouncement of judgment in the manslaughter case. This question arises: Is defendant entitled to credit for the time served during this period in computing the length of the sentence he is required to serve in the manslaughter case?

We are confronted with this anomalous situation. In the felonious assault case, it is established that the shooting of Newman by defendant did not result in Newman's death; but in the manslaughter case, it is determined that the very same shooting of Newman by defendant did cause Newman's death. The situation is one of rare occurrence. Under the circumstances, this Court, in the exercise of its "general supervision and control over the proceedings of the other courts," conferred by Article IV, Section 10, of the Constitution of North Carolina, holds that defendant should be given credit for the time so served in computing the length of his imprisonment on the manslaughter sentence. Hence, the judgment of the court below is so modified; and it is directed that an order be entered in the superior court referring to said modification by this Court of the judgment pronounced at October-November 1966 Session and ordering that a modified commitment be issued in the manslaughter case in accordance therewith.

We find no error in the trial below. However, the judgment is modified as stated herein.

No error in trial — judgment, as modified, affirmed.

CHARLES C. HENDRICKS, INDIVIDUALLY AND AS ONE OF THE EXECUTORS OF THE WILL OF DANIEL J. HENDRICKS, DECEASED, JAMES R. HENDRICKS, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF SARAH DAVIS HENDRICKS, DECEASED, AUSTIN H. HENDRICKS, RUTH H. SUTTLES, AND AILEEN H. McCULLOCH, v. D. J. HENDRICKS, JR., INDIVIDUALLY AND AS ONE OF THE EXECUTORS OF THE WILL OF DANIEL J. HENDRICKS, DECEASED, AND WIFE, ELIZABETH P. HENDRICKS, H. MONROE HENDRICKS, INDIVIDUALLY AND AS ONE OF THE EXECUTORS OF THE WILL OF DANIEL J. HENDRICKS, DECEASED, AND WILLIAM O. HENDRICKS.

(Filed 12 January, 1968.)

1. Deeds § 4—

The test of the mental capacity to execute a valid deed is whether the grantor understood the nature and consequences of his act in making the deed, and whether he knew what land he was disposing of and to whom.

2. Same; Evidence §§ 41, 43—

The mental capacity to make a deed is not a question of fact, but is a conclusion which the law draws from certain facts as a premise, and a nonexpert witness may not testify that a grantor lacked sufficient mental capacity to make a deed, since the presence or absence of mental capacity is the very question for the jury.

3. Cancellation and Rescission of Instruments § 9—

Where one occupies a confidential relationship with another and benefits from a transaction with the other in such a way that the circumstances create a strong suspicion that an undue or fraudulent influence has been exerted, the burden is upon the grantee or beneficiary to remove the suspicion by offering proof that the transaction was the free and voluntary act of the grantor.

4. Cancellation and Rescission of Instruments § 3; Fraud § 3—

The term "confidential relationship" implies a preferential position, and while the children in a family ordinarily enjoy a confidential relationship with their father, the mere relationship of parent and child does not raise the presumption of undue influence or of fraud.

5. Cancellation and Rescission of Instruments § 10— Evidence held insufficient to show that deed was procured by undue influence.

Evidence tending to show that a son lived near his father's homeplace, helped his father farm at the latter's request with the understanding that the farm was someday to be his, that the father had made a similar offer to his other sons, that another son lived in the house with the father and that other sons frequently visited the father and discussed with him his business affairs, *is held* insufficient to show that the first son occupied such a superior or preferential position with his father as to raise the presumption of undue influence in the execution of a deed from the father to the son, and an instruction that it raised such presumption is erroneous.

6. Trial § 33—

It is error for the court to charge on an abstract principle of law not supported by any evidence in the case.

SHARP, J., dissenting.

BOBBITT, J., joins in the dissenting opinion.

HENDRICKS *v.* HENDRICKS.

APPEAL by defendants from *Crissman, J.*, presiding at the 15 May 1967 Civil Session, Superior Court of GUILFORD County, High Point Division.

Mr. Daniel J. Hendrick, Sr. who died 22 September 1965 was married twice. Four children were born to each marriage. The plaintiffs herein are the children of the second marriage together with Aileen H. McCulloch who was the child of the first marriage. The three defendants are the children of the first marriage. Mr. Hendricks left a will in which Charles C. Hendricks (one of the plaintiffs), D. J. Hendricks, Jr. and H. Monroe Hendricks (defendants) were named as executors of his estate, and all of them have qualified in that capacity. Mr. Hendricks devised all of the real estate owned by him at the time of his death to his wife, Sarah Davis Hendricks, for the duration of her life, with the vested remainder therein equally in fee simple to his eight children, each one of whom is a party, either plaintiff or defendant, to this action. Mrs. Hendricks was adjudged incompetent 6 October 1965 and died 25 November 1965, the result being that under the will each of the plaintiffs and defendants is the owner of one-eighth undivided interest in the real estate of the deceased.

Prior to 15 April 1965, Mr. Hendricks was the owner of four adjoining tracts of land lying in Guilford and Randolph Counties, totaling one-hundred twenty acres and containing a dwelling house and farm buildings. On that date he executed and delivered to his son D. J. Hendricks, Jr. a deed in which sixty-four acres of the farm were conveyed, so that at the time of his death he retained approximately fifty-six acres of the farm.

The deed was not recorded until 15 August 1965, and in less than a month his son Charles (one of the plaintiffs) instituted proceedings to have his father declared incompetent. The father died before the date set for the inquisition.

This action was instituted 3 December 1965, the plaintiffs alleging that at the time of the execution of the deed to D. J. Hendricks, Jr. (Jay), Mr. Hendricks did not have sufficient mental capacity to do so, and also that the deed was procured by the exercise of undue influence over his father by Jay. They prayed that the deed be set aside on those grounds which would have resulted in all of the parties owning a one-eighth undivided interest in the entire farm of one hundred twenty acres.

The plaintiffs offered the testimony of ten witnesses as to the mental capacity of their father at around the time of the execution of the deed. In summary, it tended to show that Mrs. Hendricks broke her hip in January 1965 and was taken to the hospital where she stayed for some time, then moved to another one in Chapel Hill,

and then to the home of James Richard Hendricks, her son who lived in Chapel Hill. She did not return to her own home before her death. Mr. Hendricks was seriously concerned about the health of his wife and the financial problems presented by her hospital and medical expenses.

A family meeting was held on 7 February 1965 to consider this situation, and it was decided to sell the farm if necessary to meet expenses. After the meeting, Jay protested to some members of the family that the land had been promised to him because he had stayed on the farm and worked it and "he was going to have it one way or the other." Another family meeting was called to discuss Jay's claim; and when Mr. Hendricks was told of it he said, "if he owed Jay anything extra over what the other seven were supposed to have, that he had give[n] him a lot over there, and if he owed him anything extra, that was it." The plaintiffs denied that any of them had ever been offered the farm by their father if they would stay and look after it.

The plaintiffs offered evidence tending to show that Mrs. Hendricks' illness caused a decline in Mr. Hendricks' mental and physical condition; that at the time of the execution of the deed in April his physical disabilities included diabetes, cataracts, prostate trouble, hardening of the arteries and that mentally he had deteriorated in his memory and was senile, confused and abnormal. In response to a question discussed in the opinion, eight of the plaintiffs' witnesses answered that in their opinion Mr. Hendricks did not possess the mental awareness requisite to the making of a deed.

The plaintiffs offered the testimony of Mr. Joseph Greene who described the execution of the deed by Mr. Hendricks but who was not asked his opinion of the latter's mental condition at that time. They further presented testimony that Mr. Hendricks had not asked the plaintiffs, or any of them, to stay on the farm and work it in which event he would convey it to them.

The defendants offered the testimony of twenty-seven witnesses, many of whom testified that on or shortly before and after April 15 Mr. Hendricks, while in feeble health and of poor eyesight, knew what he was doing, knew the land he was conveying and to whom. None testified that he did not.

Twelve days after the deed to Jay was executed, Mr. and Mrs. Hendricks executed a timber deed by making their marks. It was confirmed and approved by all the children in a writing attached to the deed. The defendants testified that this confirmation was required because Mrs. Hendricks was an invalid at this time. The grantee of the timber deed testified that when he saw Mr. Hendricks a few days before the timber deed was executed, in his opinion, he had

sufficient understanding to understand what he was doing in making a deed, to understand the nature and consequences of his act in making a deed, and to know what land he was disposing of, to whom and how. Charles, the only plaintiffs' witness to testify in regard to this deed, stated: "The children agreed to the timber deed after my mother suffered the stroke and had a broken hip. Yes, she was impaired both mentally and physically. That is the reason we agreed to sell the timber." This deed is not under attack.

The evidence pertaining to the background and execution of the deed was presented primarily by the defendants. D. J. Hendricks, Jr., the grantee in the disputed deed, testified that his father had told him if he would stay and help him farm, he could have the farm when he was through with it; and further, he said: "I will give all of them [the other children] a lot to build a home on and they will understand that." Jay asked his father to give the other children the same opportunity, but in 1939 Mr. Hendricks said none of them would farm so Jay accepted his father's offer to operate the farm and did so "from then on."

Further reference will be made to the evidence for the defendants in the opinion.

After the defendants had presented their evidence, the plaintiffs offered rebuttal evidence, including that of Aileen McCulloch, a daughter of the first marriage. On recall she testified that on the second Sunday in April her father told her Jay was "aggravating me to death about it [giving him the farm]"; and "my father was not all right on April 11, 1965. Part of the time he knew what he was talking about and part not. The jury will have to work [it] out for themselves."

The court submitted the following issues to the jury:

> "1. Did Daniel J. Hendricks, Sr., on April 15, 1965, possess sufficient mental capacity to execute the deed conveying sixty-four acres of land, more or less, to the defendant, Daniel J. Hendricks, Jr.?
>
> "2. Was the execution of said deed procured by undue influence on the part of Daniel J. Hendricks, Jr.?"

Both issues were answered in favor of the plaintiff, judgment was signed on the verdict, and the defendants appealed.

Jordan, Wright, Henson & Nichols by Edward F. Murrelle, Attorneys for defendant appellants.

Cooke & Cooke by Arthur O. Cooke and William Owen Cooke, Attorneys for plaintiff appellees.

PLESS, J. The plaintiffs asked several of the witnesses introduced by them, "Do you have an opinion satisfactory to yourself as to whether or not Daniel J. Hendricks . . . had sufficient mental capacity to understand the nature and consequences of making a deed, its scope and effect, and know what land he was disposing of and to whom and how?" Over the objection of the defendants, the witnesses were permitted to say that they had such an opinion and that he (Mr. Hendricks) "did not." The plaintiffs, Charles C. Hendricks, Austin H. Hendricks and Mrs. Aileen H. McCulloch so testified. In addition, Walter Hiatt, a nephew, Marshall Williard, Mrs. Sarah Haworth, Dr. William H. Flythe and Mrs. J. T. Adams answered the same question favorably to the plaintiffs over the objection of the defendants.

We have consistently held that the test is whether or not the maker "understood what he was doing, the nature and consequences of his act and whether he knew what land he was disposing of, to whom and how." A similar test is provided in cases involving the execution of a will. "The rule is well established that a nonexpert witness may not be permitted to make the abstract statement that a grantor 'did not have sufficient mental capacity to make a deed.' This is so for the reason that mental capacity to make a deed is not a question of fact . . . it is a conclusion which the law draws from certain facts as a premise. . . ." *McDevitt v. Chandler,* 241 N.C. 677, 86 S.E. 2d 438.

In *McDevitt, supra,* we awarded a new trial because the questions admitted included phrases that the grantor "did not have sufficient mental capacity to make a deed." The presence or absence of mental capacity is the very question for the jury, and as such a nonexpert witness may not give an opinion on it but may testify only to the predicate facts (and opinions) from which the jury may draw the conclusion. 3 Strong, N. C. Index 2d, Evidence § 41. To hold otherwise would allow an invasion of the province of the jury. "[I]t is improper for nonexpert witnesses to testify that in their opinion a testator did or did not have the mental capacity to make a will." *In Re Will of York,* 231 N.C. 70, 55 S.E. 2d 791.

> "[A] person has mental capacity sufficient to contract if he knows what he is about (*Moffit v. Witherspoon,* 32 N.C. 185; *Paine v. Roberts,* 82 N.C. 451), . . . [T]he measure of capacity is the ability to understand the nature of the act in which he is engaged and its scope and effect, or its nature and consequences, not that he should be able to act wisely or discreetly, nor to drive a good bargain, but that he should be in such possession of his faculties as to enable him to know at least

what he is doing and to contract understandingly." *Goins v. McLoud,* 231 N.C. 655, 58 S.E. 2d 634.

The plaintiff's evidence in regard to the facts relating up to the execution of the deed are rather well summarized in the evidence of Mrs. Aileen McCulloch, one of the plaintiffs, who stated that her father told her that Jay was "aggravating him to death about it." The only witness offered by the plaintiffs as to the actual event was Mr. Joseph Greene, a notary public, who testified that on two or three occasions before April 15 Jay spoke to him about notarizing a deed, that his father was sick at times, "and some time when he felt good he would come by and get me and go down." Mr. Greene further testified:

> "On April 15, 1965 [Jay] came to me and requested . . . notarize a document. . . . When I arrived at the homeplace, I did not go in immediately. . . . [Jay] was already there. He came out to my automobile when I drove up and said he wanted me to fix that paper, and he would go in in a minute and come back out and . . . I waited in my car . . . just a minute or two. . . . [Jay] just told his daddy . . . that the man was 'here to fix the paper.' I didn't know Mr. Hendricks, Sr., but I presumed it was him, so he took the paper to him, and I guess he was blind . . . he agreed to it, as far as I could tell, and he [Jay] put his hand on the right line for him and made an 'X'. . . . During the time I was in the house, Daniel J. Hendricks, Sr. didn't say anything. . . . [H]e was just sitting in a chair. He never did get up. I can't exactly describe him. I didn't have any idea of anything like this, and really didn't have any interest in the thing. . . . I don't remember whether his hand shook when he attempted to make this 'X'. . . . I was probably there . . . maybe ten minutes. . . . [Jay] paid the notary fee of a dollar. . . . Daniel J. Hendricks, Sr. said nothing during all this time. . . . While I was there, Mr. Raymond Robertson signed the deed as a witness."

The defendant Jay Hendricks, in summary, testified as follows: His father had told him if he would stay and help him farm, he could have the farm when he was through with it; and further, he said: "I will give all of them [the other children] a lot to build a home on and they will understand that." Jay asked his father to give the other children the same opportunity, but in 1939 Mr. Hendricks said none of them would farm so Jay accepted his father's offer to operate the farm and did so "from then on".

Monroe Hendricks testified that he graduated from the University of North Carolina, taught school for twenty years, then returned home in 1948 and had lived there continuously since that time with his father and stepmother. "My father did offer me this farm if I would look after it and cultivate it. . . . He did make a similar offer [to D. J. Hendricks, Jr.] . . . [and] to Bill and to Charles, and to Austin, and I am not sure about Richard." He testified that Jay stayed on the farm and ran it for the last twenty years of his father's life, that he furnished all the machinery, cars for the family, and generally relieved his parents of the responsibility of operating the farm. Monroe testified that his father requested him to get his old deeds sometime prior to April 15 and "he said he wanted them to convey Jay some farm land, the farm land that he had promised him." Monroe got the deeds from a little tin box in his father's room and gave them to the latter. Later, the father in the presence of Monroe gave the deeds to Jay and "told him to have the deeds made so he could sign them, have the deed made, so he could sign them." When the deed was signed, the notary came in and said he was ready to notarize the deed. "Dad got up to the table from his chair, walked over to the table, and he wanted to know where he should sign, and I directed his hand. . . . I steadied his hand as he made the mark. Dad made the mark. Yes, I steadied his hand. The Notary wrote his name, 'D. J. Hendricks.' After that was done, my father made the mark with me holding his hand steady. . . . Mr. D. J. Hendricks, Jr. had nothing to do with my father's making his mark. He did not hold my father's hand when the mark was made, and I am certain that it was I, not Mr. D. J. Hendricks, Jr." Monroe described the mental and physical condition of his father saying that until his father had the stroke (8 May 1965) that his father was able to go for rides, visited his wife at Chapel Hill a couple of times and that in his opinion his father knew the effect of his signing the deed; that he knew who the deed was going to and had been knowing it for years. "He had requested that [the deed] to be prepared several times before it was done."

Mr. Raymond Robertson testified for the defendant saying that the deceased was his uncle; that he saw the deceased before the deed was actually signed, and that at that time Mr. Hendricks said he wanted to make D. J. Hendricks, Jr., a deed, that he was going to make him (Jay) a deed to some property. Later, Robertson went again to the home of the deceased and witnessed the execution of the deed. "I was present when Mr. D. J. Hendricks, Sr. made his mark. He made the mark with Monroe holding his hand at the proper place. He told Monroe he couldn't see where to make the mark, and

he asked him to help him. To my knowledge, Mr. D. J. Hendricks, Jr. did not have anything to do with helping Mr. D. J. Hendricks, Sr. make the mark. He didn't help him in any way that I noticed." The witness further testified, in effect, that the deceased understood what he was doing, the nature and consequences of his act in making the deed; that he knew what land he was disposing of, to whom he was disposing of it, and how he was disposing of it. "My opinion is that his mental condition was very good. I think he had the capacity to do it."

William O. Hendricks, brother of Jay, testified, among other things, "I knew the arrangement between my father and [Jay]. . . . [M]y father told me about the arrangement. . . . I was not surprised that the deed had been made because I knew it was under contract to be made. . . . He [his father] had sufficient understanding to know what he was doing, the nature and consequences of his act in making the deed, what land he was disposing of, to whom and how. . . . [M]y opinion is that he had the understanding to know those things."

It will be noted that William and Monroe were testifying against their own interest in that if the deed was set aside each would get one-eighth undivided interest in the sixty-four acres conveyed to Jay.

Unless the rule in *McNeill v. McNeill,* 223 N.C. 178, 25 S.E. 2d 615, is applicable, the evidence in this case will not support an issue of undue influence. In that opinion it is said that where one occupies a confidential relationship with another and benefits from a transaction that "such circumstances create a strong suspicion that an undue or fraudulent influence has been exerted, and then the law casts upon him the burden of removing the suspicion by offering proof that the will was the free and voluntary act of the testator." The term "confidential relationship" implies a preferential position. All of the children in a family ordinarily occupy a confidential relationship with their father, but as said in *Walters v. Bridgers,* 251 N.C. 289, 111 S.E. 2d 176, the relation of parent and child does not raise the presumption of fraud, nor does it constitute a fiduciary or confidential relationship requiring the beneficiary to establish lack of duress or undue influence in their dealings. To bring the *McNeill* ruling into play, relationship would have to be shown as more intimate and influential than the other children enjoy. Here, it is shown that Monroe lived in the house with his father while Jay lived a mile or so away. Charles testified that he visited his father at least once a week, usually spent a month with him during the summer, and that he and his father frequently discussed the affairs of the

farm and of the father's business. Austin, another son, testified that he was in his father's home three and four times a week and visited at all times of the day and night. From the record we can find nothing to sustain the claim that Jay occupied a superior position with his father or had more control over his actions than did his brothers, and we are of the opinion that the submission of this issue constitutes prejudicial error. *Cathey v. Shope*, 238 N.C. 345, 78 S.E. 2d 135; *Vann v. Barefoot*, 249 N.C. 22, 105 S.E. 2d 104.

In *Plemmons v. Murphey*, 176 N.C. 671, 97 S.E. 648, it is said:

> "A father may have favorites among his children because some, more than others, have favored him in his old age when, by reason of his infirmities, he needed their watchful care and attention. They may properly, but not unduly, use moral persuasion to obtain what they think they may deserve, a larger share of his bounty than the others, who are not justly entitled to so much.
>
> "We said in the *Craven Will* case (169 N.C. at p. 570) [*In re Craven's Will*, 169 N.C. 561, 86 S.E. 587]: 'It would be a great reproach to the law if, in its jealous watchfulness over the freedom of testamentary disposition, it should deprive age and infirmity of the kindly ministrations of affection or of the power of rewarding those who bestow it. These views were strongly approved and commended by the Court in *Mackall v. Mackall*, 135 U.S. 167 (34 L. Ed. at p. 84), where the conclusion was reached that, in a legal sense, undue influence must destroy free agency. "It is well settled," said Justice Brewer, "that in order to avoid a will on the ground of undue influence, it must appear that the testator's free agency was destroyed, and that his will was overborne by excessive importunity, imposition or fraud, so that the will does not, in fact, express his wishes as to the disposition of his property, but those of the persons exercising the influence." The Court then also used language closely applicable to the facts in our case: "That the relations between this father and his several children during the score of years preceding his death naturally inclined him towards the one and against the others is evident, and to have been expected. It would have been strange if such a result had not followed; but such partiality towards the one, and influence resulting therefrom, are not only natural, but just and reasonable, and come far short of presenting the undue influence which the law denounced. Right or wrong, it is to be expected that a parent will favor the child who stands by him, and to give to him, rather than the others, his property. To defeat a conveyance under

those circumstances something more than the natural influence springing from such relationship must be shown; imposition, fraud, importunity, duress, or something of that nature, must appear; otherwise that disposition of property which accords with the natural inclinations of the human heart must be sustained.'"

The case of *Willetts v. Willetts,* 254 N.C. 136, 118 S.E. 2d 548, is quite similar to this one. In it the father made a deed to his son for a valuable tract of land, and after his death his brothers and sisters attempted to set it aside upon the grounds of undue influence. The evidence showed that the son assisted his father in farming and in marketing his crops and livestock; that his father often requested the son's advice in connection with his business affairs, and that he listed his father's land for taxes as agent of his father. The lower court allowed motion for nonsuit which was affirmed, the court saying that the doctrine in *McNeill v. McNeill, supra,* did not apply.

The defendants take exception to the following part of the Court's charge:

"It is very generally held that when a will or a deed is executed through the *intervention* of a person occupying a *confidential relation* to the maker of the instrument, whereby such a person becomes a large beneficiary, the circumstances create strong suspicion that undue influence has been exerted.

"Where the grantee or other beneficiary of a deed or will is a person who has maintained *intimate relations* with the grantor, or the testator, or has *drafted* or *advised* the terms of the instrument, a presumption of undue influence, or of fraud, on the part of the beneficiary has often been applied." (Emphasis added.)

These instructions are improper for two reasons. First, they do not require that the jury find that a confidential or intimate relationship existed between Jay and his father but assume that it did. Second, there being no evidence tending to show a confidential relationship, it comes within the inhibition of *Carswell v. Lackey,* 253 N.C. 387, 117 S.E. 2d 51, in which we have stated that a correct legal instruction constitutes error where not applicable to the facts and the evidence of a case, which is the situation we have here.

The defendants take exception to several statements made by the trial judge in attempting to get witnesses to answer the questions propounded. An examination of the record shows that in each instance the admonition was correct and justified. We cannot limit the

authority of the judge to require the witnesses to respond to the questions rather than arguing the matter, and these exceptions are without merit.

Nevertheless, we are of the opinion that the incompetent evidence admitted upon the first issue and the submission of the issue of undue influence, and the instructions thereon, constitute reversible error, and that the defendants are entitled to a

New trial.

SHARP, J., dissenting: By its answer to the two issues submitted, the jury determined (1) that Daniel J. Hendricks, Sr., on 15 April 1965, lacked mental capacity to execute the deed to defendant Daniel J. Hendricks, Jr., which plaintiffs seek to set aside, and (2) that the deed was procured by the undue influence of Daniel J. Hendricks, Jr. The answer to either issue is sufficient to support the judgment setting the deed aside. Therefore, even if it be conceded *arguendo* that the submission of the issue of undue influence was not warranted by the evidence; that incompetent hearsay declarations of the grantor tending to establish undue influence were admitted; and that there was error in the charge with reference to the second issue, these errors did not affect the first issue. The challenged declarations of the grantor were to the effect that he had not promised defendant-grantee anything; that if he owed him anything extra he had given him a building lot. Defendants state in their brief that his statement, "rather than revealing a man who *lacks* mental capacity, shows a man who is very much in control of the situation. It tends to prove, rather than to disprove, adequate mental capacity." The admission of this evidence, therefore, did not prejudice defendant on the first issue. Neither, in my opinion, did the submission of the second issue and the charge with reference to it.

The majority, however, would vacate the jury's verdict upon the first issue because the judge permitted witnesses for plaintiff to answer the following question:

". . . [D]o you have an opinion satisfactory to yourself as to whether or not Daniel J. Hendricks on these occasions when you did see him between 29 January 1965 and 15 April 1965 had sufficient mental capacity to understand the nature and consequences of making a deed, its scope and effect, and know what land he was disposing of, and to whom, and how?"

All question of grammar aside, this question is phrased in substantial compliance with the rule laid down in *McDevitt v. Chandler,* 241 N.C. 677, 86 S.E. 2d 438 — the case upon which the majority relies to award a new trial. In *McDevitt,* the question which the court

condemned was asked by the trial judge himself and was: "Is it your opinion on that day she didn't have sufficient mental capacity to make a deed?" In awarding a new trial this court said that a witness may not make the abstract statement that a grantor "did not have sufficient mental capacity to make a deed," because such capacity is a conclusion which the law draws from certain facts as a premise. These facts are: "[w]hether the grantor understood what he was doing — *the nature and consequences of his act in making the deed;* that is, whether he knew what land he was disposing of, to whom, and how." *Id.* at 680, 86 S.E. 2d at 440. (Emphasis added.) Analysis reveals no difference between the foregoing rule from *McDevitt* and the question propounded to plaintiffs' witness in this case. The question here also complies with the test for contractual capacity quoted in the majority opinion from *Goins v. McLoud,* 231 N.C. 655, 58 S.E. 2d 634.

It is noted that in *Goins v. McLoud, supra,* a suit also involving the validity of the deed, the jury found (1) that the grantor lacked mental capacity to execute the deed and (2) that its execution had been procured by fraud and undue influence. On appeal, this court found error affecting the first issue but not the second. A trial *de novo* was ordered because the court thought the question of undue influence and fraud was, in both the complaint and evidence in that case, so tied up with the mental condition of the grantor that it was the strongest factor leading to the answer to the second issue. Such is not the situation here. I vote to sustain the judgment entered in the court below.

BOBBITT, J., joins in the dissenting opinion.

REEVES *v.* HILL AND BYRD *v.* HILL AND SPACH *v.* REEVES AND BOWMAN *v.* REEVES.

PAUL LARSTON REEVES, PLAINTIFF, v. EDWIN B. HILL, ADMINISTRATOR OF THE ESTATE OF THOMAS FRANKLIN BRYAN, SR., AND JACQUELINE HILL, ADMINISTRATRIX OF THE ESTATE OF DOROTHY McKINLEY BRYAN, DEFENDANTS

AND

JAMES LARRY BYRD, BY HIS NEXT FRIEND, FRED R. BYRD, PLAINTIFF, v. EDWIN B. HILL, ADMINISTRATOR OF THE ESTATE OF THOMAS FRANKLIN BRYAN, SR., AND JACQUELINE HILL, ADMINISTRATRIX OF THE ESTATE OF DOROTHY McKINLEY BRYAN, DEFENDANTS, AND PAUL LARSTON REEVES, ADDITIONAL DEFENDANT

AND

VIRGIE BOWMAN SPACH, ADMINISTRATRIX OF THE ESTATE OF SAMUEL ELI SPACH, SR., PLAINTIFF, v. PAUL LARSTON REEVES; AND EDWIN B. HILL, ADMINISTRATOR OF THE ESTATE OF THOMAS FRANKLIN BRYAN, SR.; AND JACQUELINE HILL, ADMINISTRATRIX OF THE ESTATE OF DOROTHY McKINLEY BRYAN, DEFENDANTS

AND

SAMUEL ELI SPACH, JR., PLAINTIFF, v. PAUL LARSTON REEVES; EDWIN B. HILL, ADMINISTRATOR OF THE ESTATE OF THOMAS FRANKLIN BRYAN, SR.; AND JACQUELINE HILL, ADMINISTRATRIX OF THE ESTATE OF DOROTHY McKINLEY BRYAN, DEFENDANTS

AND

SCOTTIE JOE BOWMAN, A MINOR, BY HER NEXT FRIEND, ROSS STRANGE, PLAINTIFF, v. PAUL LARSTON REEVES; AND EDWIN B. HILL, ADMINISTRATOR OF THE ESTATE OF THOMAS FRANKLIN BRYAN, SR.; AND JACQUELINE HILL, ADMINISTRATRIX OF THE ESTATE OF DOROTHY McKINLEY BRYAN, DEFENDANTS

AND

VIRGIE BOWMAN SPACH, PLAINTIFF, v. PAUL LARSTON REEVES; AND EDWIN B. HILL, ADMINISTRATOR OF THE ESTATE OF THOMAS FRANKLIN BRYAN, SR.; AND JACQUELINE HILL, ADMINISTRATRIX OF THE ESTATE OF DOROTHY McKINLEY BRYAN, DEFENDANTS.

(Filed 12 January, 1968.)

1. Automobiles § 53— Physical facts at scene held sufficient for jury on issue of negligence in failing to yield one-half of highway to vehicle approaching from opposite direction.

The evidence tended to show that a Ford driven in a westerly direction and a Chrysler driven in an easterly direction collided, that the Ford was damaged on the front and its motor thrown some 75 feet beyond where the vehicle came to rest along the north shoulder of the highway, that the left front of the Chrysler was damaged and that it came to rest on the south shoulder of the highway, that most of the debris was found in the eastbound lane, and that there were holes gouged in the asphalt, No. 1 some 4½ feet from the northern edge of the highway and another on the north edge of the highway northwest of hole No. 1, and hole No. 3 approximately in the center of the eastbound lane. *Held:* The physical evidence is sufficient to be submitted to the jury on the question of the negligence of the driver of the Ford in violating G.S. 20-148 and G.S. 20-146 in failing to pass to the right and in failing to yield at least one-half of the main-traveled portion of the highway to the other vehicle, and is determinative of the respective rights of the survivors and the personal representatives of the deceased occupants.

2. Automobiles § 17—

A violation of G.S. 20-148 and G.S. 20-146 is negligence *per se* and, when proximate cause of injury or damage is shown, such violation constitutes actionable negligence.

3. Death § 3—

Actions for wrongful death are purely statutory and neither punitive nor nominal damages are allowed, G.S. 28-173, but direct evidence that the deceaseds were in good health, that the *femme* worked for a grocery store and the male was part-owner of a garage in which he had actively worked as a mechanic presents sufficient evidence of pecuniary loss to permit the jury to return a verdict of actual damages.

4. Trial § 15—

Ordinarily, objection to the admission of evidence must be made at the time of its introduction.

5. Automobiles § 90—

The crucial contention of the parties in this automobile accident case was which of two vehicles traveling in opposite directions was to the left of its center of the highway when they collided, while the question of excessive speed was of secondary importance in determining their respective liabilities. *Held:* The fact that the court charged on one section of a speed statute which was not properly pleaded could not mislead or confuse the jury, and, under the facts of this case, such charge cannot be held prejudicial.

6. Appeal and Error § 49—

The exclusion of the adverse examination of a party will not be held for prejudicial error when it appears that such party fully testified to the same import upon the trial, and by questioning his own witness could have clarified any matter he deemed beclouded by the cross-examination, and it was within the sound discretion of the trial court to stop the time-consuming and tedious process of reading the questions and answers in the adverse examination.

7. Same—

The exclusion of testimony is not prejudicial when it appears that other witnesses had testified to the same import.

8. Automobiles § 45—

Testimony as to the manner in which defendant operated his car and changed lanes at some unknown town at an unstated time prior to the accident in suit and while some undetermined distance from the scene of the collision, is too remote to allow the jury to consider the matter in inferring his physical condition at the time and place of the collision.

APPEAL by Paul Larston Reeves from *Gambill, J.*, 5 June 1967 Regular Civil Session of FORSYTH.

This appeal involves six civil actions for recovery of damages for personal injuries sustained and for wrongful death occurring as a result of a two-vehicle collision, which occurred in Guilford County on U. S. Highway 62 on 9 November 1963. Involved in the collision

was a 1956 Ford, driven in a westerly direction by Paul Larston Reeves, and a 1955 Chrysler station wagon, driven in an easterly direction by Thomas Franklin Bryan, Sr., and owned by his wife, Dorothy McKinley Bryan, who was a passenger in the car.

Other passengers in the Chrysler were Virgie Bowman Spach, Samuel Eli Spach, Sr., Samuel Eli Spach, Jr., and Scottie Jo Bowman. James Larry Byrd was the only passenger in the Ford. The parties stipulated that Bryan was operating the Chrysler as the agent of his wife when the collision occurred. Bryan and his wife and Samuel Eli Spach, Sr., died as a result of injuries sustained in the wreck, and the other persons listed above suffered personal injuries.

All surviving occupants and all administrators of deceased occupants of the two automobiles involved in the collision were parties to this litigation. The suits were consolidated for trial.

Paul Larston Reeves sued the administrators of Mr. and Mrs. Bryan to recover for personal injuries, alleging negligence in that, among other things, Thomas Bryan operated the automobile at a speed greater than was reasonably prudent under existing conditions; that he operated the automobile over a public highway to the left of the center of the roadway; and that he failed to give plaintiff at least one-half of the main-traveled portion of the roadway, and that Bryan's negligence is imputed to his wife on the theory of agency. The administrators answered, denying negligence. They pleaded contributory negligence and asserted counterclaims for wrongful death of their respective intestates, alleging, *inter alia,* that plaintiff was negligent in that he failed to drive his car upon the right half of the highway; that he failed to yield at least one-half of the main-traveled portion of the highway to the Chrysler automobile, and that he operated the Ford at a speed greater than was reasonable and prudent under existing conditions. In his reply, Reeves denied negligence on his part and alleged contributory negligence of Mr. Bryan, imputed to Mrs. Bryan on the agency theory, in defense of the counterclaim.

Reeves testified that he and James Larry Byrd went to Perry's Danceland on the night of 8 November 1963, arriving about 7:55 P.M. Perry's Danceland had not opened, so they went across the street to Charlie's Place. There Reeves drank one can of beer, and he testified that he had nothing else of an alcoholic nature to drink that night. He and Byrd then went back to Perry's Danceland. They left there about 12:00 midnight in the Ford, which belonged to Reeves' sister-in-law, to go to the "Dunkin Doughnut" in High Point. Reeves testified that before the collision he was traveling 40 to 45 miles per hour up a hill and could see the lights of an approach-

ing car over the hill. When he reached the top of the hill he saw a car approaching "at what seemed like a normal speed" from the opposite direction and did not notice anything unusual at that time, but when the car came within fifty feet of him it started across the center of the road, and struck his car "head-on."

The court disallowed the reading of the adverse examination of Reeves on the stipulation of defendants Bryan that the adverse examination corroborated Reeves except for any admissions or any change as a result of cross-examination by counsel for the administrators for the Bryans at the trial.

James Larry Byrd sued the Bryan administrators to recover for personal injuries, alleging negligence of Thomas Bryan, imputed to his wife. The Bryan administrators denied negligence and subsequently joined Reeves as a third party defendant, filing cross-actions for contribution. In answer to the cross-actions, Reeves denied negligence and asserted a counterclaim for personal injuries against the Bryan administrators.

Byrd testified, in substance, that he was with Reeves on the night of the accident. Before the accident, he was trying to place a piece of cardboard over a hole in the window on the passenger's side of the car. As Reeves approached the top of the hill, he "hit" Byrd and said something to the effect that "they are coming right at us." Thereafter, all Byrd could remember was that he saw the approaching car and that Reeves ran off the side of the road.

Virgie Bowman Spach, administratrix of Samuel Eli Spach, Sr., sued the Bryan administrators and Reeves to recover for wrongful death of her intestate. Virgie Bowman Spach, Samuel Eli Spach, Jr., and Scottie Jo Bowman sued the Bryan administrators and Reeves to recover for personal injuries. In each of the above four cases the respective plaintiffs alleged that the injuries and death were caused by the joint and concurring negligence of Bryan and Reeves. Each defendant denied negligence on his part, and alleged sole negligence on the part of the other defendant.

Scottie Jo Bowman and Virgie Bowman Spach, testifying as to the events before the collision, stated that they, in company with Mr. and Mrs. Bryan, Samuel Eli Spach, Sr., and Samuel Eli Spach, Jr., had left Winston-Salem about 10:00 P.M. en route to Wilmington, North Carolina. Virgie Bowman Spach testified that Thomas Bryan said he was hungry and tired, after which they stopped at a drive-in to get something to eat. Scottie Jo Bowman and Virgie Bowman Spach testified that they did not remember the collision because they were asleep at the time it occurred.

H. B. Shaw, of the North Carolina Highway Patrol, testified in material part as follows: He assisted in the investigation of the

wreck. N. C. Highway 62, where the collision occurred, was a tar and gravel hard surface road 18½ feet wide and ran in an east-west direction. There was a 7-foot shoulder on the north side of the road and a 10-foot shoulder on the south side. A dirt road, designated as state road 1102, intersected U. S. Highway 62 from the south, forming a "T" intersection. A road sign designating road 1102 was located on the north shoulder of U. S. Highway 62. Shaw drew an imaginary line from this sign representing the center of the dirt road 1102. He described holes that he observed on U. S. 62 which had the tar dug out of them. Hole #1 was 4½ feet east of the imaginary center line and 1 foot 8 inches south of the center line of U. S. 62. Hole #2 was on the north edge of U. S. 62 and northwest of hole #1. Hole #3 was approximately in the center of the eastbound lane of U. S. 62 and 10 inches east of the imaginary center line dividing road 1102. Shaw observed two marks leaving U. S. 62 and continuing down the north shoulder of U. S. 62 east of the intersection and then coming back onto the highway west of the point where the marks left the highway. He described a pressure mark leading from the southernmost mark on the shoulder for a distance of about 36 feet in a southwesterly direction on the hard surface portion of U. S. 62. His estimate of the distance from the western point of the pressure mark to hole #1 was 50 to 60 feet. The Ford came to rest about 30 feet from Hole #1 off the north edge of U. S. 62 and west of the road sign. The Chrysler station wagon came to rest about 9 feet south of hole #3 at the northeastern corner of road 1102 intersecting U. S. 62 and headed in a northeasterly direction. Marks in the dirt road 12½ feet long led to the rear wheels of the Chrysler from west to east. The Chrysler was about 16 feet long and 5½ to 6 feet wide. Shaw stated that the transmission on the Chrysler, located at the center of the car and approximately 6 to 8 feet from the front bumper, was broken loose and hanging down. The transmission had tar and scratches on it. The Ford and Chrysler were damaged on the left front.

Roy B. Holman, also a member of the State Highway Patrol, testified in material part as follows: He was on U. S. 62 at the time he received the call concerning the accident at approximately 12:15 A.M. on 9 November 1963, and arrived at the scene about 5 minutes later. On arrival, he found the Chrysler on the dirt portion of rural unpaved road 1102. About an hour passed from the time he received the call and when he began to look around the accident scene. The Ford, except for the left rear tire, was on the north shoulder of U. S. 62. Byrd was lying in the eastbound lane and Reeves was lying near the shoulder on the right side of the Ford. All the persons rid-

ing in the Chrysler station wagon were still inside the car except Virgie Bowman Spach, who was lying on the shoulder, partially in the dirt portion of the road. Holman observed that most of the debris was in the eastbound lane. The debris consisted of oil, dirt and broken glass. He also observed an oil spot, 3 feet in diameter, east of the imaginary line and just across the center line of U. S. 62 in the westbound lane. Holman told of two identations in the dirt on the north shoulder of U. S. 62 leading in a westerly direction, and a pressure mark extending out into the road. The shoulder was composed of fine dirt and rocks and, in his opinion, the marks were fresh. He observed the pressure mark going into the debris. Holman identified the two holes in the pavement in the eastbound lane. The wheels on the Chrysler were turned to the left and the wheels on the Ford were turned to the right. He found the engine of the Ford car about 75 feet in front of the Ford. A drainage ditch ran along the north shoulder of U. S. 62, but Holman did not think the Ford was down in the ditch. The Reeves car was damaged on the front and the Bryan car was damaged on the left front. The night was clear and the road was dry.

The evidence as to personal injuries was omitted as being immaterial to the appeal.

Reeves' motion for judgment as of nonsuit at the conclusion of all plaintiff's evidence, in the suits brought by Samuel Eli Spach, Jr., Virgie Bowman Spach, Scottie Jo Bowman, and Virgie Bowman Spach, administratrix, was denied. The Bryan administrators offered no evidence. At the close of all the evidence, Reeves moved for judgment of nonsuit as to James Larry Byrd, Virgie Bowman Spach, individually and as administratrix, Scottie Jo Bowman and Samuel Eli Spach, Jr., and also as to the counterclaims of Edwin B. Hill, administrator, and Jacqueline Hill, administratrix. The motion was denied.

The jury answered the issues in favor of the administrators of the estates of Thomas F. Bryan, Sr., and Dorothy McKinley Bryan on their counterclaims against Paul Larston Reeves. The issues were also answered favorably to plaintiffs and against Paul Larston Reeves in the cases of Virgie Bowman Spach, individually and as administratrix of the estate of Samuel Eli Spach, Sr., and in the cases of Samuel Eli Spach, Jr., and Scottie Jo Bowman. In all cases the issues were answered unfavorably to plaintiffs as to the Bryan administrators. Judgments were entered dismissing the actions against the Bryan administrators. From judgments entered on the verdicts against him, Paul Larston Reeves appealed. James Larry

Byrd gave notice of appeal from judgment dismissing his action against the Bryan administrators, but failed to perfect his appeal.

Haworth, Riggs, Kuhn and Haworth and Walter W. Baker, Jr., and Forman, Zuckerman and Scheer for plaintiff appellant.

T. Conway Pruett and Womble, Carlyle, Sandridge & Rice and Grady Barnhill, Jr., for defendants Edwin B. Hill, Administrator of the Estate of Thomas Franklin Bryan, Sr., and Jacqueline Hill, Administratrix of the Estate of Dorothy McKinley Bryan.

BRANCH, J. Appellant contends the trial judge erred in denying his motion for judgment as of nonsuit.

Defendants Edwin B. Hill, Administrator of Thomas Franklin Bryan, Sr., and Jacqueline Hill, Administratrix of the estate of Dorothy McKinley Bryan, plaintiff Virgie Bowman Spach, administratrix of Samuel Eli Spach, Sr., and plaintiffs Virgie Bowman Spach, Samuel Eli Spach, Jr., and Scottie Jo Bowman (hereinafter called appellees) by their respective complaints and counterclaims allege, *inter alia,* that appellant Reeves violated the provisions of G.S. 20-148 and G.S. 20-146, in that he failed to pass to the right and give at least one-half of the main-traveled portion of the highway to the automobile in which appellees were riding.

The evidence of Patrolman Holman pertinent to these allegations is as follows:

"I first observed most of the debris on this side of the road, or would be the eastbound lane. There was oil, there was some dirt, there were some broken pieces of glass, red in color, and some was just white, regular glass. . . .

". . . we found, on the right-hand shoulder - - -

Q. Right-hand shoulder as a person would be headed towards High Point?

A. Yes, sir.

Q. All right, go ahead.

A. Two indentations into the dirt on the shoulder.

Q. Were they old or fresh?

A. In my opinion they were fresh marks.

Q. All right, go ahead.

A. They led in a westerly direction towards the rural unpaved road, and the inside indentation, or pressure mark that I found, extended from the — a pressure mark — a black mark or pressure mark, out into the road.

Q. On the hard surface you mean?
A. Yes, sir.

Q. How far onto the hard surface?
A. I didn't step it off. I didn't make that measurement.

Q. I see. Go ahead and tell what else you found.
A. Then, I believe I observed it going back *into the debris* — the pressure mark, or a cut out place into the highway, near the center of the road, which would be on the south side, *or in the eastbound lane* — a cut portion of the road, cut away." (Emphasis ours.)

A violation of G.S. 20-148 or G.S. 20-146 is negligence *per se*, and when proximate cause of injury or damage is shown, such violation constitutes actionable negligence. *Anderson v. Webb*, 267 N.C. 745, 148 S.E. 2d 846. See also *McGinnis v. Robinson*, 258 N.C. 264, 128 S.E. 2d 608; *Bondurant v. Mastin*, 252 N.C. 190, 114 S.E. 2d 292; *Hobbs v. Coach Co.*, 225 N.C. 323, 34 S.E. 2d 211; *Grimes v. Coach Co.*, 203 N.C. 605, 166 S.E. 599.

Where plaintiff sues for injuries or damages caused by an automobile collision and offers evidence showing that defendant was driving left of the center of the highway when the collision occurred, such evidence makes out a *prima facie* case of actionable negligence. *Anderson v. Webb, supra.*

When considered in the light most favorable to appellees, the testimony as to marks on the north side of the highway going back "into the debris" located in the eastbound lane, when buttressed by the testimony of the dug out holes on the south side of the highway as related to the Chrysler station wagon, permits a reasonable inference that appellant Reeves failed to pass to the right and give at least one-half of the main-traveled portion of the highway to the Bryan automobile.

Appellant also argues that the two Bryans' wrongful death counterclaims should have been nonsuited because the plaintiff administrators failed to show pecuniary loss. In this connection the administrators of the deceased Bryans elicited from the witness Mrs. Spach evidence as follows:

"Both Mr. Bryan and my husband were mechanics by trade and had been mechanics for many years, or in the mechanical business. I knew Mr. and Mrs. Bryan, I had known them for some time — about two years. I had been living here in Winston-Salem. I had visited in their home and they had visited in my home. So far as I know, Mr. and Mrs. Bryan were fine

people. Mrs. Bryan worked, I believe, at that time in a grocery store — Hodges Distributing Company was the name of it. I don't really know if Mrs. Bryan ever worked at L. Roberts, a lady's store. So far as I know, like my husband, they were in good health.

"My husband and Mr. Bryan both worked pretty long hours in the mechanical business out there. Both of them were good mechanics so far as I know. Before Mr. Bryan and my husband went in together in this partnership, Mr. Bryan worked at his garage — I suppose he owned this garage — as far as I know. I'm talking about Mr. Bryan. Then my husband went in with him. I think Mr. Bryan had operated that garage for some time but I don't know just how long."

Actions for wrongful death are creatures of the statute and the statute does not provide for assessment of punitive damages nor the allowing of nominal damages in the absence of pecuniary loss. G.S. 28-173, 174; *Armentrout v. Hughes,* 247 N.C. 631, 101 S.E. 2d 793; *Hines v. Frink and Frink v. Hines,* 257 N.C. 723, 127 S.E. 2d 508.

This Court has recognized an exception to this rule, as a rule of necessity, by allowing recovery for wrongful death of an infant without direct evidence of pecuniary damage other than sex, age and health. *Russell v. Steamboat Co.,* 126 N.C. 961, 36 S.E. 191.

Nor is it essential that direct evidence of the earnings of a deceased adult be offered in order for there to be recovery of damages. Evidence of his health, age, industry, means and business are competent to show pecuniary loss. *Hicks v. Love and Bruton v. Love,* 201 N.C. 773, 161 S.E. 394; *Owens v. Kelly,* 240 N.C. 770, 84 S.E. 2d 163.

Appellant relies heavily on *Hines v. Frink and Frink v. Hines, supra.* This case is distinguishable from instant case in that in *Hines v. Frink and Frink v. Hines* the record was devoid of any evidence as to age, health, habits or earning capacity. Here, there was evidence that the Bryans were in good health; that Mrs. Bryan worked for a grocery store and Mr. Bryan was part-owner of a garage in which he actively worked as a mechanic. This presents sufficient evidence of pecuniary loss to permit the jury to return a verdict for damages in favor of the Bryan administrators.

The assignment of error relating to the trial court's rulings on the evidence of marks on the north side of the highway is without merit. Appellant did not object to, except to, or move that the evidence elicited as to marks on the north side of the highway be stricken. Rather, he argues in his brief that, because of the confusing manner in which witnesses testified and because of the diffi-

culty experienced by the court reporter in keeping track of the progress of the trial, he was justified in waiting until all the evidence was in to move that such evidence not be considered.

It is generally recognized in this jurisdiction that evidence admitted without objection is properly considered by the court in determining the sufficiency of the evidence and by the jury in determining the issue, even though the evidence is incompetent and should have been excluded had objection been made. This rule does not apply if the evidence admitted without objection is precluded by statute in furtherance of public policy. 1 N. C. Index 2d, Appeal and Error, § 30, p. 162; *Cotton Mills v. Local 578*, 251 N.C. 218, 111 S.E. 2d 457. The objection to the admission of this evidence must be made at the time of its introduction, *Steelman v. Benfield*, 228 N.C. 651, 46 S.E. 2d 829; *Parsons v. Benfield*, 228 N.C. 651, 46 S.E. 2d 829, and where testimony sufficient to establish a fact at issue has been received in evidence without objection, a nonsuit cannot be sustained even if the only evidence tending to establish the disputed fact is incompetent. *Skipper v. Yow*, 249 N.C. 49, 105 S.E. 2d 205.

All appellees allege high speed and violations of G.S. 20-140, G.S. 20-141(a) and G.S. 20-141(c).

We recognize that since appellees rely on the physical facts at the scene of the collision to carry their cases to the jury, they must offer evidence by established facts sufficient to take the cases out of the realm of conjecture and into the field of legitimate inference. *Williamson v. Randall*, 248 N.C. 20, 102 S.E. 2d 381; *Parker v. Wilson*, 247 N.C. 47, 100 S.E. 2d 258.

The physical facts, speaking louder than words, show that the Chrysler station wagon moved less than 10 feet towards the south side of the road from the debris and holes found in the south side of the road, while the Ford traveled about 30 feet from this point, and the motor of the Ford, operated by appellant, was found 75 feet in front of the place where the Ford came to rest and about 105 feet northwest from the debris located on the south side of the road. If the station wagon had been traveling at a high rate of speed and had struck the Ford "head-on", a strong inference would arise that the Chrysler station wagon would have driven the Ford back to the north side of the highway and that the Chrysler would have continued a greater distance away from the point of impact; further, that such a collision would not have resulted in the motor from the Ford automobile being thrown *forward* in a northwesterly direction.

The tremendous damage to the automobiles, when taken with the physical facts on both sides of the road and considered with appellant's statement that the Bryan automobile approached at "what seemed like a normal speed," and when taken in the light

most favorable to appellees, permits the inference that appellant Reeves immediately before and at the time of the collision operated his automobile at an excessive speed.

Appellees having made out a *prima facie* case of actionable negligence, it then becomes a question for the jury. The trial court correctly denied appellant's motions for nonsuit.

Appellant contends the trial judge committed reversible error in connection with his instructions relative to speed.

> "One of the most important purposes of the charge is 'the elimination of irrelevant matters, and causes of action or allegations as to which no evidence has been offered, and (to) thereby let the jury understand and appreciate the precise facts that are material and determinative.' . . . it is error to charge on an abstract principle of law not raised by proper pleading and not supported by any view of the evidence." *Dunlap v. Lee,* 257 N.C. 447, 126 S.E. 2d 62.

In the pleadings in the instant case there are allegations as to excessive speed and evidence of physical facts sufficient to infer excessive speed. Appellant vigorously argues that there is prejudicial error because the judge charged on G.S. 20-141(b) (exceeding stated speed limits) when it was not pleaded. This is ordinarily error; however, in the instant case, since there was sufficient allegations and proof to justify a jury-verdict on the basis of negligence other than exceeding the stated speed limit (*i.e.* violation of G.S. 20-148 and G.S. 20-146, G.S. 20-141(a) and G.S. 20-141(c)), the fact that the trial judge charged on one section of a speed statute which was not properly pleaded would not seem to mislead or confuse the jury under the facts of this case so as to influence the verdict. While not a model charge, as a whole it is sufficient to allow the jury to understand the precise facts which are determinative of the issues, and therefore does not contain prejudicial error.

Appellant assigns as error the ruling of the trial judge which excluded from the consideration of the jury the adverse examination of appellant Reeves.

Prior consistent statements of the witness are admissible to strengthen his credibility when his veracity has been impugned in any way. *March v. Harrell,* 46 N.C. 329. In interpreting this rule we must consider it with the well recognized principle that it is the duty of the judge to control and supervise the course and conduct of the trial. *Miller v. Greenwood,* 218 N.C. 146, 10 S.E. 2d 708.

It is admitted in the record that appellant testified to substantially the same thing at the trial as he did in his adverse examination. By questioning his own witness, appellant's counsel could

clarify any matter he deemed beclouded by the cross-examination, rather than pursue the time-consuming and tedious process of reading the questions and answers in the adverse examination and requiring the trial court to pass on objections to such questions and answers. In the case of *Greer v. Whittington*, 251 N.C. 630, 111 S.E. 2d 912, the Court quoted from *Electric Park Amusement Co. v. Psichos*, 83 N.J.L. 262, 83 A. 766, as follows: " 'It is always in a judge's discretion, as indeed it is his duty, to stop an examination when he can see that its further progress will be futile; it is especially important to do so in a long case like this.' " We find no prejudicial error in the court's ruling excluding the adverse examination.

Appellant assigns as error the failure of the judge to admit certain testimony relative to the physical condition of the driver of the Bryan automobile before the collision.

Virgie Bowman Spach testified, in part:

"We left my husband's house trailer about 10:00 o'clock on our way to Wilmington and we drove a right good ways and we stopped at this drive-in cafe to get something to eat, and then after we left there we had the wreck.

"After we left there I laid my head over on my husband's shoulder and went to sleep, and next thing I remembered, we were in the wreck. I don't remember the collision at all. The next thing I remember, I heard a lot of loud talking and I heard someone tell me to be quiet, that we had had a wreck. I didn't know where I was at that time. I don't know whether I was in the car or on the ground.

CROSS EXAMINATION by Mr. Parrish:

On this night we had occasion to stop to get something to eat on the way to the beach. I believe the place we stopped at was Kelly's Place just out of Winston.

Q. Mrs. Spach, I'll ask you what, if anything, did Mr. Bryan say as regards his physical condition when you stopped to get something to eat?

MR. BARNHILL: Object.

OBJECTION OVERRULED.

A. Mr. Bryan said he was hungry and tired, he thought we'd stop and get a bite to eat.

Q. Did you have an occurrence or did something happen later on down the road as regards the operation of the car?

MR. BARNHILL: Object.

Objection sustained, and the plaintiff Reeves, in apt time, excepted.

EXCEPTION No. 10.

(If permitted, the witness would have answered as follows: "Well, just before we were in the wreck this car was coming on behind Mr. Bryan, and started to make a — started to pass him, and Mr. Bryan merged over in the left lane and almost hit him. He cussed him and called him a G. D. S. O. B. several times and told him to take all of the road, and my husband said to go ahead, and he said, 'I guess it's just a bunch of drunks."

Scottie Jo Bowman testified, in part, as follows:

"Q. All right. Did you hear Mr. Bryan make any statement at any time along — either at the time you were leaving Winston-Salem or any time between there and the accident about being tired or sleepy?

MR. BARNHILL: Objection.
THE COURT: Overruled.

Q. Did you?
A. Well, a short time before we stopped we were talking about we were — he was tired, he'd like to get something to eat — might rest him.

Q. All right. And did you hear him make that statement?
A. Yes, sir.

THE COURT: Wait a minute. Strike it out. Strike out her statement about — she's a passenger in his automobile and he's dead. Strike it out.

To the striking of the answer, the plaintiff Reeves, in apt time, excepted. EXCEPTION No. 8.

I do not recall that the restaurant that I spoke of is located here in the southern end of Winston-Salem. I'm not familiar with it. After we had something to eat we then proceeded on towards Wilmington. I don't remember what time it was that I went to sleep, but I remember asking what time it was, and I'm not sure, but it was something till 12:00.

I do not remember going through any towns. It was night and I really wasn't paying any attention.

Q. Now, somewhere between Winston-Salem and the place where this wreck happened did something else happen with respect to the operation of the car by Mr. Bryan?

MR. BARNHILL: Object.

Objection sustained, and the plaintiff Reeves in apt time excepted. EXCEPTION No. 9.

(If permitted, the witness would have answered as follows: 'We were going down the street — I'm not sure what town — but there was a car caming out of a side street, and it came over — it was sort of — I'll call it Main Street. I'm not sure of the street, but it was — Mr. Bryan started to change lanes over into the left lane — he was on the outside lane, and he liked to bump the front end of the other car, and this car pulled up beside of him and cursed him for a right good while and then went on down the street and turned left.' "

It is apparent that this testimony was offered to show that the driver of the Bryan automobile was tired and sleepy and that his physical condition contributed to the collision.

It is noted that the witness, Virgie Bowman Spach, was allowed to testify that Bryan stated "he was hungry and tired, and he thought we'd get a bite to eat." The fact that similar testimony was stricken when offered through another witness is not prejudicial. *Rowe v. Murphy,* 250 N.C. 627, 109 S.E. 2d 474.

The remaining testimony offered as to Bryan's physical condition was not in any way correlated with the collision as to time, place and distance.

The case of *Greene v. Meredith,* 264 N.C. 178, 141 S.E. 2d 287, holds that it is prejudicial error to admit testimony of the defendant's excessive speed at a point some two miles from the point of collision when there is no evidence that the defendant continued to maintain such speed to the time of the collision.

Again considering whether evidence was too remote or conjectural to be admissible, the Court in *Corum v. Comer,* 256 N.C. 252, 123 S.E. 2d 473, stated:

"The question is the negligence of the offending party at the time and place of the accident. It does not necessarily follow that a defendant is negligent at a particular time and place because he was negligent at some other place and at a different time."

Evidence of the fact that Bryan might have changed into another lane at some unknown town, at an unstated time, while he was an undetermined distance from the scene of the collision, is too remote to allow the jury to infer his physical condition at the time and place of the collision.

We find no prejudicial error in the record which warrants a new trial.

No error.

VICTOR A. KOURY v. PAIGE B. FOLLO.

(Filed 12 January, 1968.)

1. Trial § 21—

On motion to nonsuit, plaintiff's evidence must be considered in the light most favorable to him, giving him the benefit of every favorable inference which may be reasonably drawn therefrom, and discrepancies, if any, in plaintiff's evidence must be disregarded.

2. Appeal and Error § 59—

In passing upon an exception to the refusal to nonsuit, the Supreme Court will give plaintiff the full benefit of all relevant evidence introduced, even though some evidence was improperly admitted over objection.

3. Physicians and Surgeons § 20— Evidence held sufficient to show that deafness of child was caused by negligence.

Plaintiff's evidence tended to show that defendant pediatrician prescribed injections of Strep-Combiotic, a drug containing streptomycin, for plaintiff's nine-month old baby girl for treatment of a cold and bronchitis, that prior to the treatment the child was in normal health, including hearing, and that afterwards the child became deaf. The label on each container of the drug stated "Not for Pediatric Use," and instructions accompanying the drug amplified the warning. Plaintiff's expert testimony was to the effect that the damage to the hearing nerve is a known hazard of the drug and frequently occurs above a certain dosage, and that the dosage prescribed to the child was in the expert's opinion approximately double the upper safe limit for a child of comparable weight, and was approximately five times the dosage recommended for such child according to a rule stated in a textbook on pediatrics. *Held:* Plaintiff's evidence was sufficient to justify a finding by the jury that plaintiff's child was made deaf by defendant's negligence in prescribing and administering the drug, and nonsuit was improperly entered.

4. Physicians and Surgeons § 11—

A physician or surgeon may be held liable only for such damage as proximately results from his failure to possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess, or his failure to exercise reasonable care and diligence in his application of his knowledge and skill to the patient's case, or his failure to use his best knowledge in his treatment and care of the patient.

5. Trial § 18—

It is the function of the jury to determine the credibility and weight of the evidence and to determine the facts upon which the plaintiff's right to recover must stand or fall.

6. Physicians and Surgeons § 11—

A physician who holds himself out as a specialist in the field of pediatrics is required to bring to the treatment of an infant a degree of knowledge, not required of a general practitioner, as to the probable effect of drugs upon so young a patient.

7. Same—

A specialist in a given field of medical practice is not, in the absence of an extraordinary contract or representation, a guarantor of the success of his treatment.

8. Physicians and Surgeons § 16—

Mere proof that a patient does not survive a treatment prescribed or administered by a physician or surgeon, whether a specialist or general practitioner, or that the patient emerges from the treatment in an untoward condition, is insufficient to impose liability therefor, the doctrine of *res ipsa loquitur* being inapplicable.

9. Physicians and Surgeons § 11—

It is negligence for a physician to prescribe as a remedy for an illness of a nine-month old baby a drug which he knows, or in the exercise of reasonable care should know, may produce a different or worse ailment without advising the parents of the possibility of adverse results from the use thereof, and especially so where possible danger from the drug's use would be unknown to the parents.

10. Appeal and Error § 48—

The admission in evidence of printed documents, incompetent as hearsay, will not be disturbed where no objection is interposed to their introduction.

11. Evidence §§ 33, 50—

Excerpts from medical textbooks and similar publications are incompetent as hearsay evidence to prove the correctness of a statement of fact or theory therein.

12. Evidence § 17—

The rule relating to hearsay evidence is not applicable where the purpose of offering an extra-judicial statement is to prove that the statement was made and that the litigant should have reasonably known, under the circumstances, that the statement was made.

13. Same; Evidence § 50—

It is not error in a malpractice action for injury to a child to admit in evidence a manufacturer's label on a drug container stating "Not Safe for Pediatric Use" nor to admit printed instructions to the same import, since they are relevant to prove the existence of a warning which the physician should have seen and taken into account.

APPEAL by plaintiff from *Brock, S.J.*, at the 20 March 1967 Civil Session of GUILFORD, Greensboro Division.

The plaintiff sues for damages, consisting of loss of services and additional expenses incurred and to be incurred, by reason of the alleged negligent treatment of his infant daughter, Susan Ann Koury, by the defendant, a physician specializing in pediatrics.

The complaint alleges that the child, then nine months of age, was a patient of the defendant for the treatment of an ailment diagnosed by him as asthmatic bronchitis and, in the course of such treatment, the defendant prescribed for her and caused her to be given by injections excessive dosages of a drug known as Strep-Combiotic, which caused the child to become permanently and totally deaf, she having had normal hearing prior to such treatment by the defendant. The complaint alleges that the defendant knew, or should have known, that Strep-Combiotic was hazardous for use in the treatment of a child of the age of Susan Ann; that he knew, or should have known, the amount of the drug prescribed by him was excessive for a child of her age; and that he caused the drug to be given to the child without disclosing to the plaintiff or to the mother of the child the danger incident to its use, though he knew, or should have known, that it could cause deafness, and that no immediate emergency existed requiring its use. The complaint further alleges that by reason of the deafness of the child the plaintiff has incurred, and will in the future be required to incur, substantial additional expenses for the child's care and education.

The defendant, in his answer, admits that Susan Ann, who was nine months old at the time of the treatment in question, had been his patient for routine office visits and examinations since she was one month old, and that the defendant was familiar with her general physical condition. The answer admits that the child had no illnesses and that her growth and development had been normal from the time of her first visit to the defendant until the treatment in question. The answer also admits that the child was the defendant's patient at the time in question, having been admitted on his advice to the hospital for treatment for an ailment which he had diagnosed as asthmatic bronchitis and possible pneumonia, and that at the time of her admission into the hospital he prescribed an injection of Strep-Combiotic in the amount of 1.5 cubic centimeters each 12 hours, that five of such injections were so administered and that each 1.5 cubic centimeters of the drug contains 375 milligrams of streptomycin. The answer denies that in so treating the child the defendant was negligent, and denies that any deafness which the child may now have was caused by any negligent act or omission of the defendant.

At the conclusion of the plaintiff's evidence a judgment of nonsuit was entered upon the motion of the defendant. From this the

plaintiff appeals, the granting of the motion and entry of the judgment being the only assignments of error.

The testimony of the plaintiff and his wife was to the effect that prior to the admission of their little girl to the hospital, pursuant to the defendant's recommendation, on 29 June 1965, at which time she was slightly over nine months of age, she was normal in all respects, including her hearing; she responded normally to her mother's voice and was easily aroused from her sleep by the ringing of the telephone and other household noises. They testified that shortly after her return from the hospital they noted that she was inattentive to sounds and was not aroused from her sleep by excessive noises. The testimony of medical experts thereupon consulted by the parents, and who examined the child, was to the effect that she is permanently and, for all practical purposes, totally deaf, this being a nerve deafness.

The mother testified that the child developed a cold with fever on 28 June. The mother called the defendant who visited the child in her home, prescribed medication and instructed the mother to call him the following morning if the child was not substantially improved. No improvement having resulted, the child's mother took her to the defendant in his office. He recommended hospitalization in order that the child and her parents might rest better.

Upon the child's admission to the hospital she was, pursuant to the defendant's orders, placed in a croupette, and certain procedures, including the injections of Strep-Combiotic, were followed. An x-ray examination did not reveal the presence of pneumonia. On the second day after admission her bronchial condition had improved and she was discharged, upon the defendant's order, into her parents' care.

Dr. Stewart, found by the court to be an expert in the use of antibiotics in the treatment of disease, testified that Strep-Combiotic is a combination of penicillin and streptomycin, containing 375 milligrams of streptomycin in each 1.5 cubic centimeter. He further testified that damage to the hearing apparatus is a known hazard of streptomycin and occurs frequently above a certain dosage, the upper safe limit of dosage being, normally, 40 milligrams of streptomycin per kilogram of body weight in each 24 hours. (Susan Ann's weight at the time of her hospitalization was something less than 10 kilograms, so that, according to Dr. Stewart's testimony, the upper safe limit of dosage was 400 milligrams of streptomycin in 24 hours. The dosage prescribed for Susan Ann by the defendant was 1.5 cubic centimeters of Strep-Combiotic each 12 hours, amounting to 750 milligrams of streptomycin in each 24 hour period.) In response to hypothetical questions, proper in form, Dr. Stewart testified that, in his opinion, the dosage of Strep-Combiotic prescribed

by the defendant and administered pursuant to his orders could have caused the child's deafness.

Dr. Shahane Taylor, stipulated to be an expert in eye, ear, nose and throat practice, testified that Susan Ann had a total nerve deafness when he examined her approximately seven weeks after the above described treatment. In his opinion, anything that would be toxic to a nerve could affect the nerve of hearing, including a disease or a medicine.

At the time of the child's hospitalization, Strep-Combiotic was put up by the manufacturer in powder form in a vial. Sterile water was added by the nurse, pursuant to directions, in order to make the proper proportions. Thereupon, the prescribed 1.5 cubic centimeters would be drawn out of the container into a syringe and injected into the muscle of the patient.

The label on the bottle, in which the Strep-Combiotic was packaged by the manufacturer and received by the hospital, stated on one side of the bottle, in red capital letters, "NOT FOR PEDIATRIC USE." On the other side of the bottle the label stated in blue letters:

"USUAL DOSAGE
Adults: 2 cc (0.5 gram streptomycin, 400,000 units penicillin G procaine) once or twice daily.
SEE LITERATURE."

Nelson's Textbook of Pediatrics is a standard textbook in that field of medicine. Passages from it were introduced in evidence by the plaintiff. These include a statement of "Clark's Rule" for estimating dosages for children in reference to the adult dosage of a drug. Under this rule, which the textbook states is more reliable when applied to children over two years of age, a child's dosage is determined by multiplying the adult dose by a fraction, of which the child's weight in pounds is the numerator and 150 is the denominator. (Under this rule, Susan Ann's weight being approximately 20 pounds, the child's dosage would be approximately 13 per cent of the adult dosage. The dose prescribed by the defendant for this child was 75 per cent of the usual dosage stated on the manufacturer's label on the bottle.)

Seven months prior to the birth of Susan Ann, her mother developed a rash upon the upper part of her body. At that time there was an epidemic of rubella in North Carolina. The mother was at that time teaching school and she missed no time from her work. She had no fever with the rash. On the advice of her physician, given

by telephone, he being in another city, she took a measles vaccine, it being administered by a nurse in the office of another doctor. (The record does not indicate that this rash was diagnosed as rubella or German measles.)

Strep-Combiotic was regularly stocked and in common use on the pediatrics floor of the hospital at the time of the defendant's treatment of Susan Ann.

The plaintiff also offered evidence of expenses incurred by him as the result of the deafness of Susan Ann and further evidence as to the cost of the education of a deaf child.

The adverse examination of Dr. Follo by the plaintiff shows that, in his opinion, it is difficult if not impossible to determine whether a child is totally deaf or has normal hearing in the first nine months after birth. At the time of the treatment in question, he had no information that the hearing of Susan Ann was or was not normal. He was aware that streptomycin can cause damage to the eighth cranial nerve which relates to hearing, this and other adverse reactions being, in his opinion, rare. He had previously had no adverse "side effects" from it. He did not regard the drug as dangerous in the dosage he prescribed. He did not warn the child's parents of possible adverse reactions from its use. Other pediatricians in Greensboro, where this occurrence took place, were then using Strep-Combiotic for children as young as nine months of age. The dosage he prescribed was the standard dosage used by pediatricians in Greensboro. At the time he prescribed its use for Susan Ann, he did not know that the manufacturer's label upon the container bore the statement, "Not for Pediatric Use," nor did he then know that the manufacturer's literature, packaged with containers of Strep-Combiotic contained the statement:

> "Strep-Combiotic is contraindicated for pediatric use because there is a danger that dosages calculated to provide adequate amounts of Penicillin will, in some instances, supply excessive amounts of Streptomycin to infants and children."

Douglas, Ravenel, Hardy & Crihfield for plaintiff appellant.

Jordan, Wright, Henson & Nichols and William B. Rector, Jr.

McLendon, Brim, Brooks, Pierce & Daniels by C. T. Leonard, Jr., for defendant appellee.

LAKE, J. For the purposes of an appeal from a judgment of nonsuit, the plaintiff's evidence must be considered by us in the light most favorable to him and he must be given the benefit of every favorable inference which can reasonably be drawn there-

from. Strong, N. C. Index, Trial, § 21. Discrepancies, if any, in the plaintiff's evidence must be disregarded. He must be given the full benefit of all relevant evidence introduced, even though improperly admitted over objection seasonably entered. *Supply Co. v. Ice Cream Co.*, 232 N.C. 684, 61 S.E. 2d 895; *Ballard v. Ballard*, 230 N.C. 629, 55 S.E. 2d 316; 88 C.J.S., Trial, § 244.

When so considered, the plaintiff's evidence is sufficient to support, though not to compel, these findings: The plaintiff took his nine months old baby to the defendant, a specialist in pediatrics, for treatment of a bad cold and bronchitis. The baby's illness could not be classified as an emergency. The defendant prescribed and caused to be administered to the baby five injections of a drug, the manufacturer of which caused to be stamped on each container in red letters, "NOT FOR PEDIATRIC USE," and caused to be packaged with each container of the drug an amplification and explanation of the warning against use for children. The defendant, knowing the drug contained streptomycin and that streptomycin may impair the nerve controlling the hearing apparatus, prescribed for this 20 pound infant a dosage, for each injection, equal to 75 per cent of the upper limits of the dosage stated on the manufacturer's label on the bottle to be the usual dosage for adult patients. This dosage was approximately double the upper safe limit of dosage for a 20 pound child, in the opinion of the plaintiff's expert witness, and approximately five times the dosage for such child computed according to "Clark's Rule" contained in a standard textbook on pediatrics. Prior to her treatment with this drug, the baby had normal hearing. The use of the drug prescribed by the defendant, in the dosage prescribed by him, caused the child to become totally deaf. In consequence of the deafness of his child, the plaintiff has incurred and must hereafter incur expense, beyond that which is normal, for the care and education of his child.

We are, of course, not to be understood as holding or implying that the evidence compels such findings or that the foregoing paragraph is a factually correct account of what occurred in and as a result of the treatment of the plaintiff's child by the defendant. The defendant has not yet had an opportunity to present evidence to show a different factual situation or to show that his treatment of the plaintiff's child was in accordance with the standard of care required of a physician prescribing drugs for administration to a nine months old baby suffering from acute bronchitis. What we do hold is that the plaintiff's evidence, considered in accordance with the above stated rule, is sufficient, if found by a jury to be true, to support findings as above stated and, therefore, the court erred in granting the defendant's motion for judgment of nonsuit. It is for the

jury to determine the credibility and weight to be given the evidence and, after hearing the evidence of the defendant as well as that of the plaintiff, to determine the facts upon which the plaintiff's right to recover must stand or fall. Strong, N. C. Index, Trial, § 18.

We again reaffirm the rule stated by Higgins, J., speaking for this Court in *Hunt v. Bradshaw,* 242 N.C. 517, 88 S.E. 2d 762:

> "A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient. [Citations omitted.] If the physician or surgeon lives up to the foregoing requirement he is not civilly liable for the consequences. If he fails in any one particular, and such failure is the proximate cause of injury and damage, he is liable."

The question for us upon this appeal is whether there is substantial evidence in the record before us to support, though not to require, a finding by a jury that the plaintiff's child was made deaf by the defendant's failure to fulfill the second of these requirements.

The defendant is not a general practitioner. He is a specialist in the field of pediatrics. Consequently, he was required to bring to the treatment of the plaintiff's baby a degree of knowledge as to the probable effect of a drug upon so young a patient not required of a general practitioner of medicine. *Belk v. Schweizer,* 268 N.C. 50, 149 S.E. 2d 565; 41 Am. Jur., Physicians and Surgeons, § 90.

Of course, not even a specialist in a given field of medical practice is, in the absence of an extraordinary contract or representation, a guarantor of the success of his treatment or its freedom from adverse consequences to the patient. Mere proof that a patient does not survive a treatment prescribed or administered by a physician or surgeon, whether a general practitioner or one practicing in a special field, or that the patient emerges from the treatment in a worse condition than before it was administered, is not sufficient to impose liability for such consequence upon the physician or surgeon, for the doctrine of *res ipsa loquitur* does not apply. *Starnes v. Taylor,* 272 N.C. 386, 158 S.E. 2d 339, decided this day; *Belk v. Schweizer, supra; Galloway v. Lawrence,* 266 N.C. 245, 145 S.E. 2d 861; *Hunt v. Bradshaw, supra; Nash v. Royster,* 189 N.C. 408, 127 S.E. 356. In the record before us, however, the plaintiff's evidence is amply sufficient, if true, to support a finding that the defendant prescribed for his tiny patient a powerful drug without reading, or in disregard

of, express warnings printed by the manufacturer upon the container and upon a leaflet packaged with each container of the drug. It is sufficient, if true, to show that he prescribed a dosage far in excess of that recommended for so small a child by a standard textbook in his own special field of medicine. It was his duty to exercise reasonable care, not only in his diagnosis of his patient's disease, but also in ascertaining the probable effects of the drug he prescribed and to observe appropriate precautions in its use. *Reed v. Church,* 175 Va. 284, 8 S.E. 2d 285.

Obviously, rules stated in medical textbooks, like those stated in other textbooks, may be in error or may be disproved by subsequent discoveries in the field. At most, they are but the opinion of the writer, who may be less well informed in the field than is the defendant. The same is true of the opinion expressed on the witness stand by the plaintiff's expert witness and the opinion expressed on the label by the manufacturer. Upon the motion for judgment of nonsuit, however, the plaintiff's evidence is to be taken as true and interpreted in the light most favorable to him. So interpreted, it is sufficient to justify the jury in finding that the defendant knew, or should have known, that to administer this powerful drug in so large a dose to so small a patient could well result in the precise catastrophe which such evidence indicates did result therefrom. The illness for which the drug was so administered was not such as to create an emergency calling for hazardous measures. It was an illness from which most children have suffered and from which most of them have recovered in due time without such treatment.

In *Sharpe v. Pugh,* 270 N.C. 598, 155 S.E. 2d 108, we said:

> "[I]t would be negligence if defendant prescribed, as a remedy for illnesses for which it was neither necessary nor suited, a drug which he knew or should have known was dangerous, without advising and warning Brenda's [a small child] parents of the possible or probable injurious effects from the use thereof."

This record does not show that Strep-Combiotic was not suited to the treatment of the bronchitis from which the plaintiff's baby was suffering. On the contrary, it is clear from the record that its use speedily cured that ailment. A physician may not, however, with immunity from liability, use for the treatment of a relatively minor ailment a remedy which he knows, or in the exercise of reasonable care should know, may produce a different ailment or disability far worse than the original disease. Before using such a drug upon a tiny child, in the absence of an emergency, the physician should make

known to the parents of the child the possibility of adverse results which he knows or, in the exercise of care commensurate with his specialty, should know, is a reasonably possible result of the use of the drug. The plaintiff's evidence shows that the defendant did not so inform the parents of this little girl and thus give them the opportunity of an informed election between incurring the risk of prolonged bronchitis and possible pneumonia on the one hand and incurring the risk of total and permanent deafness of their child on the other.

With reference to the duty of the defendant to inform the plaintiff, or the child's mother, of the risk inherent in the use of this drug upon this patient, the present case is distinguishable from *Starnes v. Taylor, supra.* There, the patient was referred by his family doctor to the defendant surgeon for the purpose of having made the examination which was made, and the injury to the esophagus, while unlikely, was the kind of injury a patient, as well as a surgeon, could be expected to consider as a possible result of the insertion of the esophagoscope. Here, the danger was a hidden one which the defendant knew, or should have known, was unlikely to be suspected by the child's parents, and was one which expert testimony indicates to have been far more than a mere possibility when the dose is excessive. Furthermore, in this case, to warn the parent of the possible adverse result would in no way induce nervousness in the patient so as to decrease the likelihood of successful treatment.

The defendant contends in his brief that the court below erred in admitting in evidence the manufacturer's label upon the container of Strep-Combiotic and the excerpts from Nelson's Textbook on Pediatrics. There are two independently sufficient reasons why this argument is unavailing upon this appeal. (1) Upon a motion for judgment of nonsuit, all of the plaintiff's evidence relevant to the issue must be given full probative value, even though erroneously admitted. *Supply Co. v. Ice Cream Co., supra; Ballard v. Ballard, supra.* (2) The record indicates objections by the defendant to questions to witnesses concerning the contents of these printed documents, but not to the introduction of the documents themselves. There was no objection to the introduction of the adverse examination of the defendant in which he testified concerning the contents of the label and of the manufacturer's printed statement packaged with each bottle of Strep-Combiotic.

While the competency of this evidence is not before us upon this appeal, it is apparent that the same question is likely to arise upon the new trial which will be the result of our decision. We, therefore, direct attention to the principles of law by which the admissibility

of this evidence and the purpose for which it may be considered by the jury are to be determined.

It is well settled in this State, and in other jurisdictions, that excerpts from medical textbooks, and similar publications, are incompetent as evidence to prove the correctness of a statement of fact or theory therein. *State v. Summers,* 173 N.C. 775, 92 S.E. 328; *Tilghman v. R. R.,* 171 N.C. 652, 89 S.E. 71; *Lynch v. Manufacturing Co.,* 167 N.C. 98, 83 S.E. 6. See also, *Sloan v. Light Co.,* 248 N.C. 125, 102 S.E. 2d 822; *Lutz Industries, Inc., v. Dixie Home Stores,* 242 N.C. 332, 88 S.E. 2d 333. Statements in such textbooks and documents are, in the final analysis, but the opinions of the author or his statement of facts observed by him or reported by others. They are not made under oath, the writer is not subject to cross examination and the opinion is not stated in response to a hypothetical question setting forth facts in evidence in the case on trial. Consequently, when offered as evidence of the truth of the statement made therein, the publication is objectionable both under the Hearsay Rule and under the rules applicable to opinion testimony by expert witnesses.

The same principles and objections apply to the admission in evidence of a statement by a manufacturer, printed upon or packaged with a container of his product, when such statement is offered to prove the truth of the statement.

The Hearsay Rule does not apply where the purpose of offering the extra-judicial statement is not to prove the truth of the statement, but merely to prove the fact that it was made and that the circumstances under which it was made were such as should reasonably have made it known to the litigant. *Wilson v. Indemnity Corp.,* 272 N.C. 183, 158 S.E. 2d 1. The display of a red flag bearing the word "DANGER," a shouted warning or a printed warning by a person other than the witness testifying thereto, may be shown, not to prove the fact of danger, but to prove the giving of a warning which the person in question should have seen or heard and taken into account. For this purpose, the label on the bottle of Strep-Combiotic was properly admitted in evidence. It is not proof that the drug was unsafe for use upon a child. See *Salvo v. Leland Stanford Jr. University Board of Trustees,* 154 Cal. App. 2d 560, 317 P. 2d 170. It is evidence of a warning which the physician disregards at his peril, and his disregard of it is relevant upon the issue of his use of reasonable care, where other evidence shows the drug is, in fact, dangerous to a child.

Upon this record, the judgment of nonsuit was improperly entered.

Reversed.

STATE OF NORTH CAROLINA v. ESTORIA CLAYTON.

(Filed 12 January, 1968.)

1. Criminal Law § 104—

On motion to nonsuit, the evidence must be considered in the light most favorable to the State.

2. Automobiles § 113— Evidence of culpable negligence in striking boy held for jury.

The evidence tended to show that seven children left school and began walking home in an easterly direction on the shoulder of a highway, that a car driven by defendant was observed approaching from an easterly direction at a speed of 60 to 70 miles per hour, that the car ran off the pavement, struck one of the children and continued without stopping, that the defendant was found 15 minutes later beside his wrecked car and was, in the opinion of one witness, under the influence of alcohol, and that defendant admitted to a patrolman that he saw the children. The evidence further showed that the road from the school ran downgrade in an easterly direction for 150 to 200 feet, that signs at the bottom of the grade warned westbound motorists of the school and of an approaching speed limit of 35 miles per hour, that the body of deceased was found on the shoulder of the road and some 50 feet east of the signs, and that for a considerable distance east of the point of impact the road was straight and unobstructed. *Held:* The evidence is sufficient to be submitted to the jury on the issue of defendant's culpable negligence in causing the death of the child.

3. Automobiles § 112—

It is competent in a homicide prosecution for a person of ordinary intelligence to testify as to his opinion of the speed of a vehicle when he has had a reasonable opportunity to observe the vehicle in motion.

4. Same—

Where it affirmatively appears that a witness had sufficient opportunity to observe a moving vehicle, discrepancies in his testimony appearing on cross-examination, together with his statement that he was "guessing at all those speeds and distances," do not render incompetent his opinion as to the speed of the vehicle, but go instead to the credibility and the weight of his testimony.

5. Same—

In this homicide prosecution arising out of the operation of a motor vehicle, there was no error in admitting the testimony of a witness that the defendant was under the influence of intoxicants when the evidence supports a reasonable inference that the witness saw the defendant some 15 minutes or less after the homicide.

6. Criminal Law § 116—

Any inference in the solicitor's argument in regard to defendant's failure to testify in his own behalf *held* cured by the court's immediate instruction upon objection that defendant had the right not to testify and that his failure to do so should not prejudice him, and by the court's instruction to the same effect in the charge to the jury.

7. Automobiles § 114; Criminal Law § 118—

In a prosecution for manslaughter arising out of the operation of an automobile, the defendant having offered no evidence, it is not error for the court to instruct the jury that the defendant contended that he was not the driver of the automobile, since defendant's plea of not guilty puts into issue every element of the offense charged.

8. Criminal Law § 118—

An error in stating the contentions of a defendant ordinarily must be called to the court's attention in apt time to afford opportunity for correction, in order that an exception thereto be considered on appeal.

9. Criminal Law § 98—

A motion to sequester witnesses is addressed to the discretion of the trial court, and the court's refusal of a request for sequestration will not be disturbed in the absence of a showing of abuse.

APPEAL by defendant from *Bickett, J.*, February 1967 Criminal Session of PERSON.

Defendant was tried upon a bill of indictment (returned at the February 1966 Session) which charged him with the felonious killing of Joseph Richard Seamons. Defendant, represented by his privately employed counsel, Blackwell M. Brogden, Esquire, pled not guilty. He was convicted of involuntary manslaughter and appeals from a sentence of not less than five nor more than seven years in the State's prison.

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

Blackwell M. Brogden for defendant.

SHARP, J. Defendant brings forward six assignments of error. We consider first whether the judge erred in overruling the motions for nonsuit (assignment No. 5). The parties stipulated that Joseph Richard Seamons (Seamons), a school boy, died as a result of injuries received when he was struck by an automobile on 21 January 1966. Defendant offered no evidence. That offered by the State tended to show the following facts:

Allensville School is situated on the south side of Rural Paved Road 1520, which runs east and west. East of the eastern end of the circular drive around the school the road is straight for over a

quarter of a mile. It is a 2-lane, 20-foot paved highway, with dirt and grass shoulders 7 feet wide. From the school, the road runs downgrade to the east for 150-200 feet. At the bottom of this grade, on the north shoulder, dual signs warn the westbound motorist that he is approaching a school and a speed zone of 35 MPH. East of the school sign, the road is upgrade and straight for a considerable distance.

On 21 January 1966 the weather was clear; visibility, good; the road, dry. The Allensville School "let out" at 3:30 p.m. About five minutes thereafter, Seamons and six other children crossed the road and started walking in an easterly direction on the shoulder with Seamons, the third in line. Three loaded school buses were also proceeding east in the immediate vicinity. A blue and white Ford, operated in a westerly direction by a colored man wearing a hat, came down the hill "speeding." Sherman Monroe Stewart (aged 18), the driver of the first school bus (No. 99), met the Ford about halfway up the hill. He observed its approach for 200-300 feet, and, in his opinion, it was traveling at a speed of 60-70 MPH. After the Ford passed school bus No. 99, it twice ran off the pavement. The second time, it hit Seamons on the north shoulder of the road and continued on its way without stopping.

When the investigating patrolman, Joe Wright, arrived at the scene at approximately 3:50 p.m., he found Seamons' body lying on the north shoulder, 13 feet from the edge of the pavement and about 50 feet east of the school sign. From that spot, one could see to the east a quarter of a mile. The speed limit there was 55 MPH; west of the school sign, within the school zone, it was 35 MPH.

After the Ford passed the school sign, Mrs. Pauline F. Gentry, who had just entered the highway from the eastern end of the school drive and headed east, observed approaching from the east a two-tone car driven by a colored person wearing a hat. It was "waving toward the line in the middle of the road" and ran her off onto the shoulder. She observed this automobile for 100-150 feet. In her opinion, its speed was "at least 40 or 45 miles or more." After it went by, she started up the hill. As she passed the group of children on the shoulder, she realized that something had happened and backed to the spot where Seamons was lying on the bank. She dispatched two boys to the school to telephone for help and left her son, Larry Wayne Gentry, and another boy, who had been in her car, "on guard" with instructions to let nothing be moved. Larry observed glass and the dead boy's thumb in the road.

At approximately 3:50 p.m., Patrolman Joe Wright arrived at the scene, which he had approached from the west. En route, at Weaver's Store, which is nine-tenths of a mile from the spot where

he found Seamon's body, he came upon defendant standing by a 1959 blue and white Ford. This vehicle had been wrecked in the right ditch of an unpaved road which comes across from the school. Defendant told Wright that the wrecked car belonged to him and that he had been driving it. Defendant appeared to the patrolman to be in shock; "something was wrong with him at the time." He had the odor of alcohol on his breath. The right front and rear of the Ford were damaged. There was a slight dent in the top of the right fender, and all the glass was broken from the right headlight except a small fragment, which Wright removed. He placed it in an envelope, which he sealed and labeled. When he arrived at the scene of the accident, he found fragments of glass on both the pavement and the shoulder. These he placed in another envelope which he also sealed and labeled. Thereafter he delivered both envelopes to the SBI Laboratory. In the opinion of the analyst who examined the fragments, the particles in the two envelopes were at one time a part of the same sealed-beam headlight.

At Patrolman Wright's request, Larry Wayne Gentry accompanied him to Weaver's Store, where Gentry identified the 1959 Ford in the ditch as the vehicle he had seen when he and his mother entered the road from the Allensville School driveway. He also identified defendant as the driver of the vehicle. Upon this identification, the investigating officers then arrested defendant.

Shortly after Seamons was struck by the passing car, Kenneth Crow, a foreman en route to his work at Crown Aluminum Industries, passed the spot where the body lay. In order to call an ambulance he went immediately to Weaver's Store, where he saw a lot of smoke and a blue and white Ford in the ditch across the road from the store. He also saw defendant, who worked under him at Crown Aluminum, come from around the front of the car. Defendant's eyes looked glassy, and his speech was slurred when he replied to Crow's questions. In Crow's opinion, defendant had been drinking and was under the influence of alcohol.

On 22 January 1966, after having warned defendant of his constitutional rights, SBI agent Satterfield interviewed him. At that time, defendant made a statement, which is summarized as follows: On the preceding day, defendant had been cutting and hauling pulpwood. Just before lunch he had consumed two beers. Thereafter, about 3:00 p.m., he started to his work at Crown Aluminum. As he approached the Allensville School, he saw three or four boys on the road 150 feet away. He slowed down to 30-35 MPH and, seeing no other traffic on the highway, he drove a little to his left of the center. His first sight of Seamons was a fleeting glance as the boy

bounced off the right front fender of his car. Realizing that he, a Negro, had struck a white boy in a white community, he became frightened and sped away. Soon thereafter, one of his tires blew out, and his car went into the ditch, where the patrolman found it.

The fundamental rule is that on a motion for nonsuit the State's evidence must be considered in the light most favorable to it. Applying this rule, the foregoing resume clearly demonstrates the sufficiency of the State's evidence to withstand the motion. The evidence of defendant's excessive and unlawful speed, his failure to keep a proper lookout and to bring his car under control as he approached a school zone and saw children walking on the shoulder of the highway, the fact that he struck the boy who was off the pavement, and his flight from the scene of the accident, was ample to establish defendant's culpable negligence as the proximate cause of Seamons' death. *State v. Colson,* 262 N.C. 506, 138 S.E. 2d 121; *State v. Huggins,* 214 N.C. 568, 199 S.E. 926; *State v. Cope,* 204 N.C. 28, 167 S.E. 456; 1 Strong, N. C. Index 2d, Automobiles § 113 (1967); 7 Am. Jur. 2d, Automobiles and Highway Traffic § 337 (1963); Annot., Automobile — Violation of Law — Homicide, 99 A.L.R. 756, 788 (1935).

Two of defendant's assignments relate to the admission of evidence. The maximum legal speed at the point where the automobile struck Seamon was 55 MPH, although 50 feet farther it was 35 MPH. The only specific evidence that defendant's speed was in excess of 55 MPH before he passed the school sign came from Sherman Monroe Stewart, the driver of school bus No. 99, who testified as follows:

"As I leave the school I go down the hill, go down the hill into the bottom where the sign is and proceed on up the hill aways. It is a very long hill, I would say about five hundred (500) feet to the bottom. . . . I was traveling on up this road and about half way up the hill I saw a car coming down. It was bearing on my side of the road. I believe it was a blue and white car. As I proceeded on up the hill about halfway up the hill the car was coming on down and the car was about fifty (50) feet before it got to me, it cut back on its side of the road. I had the opportunity to observe the car as it approached me for about two or three hundred feet." Stewart then stated that he had an opinion satisfactory to himself as to the speed of the automobile. Over defendant's objection, he testified: "I would say between sixty to seventy miles an hour." He also said that he passed children walking on the north shoulder. They were approaching the school sign in the bottom as he went by.

On cross-examination, Stewart became confused as to the num-

ber of feet he had traveled from the school at the time he first saw the approaching automobile, and he said "It is true that I am guessing at all these speeds and distances." At this point, defendant moved to strike all of Stewart's testimony on the ground that his opinion of the Ford's speed was a mere guess and that the discrepancies in his estimates of distance rendered his estimate of speed without probative value. Defendant assigns the denial of this motion as error.

A person of ordinary intelligence who has had a reasonable opportunity to observe a vehicle in motion may give his estimate as to the speed at which it was moving. *Hicks v. Love* and *Bruton v. Love,* 201 N.C. 773, 161 S.E. 394; 1 Strong, N. C. Index, Automobiles § 38 (1957); Stansbury, N. C. Evidence § 131 (2d Ed. 1963); 8 Am. Jur. 2d Automobiles and Highway Traffic § 985 (1963). On the other hand, a witness will not be permitted to express a mere guess, as distinguished from an opinion. "Absolute accuracy, however, is not required to make a witness competent to testify as to speed." 32 C.J.S. Evidence § 546 (53) p. 239 (1964).

The mere fact a witness states that he is guessing at distances or speeds does not *per se* render his testimony incompetent. In *Finnerty v. Darby,* 391 Pa. 300, 138 A. 2d 117, the witness was asked for his "best estimate" of the speed of an automobile prior to the accident. His reply was, "Strictly as a guess I would say between 40 and 50 miles an hour." In holding this testimony admissible, the Pennsylvania court stated:

"From this appellant argues that the witness' entire testimony was nothing but guesswork or mere conjecture. In the first place, the word 'guess' does not necessarily mean mere conjecture, but may connote judgment. If a person is asked to estimate the number of people in a crowd, he may say 'I guess' a certain number, or he may say 'I judge' a certain number. By either term he is expressing an opinion based on observation. In the instant case, the witness repeatedly made clear that he could not give the exact speed of the car and was giving his best opinion of its approximate speed." *Id.* at 310, 138 A. 2d at 122. *Accord, Tews v. Hamrick,* 148 Neb. 59, 26 N.W. 2d 499.

Similarly in *Smith v. Commonwealth,* 282 S.W. 2d 840, 842 (Ky. CA 1955), a manslaughter prosecution, it is said:

"The term 'guess' is not regarded as being a mere conjecture or speculation but as a colloquial way of expressing an estimate or opinion. It is a word frequently used where a witness is called upon to make estimates of speed or distance or size or time. Like the

words 'suppose' or 'think', it is commonly used as meaning the expression of a judgment with the implication of uncertainty."

In *State v. Phelps,* 242 N.C. 540, 89 S.E. 2d 132, the testimony of one of the witnesses was that, in his opinion, the defendant's car was traveling 75 or 80 miles an hour. On cross-examination, he said he was guessing at the speed. With reference to this evidence, Parker, J. (now C.J.), said: "The statement of Eason on direct examination that the speed of the car, in his opinion, was 75 to 80 miles per hour, and his statement on cross-examination that he was guessing at the speed, is a matter of credibility." *Id.* at 545, 89 S.E. 2d at 135-36. Here, the inconsistencies in Stewart's estimate of distances bore upon the weight of his testimony rather than its competency. *Loomis v. Torrence,* 259 N.C. 381, 130 S.E. 2d 540. He testified that he observed the car for 200-300 feet as it approached. Such observation was possible, not only under his estimates but also those of Patrolman Wright and Mrs. Gentry. Furthermore, Marion Seamons, the sister of deceased, who was walking behind him, testified that bus No. 99 "was right next to the sign when the car was coming down the road," and visibility from that point to the east was unobstructed for one-fourth of a mile.

The cases cited by defendant in support of the foregoing assignment of error are inapposite. In *State v. Becker,* 241 N.C. 321, 85 S.E. 2d 327, it was held that observation for 15 feet did not afford a reasonable opportunity for the witness' estimate of speed. In *Fleming v. Twiggs,* 244 N.C. 666, 94 S.E. 2d 821, the court eliminated as having no probative value the testimony of a witness that an automobile, which she saw for only "seven or nine feet or one-half the length of the courtroom," was traveling 70 MPH.

Defendant likewise contends that the trial judge committed reversible error when he permitted Kenneth Crow to testify that, in his opinion, defendant was under the influence of alcohol when he saw him at Weaver's Store. Although the evidence does not definitely establish the lapse of time between the accident and Crow's encounter with defendant, it is a fair inference that Crow saw him before Patrolman Wright did. The officer saw him about fifteen minutes after Seamons' death, and he detected the odor of alcohol about him at that time. The judge did not err when he admitted Crow's testimony, nor when he charged the jury that if they found defendant had been drinking intoxicating liquor they could consider that fact in determining whether he operated the Ford in a criminally negligent manner.

"While the mere act of driving while under the influence of intoxicating liquor is not in itself a sufficient predicate for a conviction of reckless driving, the fact that one charged with reckless driving

had been drinking is a factor to be considered in determining his guilt, and evidence of such drinking is generally recognized as being admissible in a prosecution for reckless driving." 7 Am. Jur. 2d Automobiles and Highway Traffic § 335 (1963). *Accord,* Annot., 52 A.L.R. 2d 1337, 1364 § 22 (1957). Evidence that a defendant had been drinking is a part of the *res gestæ* and one of the circumstances to be considered by the jury in determining whether he is guilty of reckless driving. *State v. Jessup,* 183 N.C. 771, 111 S.E. 523; *accord, State v. Sisneros,* 42 N.M. 500, 82 P. 2d 274; *State v. Birch,* 183 Wash. 670, 49 P. 2d 921; *Huff v. State,* 68 Ga. App. 799, 24 S.E. 2d 227; *Allen v. State,* 273 P. 2d 152 (Okla. Crim.). See also *State v. McMahan,* 228 N.C. 293, 45 S.E. 2d 340; *State v. Gary Tyson Howard, ante* 144. Evidence that an accused was drinking is likewise admissible in a prosecution for involuntary manslaughter arising out of his operation of a motor vehicle. "Such evidence is, of course, directly relevant in a prosecution for involuntary manslaughter by an unlawful act . . . where the unlawful act charged is driving while intoxicated or under the influence of intoxicating liquor. Such evidence is also admissible where the prosecution is for involuntary manslaughter by criminal or culpable negligence resulting in the death of another." 7 Am. Jur. 2d Automobiles and Highway Traffic § 338 (1963). *Accord.,* Annot., 99 A.L.R. at 785-786.

In *Hunt v. State,* 87 So. 2d 584 (Fla.), the defendant was charged with manslaughter growing out of an automobile accident. Evidence that the defendant had been imbibing intoxicating liquors was admitted over defendant's objection. The court held that "it was proper to consider his condition as shedding light on his recklessness." *Id.* at 585. *Accord, Penton v. State,* 114 So. 2d 381; *People v. Emmons,* 114 Cal. App. 26, 299 P. 541; *Wilson v. State,* 94 Okla. Crim. 189, 237 P. 2d 177; *Cannon v. State,* 91 Fla. 214, 107 So. 360. Defendant's assignment of error No. 4 is overruled.

The solicitor was assisted in the prosecution of this case by Mr. Marshall T. Spears, Jr., attorney. Counsel for defendant interrupted Mr. Spears' argument to the jury and moved for a mistrial on the ground that he had commented upon defendant's failure to testify. Mr. Spears denied that he had made such comment, and the record does not contain the statements to which defendant objected. It does disclose, however, that Judge Bickett immediately stopped the argument and instructed the jury that any such comment, if made, would be both improper and incompetent; that a defendant's failure to testify created no presumption against him and could not be used in any way to his prejudice. He then overruled the motion for a mistrial. Thereafter, in his final charge to the jury after the arguments

were completed, the judge again instructed the jury in substantial accord with the instructions given in *State v. Stephens,* 262 N.C. 45, 50, 136 S.E. 2d 209, 213, and *State v. Lewis,* 256 N.C. 430, 124 S.E. 2d 115.

If any improper reference to defendant's failure to testify was made — and the record does not disclose any such impropriety — the prompt action of the trial judge and his repeated instructions cured the error. *State v. Stephens, supra; State v. Lewis, supra;* 2 Strong, N. C. Index 2d, Criminal Law § 102, p. 644 (1967). Defendant's assignment that the judge erred in refusing to declare a mistrial is overruled.

Defendant's objection to the charge is that the judge failed to comply with G.S. 1-180 and that he erred in telling the jury that defendant contended he was not driving the automobile which struck deceased. The first contention is overruled upon the authority of *State v. Robinson,* 272 N.C. 271, 158 S.E. 2d 23. The second likewise cannot be sustained. Defendant offered no evidence, but his plea of not guilty called into question all the State's evidence and required the State to prove every element of the charge against him. *State v. Snead,* 228 N.C. 37, 44 S.E. 2d 359. The first and most crucial question in the case was whether defendant was the driver of the car which struck and killed Seamons. Absent a judicial admission by defendant that he was the driver, it would have been prejudicial error for the judge to assume this fact. It was, therefore, proper for him to tell the jury that defendant contended he was not the driver. In any event, if a judge errs in stating a defendant's contentions, ordinarily the error must be called to his attention in time for him to correct it. *State v. Cornelius,* 265 N.C. 452, 144 S.E. 2d 203. Defendant did not repudiate this contention at the time he heard the judge make it for him. He may not do so now.

Finally, we discuss defendant's assignment of error No. 1, that the judge erred in denying his motion to sequester the State's witnesses. This motion was made at the commencement of the trial, and the record discloses only that after the jury was impaneled "defendant moves to sequester the State's witnesses. Motion overruled. Defendant excepts. This is defendant's exception No. 1."

In this State, as a general rule, witnesses will be separated upon request. Sequestration is, however, discretionary with the trial judge — not a matter of right. Stansbury, N. C. Evidence § 20 (2d Ed. 1963). Our view is succinctly stated in *State v. Spencer,* 239 N.C. 604, 609, 80 S.E. 2d 670, 674: "This jurisdiction, and the great majority of jurisdictions, follow the early English rule that the segregation, separation, exclusion of witnesses, or 'putting witnesses under the rule,' as the procedure is variously termed, is a matter not of

right, but of discretion on the part of the trial judge." A judge's refusal to sequester the State's witnesses is not reviewable unless an abuse of discretion is shown. *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802; *State v. Love,* 269 N.C. 691, 153 S.E. 2d 381; *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506, *cert. denied,* 384 U.S. 1020, 86 S. Ct. 1936, 16 L. Ed. 2d 1044; 2 Strong, N. C. Index 2d, Criminal Law § 98 (1967); 53 Am. Jur. Trial § 31 (1945). Here, defendant's counsel made a blanket request that the witnesses be sequestered. He assigned no reason for such exclusion at the time he made the request, and no abuse of discretion has been shown.

It appears from the record that defendant has had a fair trial, and in it we find

No error.

CHARLES ORR STARNES v. FREDERICK H. TAYLOR, M.D.

(Filed 12 January, 1968.)

1. Physicians and Surgeons § 20— Evidence held insufficient to show that plaintiff's esophagus was perforated by negligence.

Plaintiff's evidence was to the effect that he underwent an esophagoscopy performed by the defendant surgeon to diagnose his difficulty in breathing, that the procedure involved the insertion into the esophagus of a metal tube with a light attached, that during the course of the examination an attempt to go below the narrow area of the esophagus was unsuccessful, and that as the esophagoscope was being removed the defendant did not detect any lesion or break in the walls of the esophagus. The defendant testified that he had performed two thousand procedures of this type and that the risk of perforating the esophagus was between one in 250 and one in 500. The plaintiff developed extreme pains in his throat and chest following the examination, whereupon defendant discovered that plaintiff's esophagus had been perforated. *Held:* Although plaintiff's evidence is sufficient to justify a finding that his esophagus was perforated during the examination, it is insufficient to show that the result was caused by negligence, the doctrine of *res ipsa loquitur* being inapplicable, and nonsuit was properly entered.

2. Physicians and Surgeons § 11—

To establish liability upon the surgeon or physician in an action for malpractice, there must be proof of actionable negligence by the defendant which was the proximate cause of the plaintiff's injury or his worsened condition.

3. Same—

In the absence of a contract or other representation, the surgeon or physician is not ordinarily an insurer of the success of his operation or treatment.

4. Same—

A physician or surgeon may be held liable only for such damage as proximately results from his failure to possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess, or his failure to exercise reasonable care and diligence in his application of his knowledge and skill to the patient's case, or his failure to use his best knowledge in his treatment and care of the patient.

5. Same—

In the absence of fraud or misrepresentation a physician or surgeon must be given wide discretion in advising the patient as to possible consequences of an operation or treatment where the possibility of an adverse result is relatively slight.

6. Physicians and Surgeons § 20—

In a malpractice action, evidence that defendant surgeon had performed some two thousand esophagoscopic examinations and that the occurrence of a perforation of the esophagus in such procedure is unusual, and that the defendant gave plaintiff his customary warning that any surgical procedure is accompanied by some risk, *held* insufficient to show that defendant was negligent in advising the plaintiff of the consequences of the examination.

7. Physicians and Surgeons § 19—

Nothing else appearing, the surgeon's duty to his patient does not end with the termination of the operation, and in the subsequent treatment of the patient the surgeon must give him such attention as the necessity of the case demands.

8. Same—

Evidence that the defendant surgeon performed an esophagoscopy upon the plaintiff and that he did not detect any break or lesion in the esophagus wall during the course of the examination, that some pain was normally anticipated following such an examination but that a perforation of the esophagus wall was highly unlikely, that plaintiff was left in the care of a nurse with instructions concerning the relief of pain, and that, upon plaintiff's complaint of severe pain in the throat and chest, defendant discovered a perforation in the esophagus and promptly closed the opening by an operation, *held* insufficient to justify a finding of negligence.

APPEAL by plaintiff from *Froneberger, J.*, at the 3 April 1967 Schedule B Civil Session of MECKLENBURG.

This is an action for damages for alleged negligent malpractice by the defendant, a surgeon, resulting in injury to the plaintiff, his patient. At the close of the plaintiff's evidence, a judgment of nonsuit was entered from which the plaintiff appeals, the allowance of the motion for judgment of nonsuit being his only assignment of error.

The following facts are alleged in the complaint and admitted in the answer: The defendant is duly licensed to practice medicine and surgery in North Carolina and holds himself out to the public as be-

ing qualified to engage in such practice, including the practice of thoracic surgery. In May 1963 the plaintiff, having consulted a general practitioner of medicine concerning difficulty which he had experienced in swallowing solid food, was referred by that doctor to the defendant. Prior to the referral, the doctor first consulted had made x-ray examinations of the plaintiff, which showed a narrowing of his lower esophagus and a diaphragmatic hernia. Pursuant to the referral, the plaintiff was admitted to the hospital as the defendant's patient for the performance of an esophagoscopy for the further study and evaluation of his difficulty. This surgical procedure was performed by the defendant on the day following the admission of the plaintiff to the hospital.

The complaint further alleges that the defendant was negligent in the following respects, the answer denying these allegations: (1) The defendant failed properly to prepare and instruct the plaintiff prior to the operative procedure; (2) he disregarded other diagnostic evidence; (3) he performed the esophagoscopy with greater force than was necessary and without taking proper precautions to prevent perforation of the esophagus; (4) he perforated the esophagus in performing the esophagoscopy; and (5) after the operative procedure he failed properly to attend and treat the plaintiff.

The plaintiff's evidence consisted of his own testimony, that of his wife, that of the head nurse on the hospital hall, the adverse examination of the defendant by the plaintiff, and the hospital records. The following is the summary of this evidence:

The Defendant's Testimony on Adverse Examination:

The narrowing of the plaintiff's esophagus was at a point just above the entry into the stomach. The surgical procedure consisted of the insertion of an adult-size esophagoscope into the esophagus and down to the point of the narrowing. This device consists of a metal tube with a light in it which enables the surgeon to observe the walls and condition of the esophagus during the insertion and withdrawal of the esophagoscope.

Prior to undertaking this procedure upon the plaintiff, the defendant had made special studies in this field of surgery and had performed approximately 2,000 procedures of this type. In the course of these examinations of other patients, perforations of the esophagus had occurred. The ratio of the occurrence of such perforations to such procedures undertaken is somewhere between one in 250 and one in 500. An attempt, such as was made in this instance, to dilate a stricture in an esophagus would increase the risk of perforation at the point of such attempted dilation but would not increase the risk of a perforation elsewhere in the esophagus.

The defendant habitually explains to all of his patients that "any procedure carries risk," and he probably explained to the plaintiff that the procedure to be followed in his case carried risk. He does not think that he used the term "perforation" in this explanation of the procedure and of its risk to the plaintiff. He does not remember the exact conversation with the plaintiff since it occurred more than two years prior to his adverse examination in this litigation.

For this procedure the plaintiff's throat was anesthetized. In order to determine the nature, extent and cause of the stricture of the esophagus a biopsy was performed, a small amount of tissue being taken for examination, and an attempt was made to dilate the narrowed area so as to get the esophagoscope further down, but it would not pass below the narrow portion of the passage. The esophagoscope was then removed. Throughout this procedure the defendant observed the walls of the esophagus. He saw no lesion or break therein as he was removing the esophagoscope. No bleeding was seen and the patient appeared to be in good condition. There was, at that time, no indication of any complication. The entire operative procedure required approximately 20 minutes and was completed at 1:50 p.m. The patient was then taken to the recovery room, where he was seen by the defendant. At 2:40 p.m. he was taken from the recovery room back to his own room in the hospital.

The defendant left instructions for the nurse to keep the plaintiff from having anything by mouth until two hours after the completion of the procedure. He returned to his office and spent the afternoon seeing other patients. Normally, if anything "unusual or out of the ordinary" occurred to one of his patients he would be informed of it. He received no such information concerning the plaintiff. He gave the nurse no specific instruction concerning any swelling of the neck in the plaintiff's case. There had been no such visible swelling of the neck when he next saw the plaintiff.

Without being "called," the defendant returned to the hospital at 7 p.m. to make a routine check of the plaintiff. He then found the plaintiff complaining of pain in his neck and between his shoulder blades. There was no visible swelling of the neck but there was indication of air in the soft tissues of the neck. Suspecting that this was due to a perforation of the esophagus, the defendant had an x-ray examination made of the plaintiff immediately. This confirmed the existence of a perforation of the esophagus and the presence of air in the tissues of the neck. For the reason that such perforation would permit fluids, air and other matter to get into the soft tissues of the neck, with the resulting danger of infection, the defendant determined that it was necessary to operate immediately

to close the perforation and drain from the affected area such foreign matter as had leaked through the perforation. This operation was performed promptly by the defendant.

The perforation of the esophagus was approximately one-tenth of an inch in length and was not at the point of the stricture, at which the attempted dilation had been undertaken during the first operation, but was some ten inches higher up the esophagus.

By this second operation the defendant closed the perforation and inserted drains. Thereafter, the plaintiff developed extensive infection in the mediastinum and the chest cavity, which required further operations and prolonged hospitalization. This infection resulted from the perforation of the esophagus.

The Testimony of the Nurse:

Entries made by the nurse upon the hospital records show that the defendant ordered the plaintiff to have nothing by mouth for two hours following the surgical procedure. The plaintiff was having pain before the two hours expired and requested that he be given something for it. Since this would require the swallowing of a pill with water, the nurse communicated with defendant, who gave permission for the plaintiff to take the pill at that time. The plaintiff could not take it because he could not swallow. He still needed something for the pain and the nurse informed the defendant of that circumstance and asked if the plaintiff could be given something by another method. The defendant then ordered a hypodermic, which the nurse administered at 4:10 p.m. There is no entry on the record covering the period from 4:10 p.m. to the defendant's return to the hospital at 7 p.m.

The Testimony of the Plaintiff:

Upon entering the hospital the plaintiff planned to stay two or three days. He remained 41 days. When the esophagoscopy was completed, the defendant told the plaintiff that it was a "rough examination." The plaintiff's throat was sore. He could not swallow his saliva. His neck felt as if it was swollen. He had extreme pain in his throat and chest. He was alarmed because he could not talk.

The Testimony of the Plaintiff's Wife:

When the plaintiff returned to his room following the esophagoscopy, he was in extreme pain and was not able to talk. He was moaning and groaning. His wife asked the nurse to give him something for the pain. After an interval the nurse returned with tablets

but the plaintiff could not take them. His wife told the nurse he would have to have something else for pain, and a few minutes after 4 p.m. the nurse gave him a shot which helped him slightly. The defendant came back to the hospital at approximately 7 p.m., examined the plaintiff and told the plaintiff's wife that the plaintiff "had trouble" which needed to be corrected immediately. In response to her question, he told her that this trouble "was done during the operation" and that the corrective procedures, above described, were necessary immediately.

Myers and Sedberry for plaintiff appellant.

Helms, Mullis, McMillan & Johnston by James B. McMillan and R. Malloy McKeithen for defendant appellee.

LAKE, J. Unquestionably, the evidence of the plaintiff is sufficient, when taken to be true as it must be upon a motion for judgment of nonsuit, to show that in the course of the esophagoscopy performed by the defendant, the plaintiff's esophagus was perforated and that infection resulted therefrom, causing the plaintiff to become a very sick man and to sustain pain, suffering, prolonged disability and increased expense. The question for determination is whether the evidence is sufficient to support a finding that the proximate cause of these unfortunate occurrences was a negligent failure of the defendant to perform a professional duty owed by him to the plaintiff, his patient.

Proof that the plaintiff, as patient, was operated upon or treated by the defendant, as surgeon or physician, and that, as a result of such operation or treatment, the plaintiff was injured and his condition was worse after the operation or treatment than before is not sufficient to establish liability of the defendant for such injury. The doctrine of *res ipsa loquitur* does not apply to such a situation. To establish liability upon the surgeon or physician in malpractice cases, there must be proof of actionable negligence by the defendant, which was the proximate cause of the plaintiff's injury or worsened condition. The surgeon or physician is not, ordinarily, an insurer of the success of his operation or treatment. *Lentz v. Thompson,* 269 N.C. 188, 152 S.E. 2d 107; *Galloway v. Lawrence,* 266 N.C. 245, 145 S.E. 2d 861; *Watson v. Clutts,* 262 N.C. 153, 136 S.E. 2d 617; *Hunt v. Bradshaw,* 242 N.C. 517, 88 S.E. 2d 762; *Nash v. Royster,* 189 N.C. 408, 127 S.E. 356. In the absence of proof of a contract to that effect, a surgeon or physician does not warrant a cure, or even that the patient will be in as good condition after the operation or treatment as he was in prior thereto. *Smith v. McClung,* 201 N.C. 648, 161 S.E. 91.

The measure of the undertaking and duty of a surgeon or physician, in the absence of proof of a different contract, is thus stated by Higgins, J., speaking for the Court in *Hunt v. Bradshaw, supra:*

> "A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient. [Citations omitted.] If the physician or surgeon lives up to the foregoing requirements he is not civilly liable for the consequences. If he fails in any one particular, and such failure is the proximate cause of injury and damage, he is liable."

In the present case there is no contention that the defendant, at the time of his treatment of the plaintiff, did not possess the degree of professional learning, skill and ability ordinarily possessed by others in that branch of the practice of medicine in which he engages and which was involved in the procedure performed upon the plaintiff. It is likewise not contended that the defendant failed in any way to exercise properly such skill and care in all subsequent operations for and treatment of the plaintiff's condition after the discovery of the complication resulting from the perforation of the esophagus. The plaintiff contends that the defendant was negligent in that: (1) He failed prior to the commencement of the esophagoscopy to advise the plaintiff of the risk of such perforation of the esophagus and of the resulting infection; (2) he perforated the wall of the esophagus in the course of this procedure; (3) he failed to discover the perforation and commence the corrective procedures earlier. The question for us to determine is whether the plaintiff has introduced sufficient evidence of any of these allegations to justify the submission of the issue of the defendant's negligence to the jury.

The plaintiff does not contend that the performance of an esophagoscopy was not indicated by the result of prior examinations of the plaintiff's condition, or that the decision to perform it was not in accord with the highest standards of medical judgment. This Court has discussed the duty of a physician or surgeon to advise his patient, or the parent or other person acting for the patient, of risks inherent in a proposed operation or treatment in *Sharpe v. Pugh,* 270 N.C. 598, 155 S.E. 2d 108; *Watson v. Clutts, supra;* and *Hunt v. Bradshaw, supra.* We adhere to the principles there stated. See also

the discussion of this matter in Annotation, 79 A.L.R. 2d 1028. As in *Sharpe v. Pugh, supra,* we deem it unnecessary and unwise to attempt, in the decision of this appeal, to define precisely the extent and limits of the legal duty of a physician or surgeon to make known to his patient, or to the person acting for the patient, the possible or probable adverse effects from a contemplated operation, treatment or use of a drug.

Where, as here, there is no contention of fraud or misrepresentation by the surgeon in order to induce the patient to undergo an unnecessary or unwise surgical procedure, and the likelihood of an adverse result is relatively slight, much must be left to the discretion of the physician or surgeon in determining what he should tell the patient as to possible adverse consequences. While the patient, or the person acting for him, has the right to an informed election as to whether to undergo the proposed operation, treatment or to take a prescribed drug, it must be borne in mind that the physician's or surgeon's primary concern at the time of the consultation is, and should be, the treatment of the patient's illness or disability, not preparation for the defense of a possible lawsuit. Obviously, an increase in the normal anxiety of one about to undergo a surgical procedure is not medically desirable. Advice, which is calculated to increase such anxiety by recounting unlikely possibilities of undesirable consequences, is not consistent with the above stated duty of the physician or surgeon to his patient. A different situation is presented when the physician or surgeon knows, or should know, the proposed operation, treatment or drug has a high ratio of adverse reactions or complications of a serious nature, not likely to be known to the patient. See: *Sharpe v. Pugh, supra; Mitchell v. Robinson,* (Mo.) 334 S.W. 2d 11, 79 A.L.R. 2d 1017.

The evidence in this record does not disclose any false statement or unwarranted assurance by the defendant to the plaintiff. The evidence is that the occurrence of a perforation of the esophagus in the course of the procedure here contemplated and followed is quite unusual, the incidence being one to 250 or one to 500. The evidence is that the defendant gave the plaintiff the customary warning that any surgical procedure is accompanied by some risk of unfortunate consequences. There is nothing to indicate that the most complete discussion of the risk attendant upon this procedure would have deterred the plaintiff from consenting to its performance. Therefore, there is no evidence of negligence by the defendant prior to the performance of the esophagoscopy.

There is a complete absence of evidence of negligence in the performance of the procedure itself. The evidence is that the equipment

used was standard for that purpose. There is nothing to indicate that it was not in perfect condition. There is no evidence of undue force, neglect or lack of skill in the manipulation of the esophagoscope. The evidence is clear and undisputed that the defendant observed the walls of the esophagus as he withdrew the equipment and did not detect the perforation, which appears to have been quite small and to have produced no bleeding. There is no evidence to indicate that he should have detected it in that process. The evidence, therefore, is not sufficient to support a finding of any negligence by the defendant in the performance of the esophagoscopy.

The surgeon's duty to his patient does not, of course, end with the termination of the operation itself, nothing else appearing. As Stacy, C.J., said for this Court in *Nash v. Royster, supra,* the surgeon "must not only use reasonable and ordinary care, skill and diligence in its performance, but, in the subsequent treatment of the case, he must also give, or see that the patient is given, such attention as the necessity of the case demands." In *Galloway v. Lawrence, supra,* we held that evidence, from which the jury could reasonably infer that a surgeon, who was advised by the nurse in charge of the patient of symptoms indicating the onset of a dangerous complication, had delayed unreasonably a further examination of the patient, required the submission to the jury of the issue of negligence in the post operative treatment.

The evidence in this case is not of that nature. It shows that the defendant saw the plaintiff in the recovery room after the esophagoscopy and there was then no indication of any complication. There is nothing in this record to indicate that, in the absence of a perforation of the esophagus, any complication was to be anticipated as even a possibility. Perforations of the esophagus by the procedure here followed are rare. None had been observed as the esophagoscope was withdrawn in this case. Under these circumstances, the defendant was not negligent in returning to his office, leaving the plaintiff in the care of a competent hall nurse.

The record does not indicate that pain and difficulty in swallowing, after the wearing off of the anesthetic, is unusual following an esophagoscopy. Evidently, such pain was anticipated since the defendant left instructions for the administration of tablets to relieve pain after two hours. There is nothing in the record to indicate that the telephone calls from the hall nurse, prior to the expiration of the two hours, disclosed anything other than the presence of normal pain. There was no visible swelling of the neck. Five hours after the conclusion of the procedure the defendant returned to the hospital for a routine check upon his patient. He then discovered sym-

ptoms which he then correctly interpreted as indicating a perforation of the esophagus, for which he took immediate corrective action. We find in this record no evidence of negligence by the defendant in the post operative care of his patient. Consequently, the judgment of nonsuit was proper.

No error.

KENT CORPORATION, A N. C. CORPORATION, PLAINTIFF, v. CITY OF WINSTON-SALEM, DEFENDANT.

(Filed 12 January, 1968.)

1. Contracts § 12—

A contract must be construed with regard to the intention expressed by the language of the parties, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.

2. Same—

Where the terms are plain and explicit, the court will determine the legal effect of a contract and enforce it as written by the parties.

3. Municipal Corporations § 17— Contract held not to contemplate meter fines as rental revenue.

The pleadings and evidence showed that the defendant municipality leased property to be used for off-street parking and that the rental therefor was to be based on the "proceeds from the operation of the parking meters" and the "revenue derived from the meters." Ordinances of the municipality prescribed penalties for violation of meter parking. Plaintiff lessor brought this action to recover its proportionate share of the monies collected by the municipality as penalties under the authority of the ordinances. *Held:* The terms of the contract, in the absence of any provision to the contrary, contemplate that the revenue and proceeds derived from the meters relate solely to coins inserted in the meters for the use of the parking spaces and not to penalties.

APPEAL by plaintiff from *Gambill, J.*, Second Week of April 17, 1967 Two-Week Session of FORSYTH.

Plaintiff instituted this action June 29, 1964, to recover additional rental for property in Winston-Salem, N. C., now owned by plaintiff and used by defendant, as lessee, and known as the Marshall Street-Spruce Street Parking Lot.

Defendant acquired possession of the subject property under lease dated December 5, 1950, executed by Mina P. Fleshman (widow), and Geraldine F. Pratt and husband, Clyde R. Pratt, as lessors, and by defendant, as lessee. By deed dated July 25, 1960, the said lessors conveyed the subject property to plaintiff, plaintiff being a

corporation established and incorporated on July 25, 1960, by Mrs. Fleshman and Mrs. Pratt.

The provisions of the lease relating to rental are as follows: "As rental for the demised premises, the Lessors shall receive the following sums, to wit: *From the proceeds from the operation of the parking meters installed upon the demised premises,* there shall first be paid to the Lessors annually, payable in quarterly instalments, a sum equivalent to six per cent (6%) of the gross sum of $125,000, plus an additional amount sufficient to reimburse Lessors for the amount of City and County *ad valorem* taxes paid by them on the demised premises, as shown by receipts showing such payment presented by Lessors to Lessee. After the foregoing sums have first been paid to Lessors *from the meter revenue,* there shall then be retained by the Lessee *from such revenue* an amount equal to six per cent (6%) on the gross sum of $125,000, plus an amount equal to said taxes. After the Lessee has been paid *from said meter revenue* the same amount as that paid to the Lessors as aforesaid, the additional proceeds *from the meters,* if any, shall then be equally divided between the Lessors and the Lessee, such division of the remaining proceeds to be made on June 30, 1951, and on the same date thereafter during the term of the lease, provided, however, that for the period between the date the meters are put into operation and June 30, 1951, the Lessors and the Lessee shall receive only the pro rata part of the annual rental as aforesaid, and likewise the Lessors shall only be reimbursed for the pro rata part of the 1951 City and County *ad valorem* taxes. The annual periods for the calculation and division of the revenue from the meters as aforesaid shall commence June 30, 1951, and the division shall be made on the same date thereafter during the term of the lease. *The Lessee shall not be liable to the Lessors for any other amount or sum as rental, and the rental payable to Lessors shall be paid solely from the revenue derived from the meters as aforesaid,* plus any revenue derived from the sale of advertising rights and privileges on the demised premises as hereinbefore provided." (Our italics.)

The lessee did not exercise the option to erect advertising billboards on the demised premises, and no such billboards have ever been erected thereon.

The term of the lease was for ten years with an option granted to the lessee to extend the term of the lease for an additional period of ten years. This option was duly exercised, and defendant is now in possession of the demised premises in accordance with the terms and provisions of the lease agreement.

The lessee agreed to purchase and install parking meters on the subject property, the meters to remain the property of the lessee and

to be removed by it upon termination of the lease. During the term of the lease, the lessee was to have complete control of the operation of the parking lot and of the meters, including "the policing of said parking lot and the fixing of the meter rates."

Defendant contends "the proceeds from the operation of the parking meters installed upon the demised premises," referred to in the lease, relates to coins deposited in the meters by patrons to activate the operation thereof. Defendant has fully accounted for and paid to the original lessors and to plaintiff their full share of these receipts. They are not involved in this litigation.

Plaintiff alleged that, "commencing with the first lease year of 1950-1951 and continuing each and every year thereafter including the current lease year of 1965-1966, the defendant has received proceeds and derived revenue from the said parking meters . . . in the form of collections of parking tickets; that said moneys so received by the defendant represent sums paid by persons using such parking spaces and failing to deposit the required parking charges in the meter provided for such purpose; that the plaintiff has made claim and demand upon the defendant to account for and pay to the plaintiff one-half (½) of all such proceeds or revenue derived from the payment of said parking tickets . . . but the defendant has failed, refused and neglected to make such accounting and payment to the plaintiff . . ." Plaintiff prays that it recover from defendant "a sum equal to one-half (½) of meter revenue derived from the parking tickets collected by the defendant on the lease property for each and every lease year commencing with 1950-1951 . . ."

The evidence consists of stipulations which, *inter alia,* identified the lease and each of the municipal ordinances referred to below, and the testimony of Mrs. Pratt. Mrs. Pratt testified, in substance, it was her understanding the lessors were to receive the stated portion of all revenue received from defendant's operation of the parking lot; and that she and her mother, the only persons interested in plaintiff, learned for the first time on July 18, 1962, that defendant was not accounting to plaintiff for any portion of its receipts from parking tickets.

The ordinances of the City of Winston-Salem, to which reference has been made, are as follows:

An ordinance adopted May 25, 1951, entitled, "An ordinance creating rules and regulations and establishing rates for the operation of off-street parking lots by the City." This ordinance applies, *inter alia,* to the "Marshall Street-Spruce Street Lot." It provides: "Any person violating any of the provisions of this ordinance shall be subject to the same penalties and punishment as are now or hereafter provided for the violation of any ordinance regulating the

parking of vehicles on any public street controlled by parking meters. All provisions of the City Parking Meter Ordinance, now or hereafter in force, and not inconsistent herewith, shall apply to the parking of a vehicle in any off-street parking lot maintained by the City of Winston-Salem."

An ordinance adopted July 20, 1951, amending said ordinance of May 25, 1951, which created rules and regulations and established rates for the operation of off-street parking lots by the City of Winston-Salem, and changed the parking meter rates applicable to off-street parking lots by the City of Winston-Salem, including the rates applicable to the "Marshall Street-Spruce Street Lot."

An ordinance adopted November 6, 1953, entitled, "An Ordinance Creating Rules and Regulations and Establishing Rates for the Operation of Off-Street Parking Lots by the City," which amended said ordinance of May 25, 1951, by providing that any person failing to "deposit the required coin in the meter for the space in which such vehicle is parked, or any person who parks a vehicle in either of said parking lots and permits same to remain parked overtime after expiration of the time for which the required coin has been deposited in the meter box, or any person who fails to pay the required charge for the privilege of parking in any of said parking lots, shall be subject to having such vehicle removed from such parking lot by a member of the Police Department of the City" and by providing that such vehicle could be towed away at a charge of $5.00 and be impounded at certain specified rates, and by providing that "(i)n addition to these charges, the owner of such vehicle shall pay the sum of $1.00 as a penalty for violating the rules and regulations applicable to the parking of vehicles on said parking lots."

There is no evidence or stipulation as to "parking tickets," if any, issued in connection with parking on the subject property. The record is silent as to whether "parking tickets" are issued by a parking lot attendant or by police officers; as to whether payment thereof is made to a parking lot employee or at the police department; or, as to whether the failure to pay such parking ticket results in the issuance of a warrant. All that appears in the record bearing upon these matters is set forth in the following stipulation: "It is stipulated and agreed that the City of Winston-Salem collected over the entire period of the Ordinances sums of money from customers using the parking area *under the authority of the Ordinances hereinabove listed;* that such were not included in the amounts paid to Kent Corporation or its predecessors and assigns over the entire period of the Ordinances." (Our italics.)

A jury trial was waived.

Judge Gambill entered judgment which, after setting forth findings of fact, concluded that "(t)he plaintiff and its predecessors in title are not entitled to an accounting for and a recovery of any fines or penalties collected by the City of Winston-Salem in connection with the Marshall Street-Spruce Street Parking Lot," and adjudged "that the plaintiff have and recover nothing of the defendant," and that the action be dismissed and plaintiff taxed with the costs.

Plaintiff excepted to certain of the findings of fact and also to the court's failure to make a finding as to the date on which plaintiff and its predecessors in title first learned "that the receipts from the City did not include sums collected by the City from parking tickets placed on cars failing to feed the meters or parked overtime on the leased premises." Plaintiff also excepted to the court's conclusions of law. Plaintiff excepted to the judgment and appealed.

Blackwell, Blackwell, Canady, Eller & Jones for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice and Allan R. Gitter for defendant appellee.

BOBBITT, J. The question for decision is whether defendant, by the terms of the lease, is required to account to plaintiff for one-half or any portion of the money collected by defendant as penalties for violations of the municipal ordinances relating to parking on municipal off-street parking lots. The answer depends upon whether the money so collected by defendant constitutes "proceeds from the operation of the parking meters," or "revenue derived from the meters."

In *Rhodes, Inc. v. Raleigh,* 217 N.C. 627, 9 S.E. 2d 389, 130 A.L.R. 311 (1940), ordinances purporting to regulate on-street parking by meters and providing penalties for the violation thereof were held invalid on the ground authority to enact such ordinances had not been conferred on municipal corporations by the General Assembly.

When *Rhodes* was decided, Section 2787, Subsection 31, of the Consolidated Statutes, conferred upon municipal corporations the power "(t)o provide for the regulation, diversion, and limitation of pedestrians and vehicular traffic upon public streets, highways, and sidewalks of the city."

The statute codified as C.S. 2787(31) was amended twice by the General Assembly of 1941.

C.S. 2787(31) was first amended by Chapter 153, Public Laws of 1941, which conferred upon municipal corporations authority to

regulate and limit vehicular parking on streets and highways in congested areas by parking meters as provided therein. The provisions of said Chapter 153, which relate solely to on-street parking, are the basis of decision in *State v. Scoggin,* 236 N.C. 1, 72 S.E. 2d 97 (1952), in which a conviction for violation of a Raleigh Parking Ordinance was upheld.

C.S. 2787(31) was later amended by Chapter 272, Public Laws of 1941, which provided: "The governing authorities of all cities and towns of North Carolina shall have the power to own, establish, regulate, operate and control municipal parking lots for parking of motor vehicles within the corporate limits of cities and towns. Cities and towns are likewise hereby authorized, in their discretion, to make a charge for the use of such parking lots." Section 2 of said Chapter 272 provided: "Municipal parking lots for motor vehicles established and operated by cities and towns are hereby declared to be for a public purpose."

The above statutory provisions were in force on December 5, 1950, when the lease here involved was executed.

C.S. 2787(31), as amended from time to time, is now codified as Section 160-200, Subsection 31, of the General Statutes. (Note: We do not find that the provisions of Section 2 of Chapter 272, Public Laws of 1941, have been brought forward and incorporated in any section of the General Statutes.)

The first ordinance regulating off-street parking on public parking lots operated by Winston-Salem was adopted May 25, 1951. It provided that violations thereof were subject to the same punishment and penalties as violations of the ordinance then in effect regulating on-street parking. The provisions of the later ordinances, which amended the ordinance of May 25, 1951, are sufficiently set forth in the statement of facts. It is noted, however, that prior to the adoption of the ordinance of November 6, 1953, the General Assembly, by its enactment of Chapter 879, Session Laws of 1953, ratified April 20, 1953, had authorized municipalities to levy a penalty of $1.00 for illegal parking of motor vehicles upon any street, alley, *or other public place.*

Decisions of this Court relating to off-street and on-street parking include *Britt v. Wilmington,* 236 N.C. 446, 73 S.E. 2d 289 (1952), and *Henderson v. New Bern,* 241 N.C. 52, 84 S.E. 2d 283 (1954). See also *Town of Graham v. Karpark Corp.,* 194 F. 2d 616 (4th Cir. 1952), affirming *Karpark Corp. v. Town of Graham,* 99 F. Supp. 124 (M.D.N.C. 1951). In our view, none of our prior decisions controls decision herein.

Plaintiff states, and rightly so, the question presented "is primarily one of construction of a written contract."

The basic rules for the construction of a contract are embodied in the following statement: "The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Electric Co. v. Insurance Co.*, 229 N.C. 518, 50 S.E. 2d 295. "Where the terms are plain and explicit the court will determine the legal effect of a contract and enforce it as written by the parties." *Church v. Hancock*, 261 N.C. 764, 136 S.E. 2d 81. In this connection, see 2 Strong, N. C. Index 2d, Contracts § 12.

The rental, according to the explicit language of the lease, is to be based on the "proceeds from the operation of the parking meters" and the "revenue derived from the meters." Absent any provision suggesting a contrary meaning, we think these expressions refer solely to coins inserted in the meters for the activation thereof.

It appears that a Winston-Salem ordinance relating to on-street parking was in force when the ordinance of May 25, 1951, relating to parking on municipal off-street parking lots, was adopted. The record does not disclose whether it was contemplated on December 5, 1950, that defendant would adopt ordinances relating to municipal off-street parking and providing penalties for violations thereof. However, the lease, after referring to "the calculation and division of the *revenue from the meters*," (our italics) adds: "The Lessee shall not be liable to the Lessors for any other amount or sum as rental, and the rental payable to Lessors shall be paid *solely* from the revenue *derived from the meters* as aforesaid . . ." (Our italics.)

The primary purpose of the penalties prescribed in the Winston-Salem ordinances relating to parking on municipal off-street parking lots is to enforce the provisions of such ordinances requiring that coins be deposited in the meters covering the parking periods used by the patrons. The collection of the penalty is ancillary to the accomplishment of said primary purpose. The lessors benefit from increased collections through the meters resulting from the provisions of the ordinances and the enforcement thereof by defendant at its expense.

It was stipulated that the money collected by defendant for which plaintiff seeks an accounting was collected *under authority* of said ordinances. It was not collected for use of space but for violation of a municipal ordinance. Neither by pleading nor by assignment of error does plaintiff challenge the validity of said ordinances. Even so, if such ordinances were invalid, the aggrieved party would be the patron of the parking lot from whom defendant unlawfully collected the penalty. Obviously, plaintiff would have no right thereto.

The conclusion reached is that any money collected by defendant under authority, or under color of authority, of said Winston-Salem ordinances, as penalties for violations of said ordinances, does not constitute "proceeds from the operation of the parking meters" or "revenue derived from the meters" within the meaning of those terms as used in the lease of December 5, 1950. Accordingly, the judgment of the court below is affirmed.

Having reached the conclusion that defendant was not obligated under the lease to pay to plaintiff or its predecessors in title any part of the sums of money collected as penalties under the authority of the municipal ordinances referred to above, the question as to when the plaintiff and its predecessors in title first learned that defendant was not accounting to them therefor is immaterial.

Affirmed.

STATE OF NORTH CAROLINA v. BOYD BAXTER SQUIRES AND ALVIN THOMAS WILLIFORD.

(Filed 12 January, 1968.)

1. Searches and Seizures § 1—

The search of a defendant's room without a search warrant is unlawful, and it is error to admit in evidence the shotgun shells found therein which tend to implicate defendant, and further error for the court to instruct the jury in regard to such evidence obtained without a search warrant.

2. Criminal Law § 79— Admission of evidence competent against one defendant only is prejudicial to the other when its admission is not restricted.

The State's case was that one defendant had a sawed-off shotgun and with the other defendant entered an ABC store, and that the other defendant robbed the cash registers while the first defendant held the employees at bay with the gun. The defendant without the gun was permitted to testify that the defendant with the gun had just gotten out of prison, how he was dressed at the time of the crime and where he resided, and the color and make of his car, all of which implicated the defendant with the shotgun. *Held:* The admission of the evidence was incompetent and was prejudicial to the defendant who carried the shotgun, which error was emphasized by the failure of the court to restrict the consideration of such testimony to the defendant making the statements, and the court's later instruction to disregard this testimony if it tended to implicate such defendant does not cure the error when the court again recapitulates this evidence without restriction.

3. Criminal Law § 146—

A new trial must be granted by the Supreme Court for incompetent evidence entered in the trial below, since the question for determination by

the Supreme Court is not whether there was sufficient competent evidence to convict but whether incompetent evidence of a prejudicial nature was admitted over objection.

4. Criminal Law § 103—

The jury has the right to assume that all of the evidence admitted is competent unless the court effectively removes it from their consideration, since the competency of the evidence is the province of the court and its weight and credibility are for the jury.

APPEAL by defendant, Boyd Baxter Squires, from *Canaday, J.*, April 2, 1967 Criminal Session, WAKE Superior Court.

The defendant, Boyd Baxter Squires, and one Alvin Thomas Williford, were indicted by the Wake County Grand Jury for armed robbery by the threatened use of a sawed off shotgun, forcibly took from Thomas R. Freeman, Jr. and James Walter Edwards, the sum of $580.15 in United States money.

The offense is alleged to have occurred on December 6, 1966 at the Wake County ABC Store No. 4 in Raleigh. Upon arraignment, each defendant, through court appointed counsel, entered a plea of not guilty.

State's witnesses, Thomas R. Freeman, Jr. and James Walter Edwards, each testified that he was employed by the Wake County ABC Board at its store on East Cabarrus Street in Raleigh. At approximately 5:30 p.m. on December 6, 1966, the defendants Squires and Williford entered the store. Squires had a sawed off shotgun and, by its threatened use, held the witnesses at bay until he and Williford seized the contents of the cash registers in the store. The amount of money taken was $580.15. Squires wore a long raincoat and hat. He wore glasses.

State's witness, Milton (Bud) Hunter, who worked in a music store next door, testified he saw Squires and Williford in the process of holding up the employees of the ABC store. Fearing they would visit his employer's store, in which he was alone, he gathered the store's cash and the owner's pistol and left the store for the purpose of hiding the cash in a motor vehicle outside. As Squires and Williford completed the hold up, they passed by Hunter in the alley between the stores. Williford cursed and struck him. The witness returned the compliment by firing three shots at Williford with the pistol, one of which shattered Williford's lower leg. However, Williford managed to board a city bus. Hunter notified the police who intercepted the bus a few blocks away. Officers Denning and Mohiser found Williford on the bus with blood gushing from a gunshot

wound in his leg. They placed him under arrest, "warned of his rights", called an ambulance, and had him admitted to the hospital. He declined to talk about anything except his wounds. A search of his pockets produced several hundred dollars in bills.

Officer Denning testified that while Williford was in the emergency room on a stretcher, bleeding, in a heavy sweat, though it was December, and while glucose was being administered by the nurses, the officer obtained from him, among other admissions, the following: "He stated that he didn't know the man (his companion) by name, had been knowing him about three days, and had just got out of prison and all he knew he called him Joe . . . Williford stated that he (the companion) lived in the Andrew Johnson Hotel . . . in Room 318; I asked him as to what kind of a car the other person had, he stated that he had a Rambler with a white top and a dark bottom; . . ." The defendant Squires objected and moved to strike. COURT: "I don't see that it implicates him. . . . Gentlemen, insofar as this testimony may tend to implicate the defendant Squires, I instruct you that you will disregard it; . . ." The foregoing is the subject of exception and Assignment of Error 7.

The State offered testimony that Squires, for the previous 25 days, had rented and lived in Room 318 at the Andrew Johnson Hotel. He drove a Rambler automobile with a white top and dark body. The officers obtained the key, opened and searched Room 318, without a search warrant. They found in the room 12 gauge shotgun shells loaded with No. 1 buckshot.

State's witness Annie Mae Williams testified that soon after the hold up she found under an automobile in her backyard a long raincoat, a sawed off shotgun, a hat, and a pair of glasses. These articles were found a few feet from the rear of the ABC store, and in the direction in which Squires and Williford had fled. The shotgun was loaded with two No. 1 buckshot shells. The shells were introduced as State's Exhibit No. 6.

The defendants testified and offered evidence of other witnesses in their behalf. Williford testified he went into the liquor store as a customer when a man whom he did not know came in with the shotgun and ordered him to get the money from the cash registers and from a customer in the store. After he complied, the man took all the money from him on the outside of the store. The man with the gun ordered him to "get out" and while he was fleeing from the man with the gun, he was shot by Hunter. He did not remember making any statements to Officer Denning.

Squires testified he did not go to the ABC store and did not participate in the holdup and knew nothing about it. He introduced evidence indicating that he had recently obtained a considerable

amount of cash, approximately $800. When arrested, 2 or 3 hours after the robbery, he had several hundred in currency in his pocket.

The jury returned verdicts of guilty as to each defendant. From a prison sentence of 18 to 20 years, the defendant Squires appealed.

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

Vaughan S. Winborne for defendant appellant.

HIGGINS, J. The appellant has assigned numerous errors in the admission of evidence and in the Court's charge. We discuss herein only Assignments 4, 7 and 11. We do not intimate that other assignments are non-meritorious.

By Assignment No. 4, the appellant challenges the admission of the box of 12 gauge shotgun shells loaded with No. 1 buckshot taken from Squires' room at the Andrew Johnson Hotel, which the officers searched without a warrant. Officer Goodwin testified he and Officer Johnson went to Room 318 and found the door locked. ". . . I searched the room . . . I found clothing, personal papers, shotgun shell number one buck, 12 gauge. . . ." The shells were similar in size and loads to the two found in the gun at the scene of the holdup and which were introduced in evidence as State's Exhibit No. 6. The appellant objected to the introduction of the shells found in Room 318 on the ground they were obtained as a result of an illegal search. The objection should have been sustained.

This Court, in *State v. Mills,* 246 N.C. 237, 98 S.E. 2d 329, opinion by Parker, J. (now C.J.), stated: "'A rooming house is also protected against unreasonable searches and seizures, as is a person's room in an apartment house, hotel, rooming or boarding house, or in a tourist camp.'" The officers had no right to enter and search appellant's room without a warrant authorizing the search. The shells obtained by the unlawful search were inadmissible in evidence. Since the shells found in the room appeared to be identical to those with which the sawed off shotgun was loaded, the effect of the admission of the box of shells was devastating. Assignment of Error No. 4 is sustained.

Tied in with Assignment No. 4 is Assignment No. 11, which involves the Court's charge recapitulating the evidence. ". . . further, that Officer Johnson saw or observed a box of shotgun shells in the defendant Squires' room, that is in Room 318 in the Andrew Johnson Hotel and that these gun shells seen by Officer Johnson are similar in appearance to the two shotgun shells designated as State's Exhibit Six."

Assignment of Error No. 7 involves the testimony of Officer Denning and the Court's recapitulation of that evidence concerning the admissions made by Williford in the hospital. At the time of Williford's arrest on the bus, the warning as to his rights was given. At that time he declined to talk about anything except his wounds. At the time of the admissions, Williford was on a stretcher in the emergency room, being administered glucose, bleeding and calling for water. In this condition, shortly after the shooting, the officer obtained from him the admission about which Officer Denning testified. The evidence came into the case in this way:

"SOLICITOR: Just tell us from start to finish what he told you.

A. He stated that he didn't know the man by name, had been knowing him about three days, had just gotten out of prison and all he knew he called him Joe.

Objection and move to strike.

COURT: Overruled.

EXCEPTION.

A. The man was wearing a hat and glasses; he stated that the man . . . lived in the Andrew Johnson Hotel . . . in Room 318. I asked him as to what kind of car the other person had, he stated that he had a Rambler with a white top and a dark bottom.

Objection by Squires.

COURT: I don't see that it implicates him . . . Gentlemen, insofar as this testimony may tend to implicate . . . Squires, I instruct you that you will disregard it."

Thereafter, the State offered evidence that Squires' room in the Andrew Johnson Hotel was No. 318 and that he had a Rambler automobile with a white top and a black bottom.

Conceivably we might be justified in saying the instruction to the jury to disregard the evidence would cure the error, but for the Court's recapitulation of evidence in the charge in these words: "That defendant Williford told officer Denning that the man who was with him at the liquor store lived in Room 318 at the Andrew Johnson Hotel and that this man owned a Rambler automobile and that he knew this man only as Joe; that he, the defendant Williford, and the man known as Joe walked to the ABC store from the hotel and that they had planned to walk back to the hotel after the robbery. And the State offered further evidence which tends to

show that after their conversation . . . Officer Denning immediately called and related Williford's statements to the radio officer at the Raleigh Police Department." At the time Williford's testimony was admitted, the Court intimated the evidence did not implicate Squires. That is true, but later on the other evidence bridged the gap and made Williford's statements very material.

While the Court, in other parts of the charge, referred to Williford's admissions to the officer, not once in the charge did the Court instruct the jury that Williford's statements made to the officer, and related by him to the jury, did not constitute evidence against Squires. Williford's admissions only indicentally involved himself. Their main thrust was against Squires. True there was direct and positive evidence by three eye witnesses that Squires was the man with the sawed off shotgun, wearing a raincoat, hat and glasses, participating in the holdup. That evidence was clear of taint. But the question of law for this Court is not whether there was sufficient admissible evidence to convict, but whether incompetent evidence of a prejudicial nature was admitted over objection. The Court does not weigh the evidence. That is the function given to the jury. Whether evidence has any weight is a matter of law for the Court. If it has weight, the jury must manipulate the scales. *State v. Bell*, 270 N.C. 25, 153 S.E. 2d 741; *State v. Williams*, 255 N.C. 82, 120 S.E. 2d 442.

Williford testified he was in the ABC store at the time one unknown to him entered with a shotgun and forced him to take the money from the cash register. Squires testified he was neither present nor participated, nor had any knowledge of the offense charged. The main issue was whether Squires was present and participating. The resolution of that issue required the jury to weigh the evidence. The jury assumes, and has a right to assume, all evidence admitted is competent unless and until the Court effectively removes from their consideration all incompetent evidence which the Court has permitted them to hear. "The jury cannot exercise the prerogative of the Judge. The Judge cannot exercise the prerogatives of the jury. The two are distinct and neither has a right to invade the other's field." *State v. Fogleman*, 204 N.C. 401, 168 S.E. 536.

In this case the Court permitted the jury to weigh against the appellant the hearsay evidence of Officer Denning, quoting Williford. The State offered testimony of three eye witnesses to all the essential elements of a robbery with firearms. Their identity of the appellant as one of the participants was unequivocal. With that sort of evidence, the Solicitor was poorly advised when he jeopardized the trial by offering the hearsay statements made by Williford after his arrest and while he was undergoing emergency treatment for

serious gunshot wounds. He had first refused to talk. Our cases, long before recent pronouncements of other courts, have held that confessions must be voluntary to be admissible. This Court stated that rule 100 years before *Miranda* was born. *State v. Roberts,* 12 N.C. 259; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *State v. Davis,* 253 N.C. 86, 116 S.E. 2d 365. The latter case was reversed by the United States Supreme Court, 384 U.S. 737, 16 L. Ed. 2d 895.

The Solicitor likewise used bad judgment in placing in evidence the box of shotgun shells taken from the appellant's locked room at the Andrew Johnson Hotel, by officers who were not equipped with proper process to force entry into that room. For the errors herein discussed, the appellant is entitled to and is awarded a

New trial.

STATE v. MARY ANN HALL TILLEY.

(Filed 12 January, 1968.)

1. Criminal Law § 104—

On motion to nonsuit, the evidence is to be considered in the light most favorable to the State and the State is to be given the benefit of all inferences reasonably deducible therefrom.

2 Receiving Stolen Goods § 5—

Evidence of the State tending to show that a truckload of sausage, hams and frankfurters was stolen from the premises of a meat company, that on the following day almost 1000 lbs. of the meat bearing the company's label were found in defendant's possession in an automobile driven by her, and that she was attempting to sell the meat to a retail grocer at a price less than the prevailing market price, together with her statements to officers that she was attempting to dispose of the meat at the behest of some other person but that she knew the meat was stolen, *held* sufficient to go to the jury on the issue of defendant's guilt of receiving stolen goods.

3. Receiving Stolen Goods § 1—

The essential elements of the offense of receiving stolen goods are the receiving of goods which had been feloniously stolen by some person other than the accused, with knowledge by the accused at the time of the receiving that the goods had been theretofore feloniously stolen, and the retention of the possession of such goods with a felonious intent or with a dishonest motive. G.S. 14-71.

4. Criminal Law § 124—

An apparently ambiguous verdict may be given significance and correctly interpreted by reference to the charge, the facts in evidence, the theory of the trial and the instructions of the court.

5. Receiving Stolen Goods § 7—

Where the indictment charges defendant with feloniously receiving stolen goods of a value of $2500, but the theory of the trial, the evidence and the charge of the court, all relate solely to defendant's guilt of receiving stolen goods of a value less than $200, a misdemeanor, a verdict of guilty as charged is sufficient to support a conviction of a misdemeanor only and to bar a subsequent prosecution.

APPEAL by defendant from *McKinnon, J.*, February 1967 Session of CHATHAM.

Criminal prosecution on an indictment that charged defendant on 22 July 1966 at and in Chatham County with unlawfully and feloniously receiving a quantity of meat, to wit, 9,000 pounds of frankfurters, sausage, picnic hams and bologna of the value of $2,500 of the goods and chattels of Chatham Foods, Inc., before then having been feloniously stolen, taken, and carried away, and the said defendant then and there well knowing that the goods had been theretofore feloniously stolen, taken, and carried away.

The defendant, who was represented by a lawyer, Harry P. Horton, entered a plea of not guilty. The recitation of the jury's verdict contained in the transcription of the record on appeal being incorrect, the true verdict, as shown by the lower court's records, was certified under the hand and seal of the clerk of the Superior Court of Chatham County and brought before this Court as an addendum to the record. It states: "The jury returns a verdict of guilty as charged."

From a sentence of imprisonment requiring that the defendant be confined in quarters provided for women in the State's prison for a term of not less than 18 months nor more than 24 months, she appeals.

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

Harry P. Horton for defendant appellant.

PARKER, C.J. Defendant assigns as error the denial of her motion for judgment of compulsory nonsuit made at the close of all the evidence.

The State's evidence, considered in the light most favorable to it and giving it the benefit of all inferences reasonably deducible therefrom, 2 Strong's N. C. Index 2d, Criminal Law, § 104, tends to show the following facts:

On the afternoon of 21 July 1966 a Chevrolet truck with a cold storage body was loaded on the premises of Chatham Foods, Inc., with between eight and nine thousand pounds of frankfurters, bo-

logna, sausage, bacon sliced and in slabs, and picnic and tenderized hams, the property of Chatham Foods, Inc. Some of this meat was in boxes, some in packages or loose in stacks. All packages and boxes were marked with the Chatham label. After the truck had been loaded with the meat, it was plugged in at the loading dock to be refrigerated until after midnight when the driver was to return to make deliveries of the meat to customers. The truck was left unattended during the night. When the driver returned to the premises at 2 a.m. on the next day for the truck loaded with meat, it had been stolen.

Bob Phillips, a shipping clerk with Chatham Foods, Inc., had assisted the driver in loading this truck with the meat. He testified on direct examination: "A day or two later I saw about four hundred eighty or ninety pounds of the same meat I had loaded on the stolen truck when it was returned to the Chatham plant by Mr. Brooks, our sales manager." He testified on cross-examination: "I identify the meat brought back to the plant by Mr. Brooks as the stolen meat because it was mashed up and looked like it had been hauled and part of it had thawed out. Aside from the Chatham label, the only identification on the meat is the date of processing which is stamped on every package. I did not look for the date on the stolen meat and my only reason for identification of it as the stolen meat is that some of the packages were mashed and some of it thawed. I could not say from my own knowledge that it was the same meat. Chatham Foods has bologna, sausage and hams going all over North Carolina and the meat could have been part of a shipment a day or two earlier or the same date it was brought to me." He testified further in substance on cross-examination: Of the meat returned, 60 pounds consisted of frankfurters of the 28½¢ per pound grade and 45 pounds of frankfurters that sold at a maximum of 35¢ per pound. Other types of meat returned to him included 20 pounds of air-dried sausage at 53¢ or 54¢ per pound, 50 pounds of Cardinal franks selling for 34¢ per pound, 120 pounds of smoked sausage selling for about 28¢ per pound, 80 pounds of another grade of franks that sold for 36¢ or 38¢ per pound, 54 pounds of Sycamore bologna at 36¢ per pound, and 49 pounds of picnic hams at about 38¢ or 39¢ per pound. He testified on recross-examination in substance that the total value of the food returned to Chatham Foods by the sales manager was $154.39. (At the time of the return of this bill of indictment, the defendant's name was Mary Ann Hall Tilley. Thereafter, by marriage, her surname became Foster.) He did not sell Mrs. Foster 500 pounds of bologna on that date. Neither did he sell 500 pounds of bologna, 500 pounds of Jubilee weiners, nor 500 pounds of smoked sausage to Charles Jones. He does not know Joe Johnson. All the meat that leaves the Chatham plant is billed to cus-

tomers, and he has never billed any customer for as much as 500 pounds of weiners and 900 pounds of smoked sausage.

Everett Lee Barbee was a meat cutter working for Stevenson's Grocery on Lexington Avenue in Thomasville. He testified in substance: Defendant called him and asked him if he would buy about two thousand pounds of meat. She asked him what he could get for it, and he said he could not say until he saw the meat. She asked him if he could give her any idea and told him it was Chatham brand. She asked him if he could get 25¢ a pound for it. She wanted to sell him sausage, weiners, and bologna, and he could not buy that combination from Chatham Foods that cheap. He told her to call him back about two or three o'clock. She subsequently called him back, and he told her not to bring the meat until seven or eight o'clock, because he was too busy. When she came with the meat about seven or eight o'clock, she did not have all of it because she could not get all of it in the car. There was a man with her, but he did not see who it was. Mrs. Tilley wanted to see him outside. He went outside with her and saw some of the meat in the back seat of a Mustang car. She told him that was not all of it, that she could not get a truck or something and they would have to bring the rest later. Sycamore sausage was in the car and some other meat with a Chatham brand. Before defendant came in the store, Mr. Poole, the sheriff, and Mr. Stamey, a lieutenant detective on the Thomasville police force, came in the market and Stamey told him that Poole was going to work there, and Poole put on an apron and went to work. He does not know who notified the police officers. Poole was working in the store when this unknown man came in and told him that defendant was at the car with the meat. As far as he knows, the store did not buy any of the meat. Defendant told him that someone else had the meat and that it was not her meat.

Russell Poole on 22 July 1966 was working in the Chatham County sheriff's department as a deputy sheriff. He had been a deputy sheriff for about 19 years. He went to Stevenson's Grocery on 22 July 1966 as the result of information received by him that there would be some Chatham Foods meats delivered to it. He went to the Thomasville police department and contacted Lieutenant Stamey of the detective division. They went to Stevenson's Grocery and contacted Mr. Barbee with reference to the meat that defendant was trying to sell to him. After going to the grocery store, he went back to the Thomasville police department, waited a couple of hours, and returned to Stevenson's Grocery, put on a white coat, went back to the meat department as a meat cutter, and waited until 7:20 p.m. At 7:20 p.m. Mr. Foster came in the store to the meat counter and told Mr. Barbee that Mary Ann Hall Tilley wanted to

see him out back. He, Mr. Barbee, and Mr. Foster went out the back door where there was a blue Mustang automobile parked and defendant was sitting under the steering wheel. In the back seat he could see several boxes bearing the Chatham Foods brand labels — sausages, weiners, etc. He later took possession of the meat, which amounted to over eight hundred pounds. The meat was located in the back seat and in the trunk of the Mustang. After he observed the Chatham meats, he advised Foster and defendant that he was an officer and that they were under arrest for receiving stolen goods. He and Lieutenant Stamey got in the car with defendant and proceeded to the Thomasville police department. Foster was placed in another car and taken there also. Lieutenant Stamey advised defendant of her constitutional rights as laid down in *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 10 A.L.R. 3d 974. After he had testified that Lieutenant Stamey had warned defendant of her constitutional rights, Mr. Horton objected and asked to qualify the witness, and the jury was excused from the courtroom. After the jury returned to the courtroom Poole testified, without objection, as follows:

> "After Lt. Stamey had advised Mrs. Tilley of her constitutional rights, she stated that a man whom she did not name brought the meat to her house; she was selling the meat for him; she was trying to get the money to pay off some checks she had. She stated she had some of the meat at her house that she had kept for her own use. She did not name the man that brought the meat to her house. . . . I found 493 pounds. The types of meat were Sycamore franks, Sycamore smoked sausage, Cardinal franks, air-dried sausage, pork sausage, Cardinal franks, smoked sausage, smoked picnics and Sycamore bologna. It was all Chatham brand meats."

Poole subsequently turned over the meat to Mr. Jack Brooks, sales manager of Chatham Foods, Inc. Poole testified further as follows on direct examination, without objection:

> "After Mr. Brooks received the meat, I and Sheriff Don Whitt, Chief of Police, J. S. Moody, and Mrs. Tilley and Mr. Foster, returned to Siler City. They were given a hearing before a Justice of the Peace, A. M. Stone, and placed under bond. At the hearing before the Justice of the Peace Mrs. Tilley stated that she got the meat from a Wilson Packing Company salesman named Joe Johnson; that he delivered it to her house in a 1961 blue Plymouth; that he at the time was supposed to have rented a truck so that she could bring the two thousand pounds

in one load; that he was unable to get a truck so therefore she had to bring part of it at the time and was aiming to make three loads of it; that Mr. Johnson advised her that his wife was mad at him and he could not stay and had to go on back home.

"She stated that she knew the meat was stolen, that she was just trying to get enough money to pay off the checks she had at that time in High Point. Subsequently, I tried to locate a Joe Johnson who worked at the Wilson Packing Company. I did not find him, nor did I find a 1961 blue Plymouth."

John W. Emerson, Jr., is the sheriff of Chatham County. He testified in substance: The stolen truck was later found beside Highway #220 about five miles north of Asheboro going toward High Point. When the truck was found, there were a couple boxes of chicken or turkey necks in the truck. He saw the defendant later in the Thomasville police station. He advised her of her constitutional rights. He asked her if Lieutenant Stamey had advised her of her constitutional rights, and she said that he had. He again advised her of her rights before he asked any questions. The sheriff testified without any objection as follows:

"Mrs. Tilley said she had gotten the meat from a man driving a blue Plymouth, a 1960 or 1961 model. She did not state who this man was and she said at that time she knew something was wrong. I asked if she knew the meat was stolen and she said that she knew something was wrong with it."

Later defendant came to his office in Chatham County of her own volition and said she wanted to talk to him. She stated at this time in substance that the person driving the 1960 or 1961 blue Plymouth was a man by the name of Charlie Jones, a white man about 45 years of age. He had contacted her on 22 July 1966 and stated that a Joe Johnson, a salesman from Wilson Packing Company in High Point, had about two thousand pounds of meat, and he asked her if she knew someone who could use it. She said that Jones told her he wanted 25¢ a pound for it and that she could have half of it for selling it. Defendant said that she told Jones that she knew something was wrong about the meat, and Jones told her to try to sell it and she contacted Bill Barbee at Stevenson's Grocery in Thomasville. On redirect examination Sheriff Emerson, without objection, testified as follows: "Mrs. Tilley said she knew something was wrong with the meat and I asked her if she knew it was stolen and she said yes, that she knew something was wrong with it."

Verlo Stamey is a lieutenant detective with the police force of Thomasville. He knew the defendant. He received information about some meat to be delivered at Stevenson's Grocery on the afternoon of 22 July 1966. As a result of that information, he notified the Chatham County officers. He testified: "I advised Mrs. Tilley of her rights, first there at the store along with Sheriff Poole and myself in the car. I later did it again at the station. I stated to Mrs. Tilley at the car before she left the car, I said, 'Mrs. Tilley, you know your rights.' She said, 'Yes, I know my rights,' and I said, 'I will have to advise you of your rights now.' " He then again advised her of her rights.

The defendant offered evidence tending to show the following facts: She had been formerly in the restaurant business for about sixteen or seventeen years. She received a telephone call from a Mr. Charles Jones who asked her if she was still in the restaurant business. He said he was with Wilson Company and that the company had some surplus meat and he thought maybe she could use some in her restaurant. She replied that she was no longer operating a restaurant but she might know someone who could use it and for him to call her back later. She was at first suspicious about the low price of 20¢ or 25¢ per pound, but after finding out that it consisted of weiners, bologna, etc., she was no longer suspicious. She thought that the meat was from the Wilson Company; she did not know it was Chatham brand meat. She made no statement to Sheriff Emerson or Deputy Sheriff Poole that she knew the meat was stolen. She did state to Sheriff Emerson that she thought something was wrong with the meat when Mr. Jones first called her, but when she found out that the meat was weiners, bologna, etc., instead of beef her suspicions were allayed. She does not know what happened to the rest of the meat. She understood Jones was an employee of Wilson Company.

The essential elements of the offense of receiving stolen goods are the receiving of goods which had been feloniously stolen by some person other than the accused, with knowledge by the accused at the time of the receiving that the goods had been theretofore feloniously stolen, and the retention of the possession of such goods with a felonious intent or with a dishonest motive. Receiving stolen goods knowing them to have been stolen is a statutory offense. G.S. 14-71. The criminality of the action denounced by the statute consists in receiving with guilty knowledge and felonious intent goods which previously had been stolen. *S. v. Yow*, 227 N.C. 585, 42 S.E. 2d 661; *S. v. Brady*, 237 N.C. 675, 75 S.E. 2d 791; *S. v. Collins*, 240 N.C. 128, 81 S.E. 2d 270; *S. v. Neill*, 244 N.C. 252, 93 S.E. 2d 155.

The State's evidence considered in the light most favorable to it and giving it the benefit of every reasonable inference to be deduced therefrom would permit a jury to find the following facts: (1) That on the night of 21 July 1966 a truck load of frankfurters, sausage, picnic hams, and bologna was feloniously stolen from the premises of Chatham Foods, Inc., the said truck load of meat being the property of Chatham Foods, Inc.; (2) that the next day 980 or 990 pounds of this stolen meat of the value of $154.39 bearing the Chatham Foods label were in defendant's possession in a Mustang automobile driven by her, and she was trying to sell it at a price below the market to Stevenson's Grocery in Thomasville; (3) that the defendant, after having been warned of her constitutional rights under the *Miranda* decision, told John W. Emerson, Jr., the sheriff of Chatham County, Deputy Sheriff Poole, and a justice of the peace, A. M. Stone, that she knew the meat was stolen and that she was just trying to get enough money to pay off the checks she had at that time in High Point; and (4) that the defendant received this stolen meat with a felonious intent or with a dishonest motive. In our opinion, and we so hold, the State's evidence was sufficient to carry the case to the jury, and the court correctly overruled the motion of defendant for a judgment of compulsory nonsuit.

The undisputed evidence in the record is that the value of the stolen property in possession of defendant was $154.39. Judge McKinnon charged the jury as follows:

> "Members of the Jury, the charge here placed charged the receiving of stolen goods of a value of approximately $2,500.00. The Court has ruled that the case should be submitted to you only upon the lesser included offense of receiving stolen goods having a value not exceeding $200.00 knowing them to have been stolen. So, the only distinction between such charges in so far as the value of the goods in question is concerned relates to the punishment and the elements of the offense are no different regardless of the amount of property which may be involved.
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> * * *
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> "As I have said, Gentlemen, the charge now placed against the defendant is receiving stolen goods of a value not exceeding $200.00 knowing them to have been stolen so you will say whether she is guilty or not guilty of that offense."

The verdict as shown by the court records certified under the hand and seal of the clerk of the Superior Court of Chatham County as set forth in an addendum to the record was, "The jury returns a verdict of guilty as charged." Every feature of the trial discloses

that both the State and the defendant considered this criminal prosecution as relating solely to whether the defendant was guilty of receiving with a felonious intent stolen goods of the value of $154.39 knowing them to have been stolen. The evidence and the judge's charge do not refer to any property of a greater value than $200. There can be no doubt that the jury convicted the defendant of the misdemeanor of receiving stolen property well knowing at the time of the receiving that it had been theretofore feloniously stolen and carried away, and receiving it with such knowledge and with a felonious intent.

What was said in *S. v. Thompson,* 257 N.C. 452, 126 S.E. 2d 58, is controlling here:

> "A verdict, apparently ambiguous, 'may be given significance and correctly interpreted by reference to the allegations, the facts in evidence, and the instructions of the court.' *S. v. Smith,* 226 N.C. 738, 40 S.E. 2d 363; *S. v. Beam, supra* [255 N.C. 347, 121 S.E. 2d 558]. 'The verdict should be taken in connection with the charge of his Honor and the evidence in the case.' *S. v. Gilchrist,* 113 N.C. 673, 676, 18 S.E. 319, and cases cited; *S. v. Gregory,* 153 N.C. 646, 69 S.E. 674; *S. v. Wiggins,* 171 N.C. 813, 89 S.E. 58. When the warrant, the evidence and the charge are considered, it appears clearly the jury, by their verdict, found defendant guilty of operating a motor vehicle on the public street of Graham while under the influence of intoxicating liquor."

Applying the rule of law stated in the *Thompson* case, it is manifest that the verdict is sufficient and valid and will bar a further criminal prosecution for the offense of receiving stolen goods knowing them to have been stolen from the Chatham Foods, Inc., on 22 July 1966. The punishment of not less than 18 months nor more than 24 months was the punishment for a misdemeanor. G.S. 14-72.

In the trial below we find

No error.

STATE v. VAN R. PAIGE.

(Filed 12 January, 1968.)

1. Criminal Law §§ 79, 89—

Testimony in corroboration of an accomplice is admissible where the court correctly instructs the jury before its admission as to how such testimony is to be considered, reiterates such instruction in the charge to the jury, and further instructs the jury that the testimony of an accomplice should be carefully scrutinized.

2. Criminal Law § 116—

An instruction that the defendant's failure to testify in his own behalf is a fact and not a circumstance to be considered against him, *held* not erroneous, although an inappropriate choice of words, since the instructions in their entirety correctly charge that the defendant had a legal right to rely upon the weaknesses of the State's case and to elect not to testify in his own behalf.

3. Criminal Law § 167—

In order to be entitled to a new trial, defendant has the burden of establishing not only that error was committed but that such error was material and prejudicial, since verdict and judgment are not to be set aside for mere technical error.

4. Robbery § 6—

A judgment of imprisonment for not less than five nor more than thirty years upon conviction of armed robbery is authorized by G.S. 14-87.

5. Criminal Law § 138—

Where a new trial is awarded upon defendant's own application, the fact that the sentence imposed upon conviction at the second trial exceeds the sentence imposed at the first trial is not ground for legal objection, the sentence imposed at the second trial being authorized by statute, but the defendant is to be given credit for the time served on the sentence imposed at the first trial.

ON *certiorari* from *Morris, J.*, September 1963 Session of CHOWAN.

Criminal prosecution on an indictment found by the Chowan County grand jury at the September Term 1958 charging defendant on 26 March 1954 with the felony of robbery with firearms and other dangerous weapons, a violation of G.S. 14-87. Upon this indictment defendant was tried at the September Term 1958 of Chowan. Defendant was not represented by counsel. He pleaded not guilty, was found guilty as charged by the jury, and was sentenced to a term of 25 years in the State's prison. Following an exhaustion of State remedies, petitioner applied to the United States Supreme Court for a writ of *certiorari*. The United States Supreme Court on 17 June 1963 vacated the judgment and remanded the case for further consideration in the light of *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 93 A.L.R. 2d 733. *Paige v. North Carolina*, 374 U.S. 491,

10 L. Ed. 2d 1047. On 19 July 1963 this Court, pursuant to the mandate of the United States Supreme Court, remanded the case to the Chowan County Superior Court for retrial upon the original indictment, with direction that counsel be appointed to represent defendant at the retrial. Accordingly, the Superior Court of Chowan County appointed John F. White, an experienced lawyer for many years in criminal cases and a former member for many terms of the General Assembly from his County, and George E. Tillett, a member of defendant's race and now an Assistant United States Attorney attached to the office of the United States District Attorney for the Eastern District of North Carolina, both of the Chowan County Bar, to represent defendant, and his case was called for trial at the September 1963 Session of Chowan. Defendant pleaded not guilty. Verdict: Guilty of the felony and crime of armed robbery, as charged in the indictment. The court stated that he was going to give the defendant credit "for serving from October 1, 1961, until the present time." Whereupon, the court pronounced judgment that the defendant be confined in the State's prison for a period of 27 years. From that judgment defendant appealed to the Supreme Court.

Following defendant's entries of appeal, counsel for the defendant requested that they be relieved from further responsibility in the case, and the prisoner notified the court that he would then proceed by petition for *certiorari* and made no request for continuance of the services of counsel to appear for him. Whereupon, the court entered an order relieving his counsel, White and Tillett, from appearing further for him. Following the denial of several petitions for relief filed by defendant *pro se* in the State and United States Courts, defendant applied to this Court for a writ of *certiorari* to permit him to perfect his appeal from the judgment passed against him at the September 1963 Session of Chowan. This Court allowed his petition by order of the Court in conference on 20 June 1967. The Superior Court ordered Chowan County to pay for a transcript of the record of defendant's trial at the September 1963 Session and to pay for mimeographing under the direction of the clerk of this Court the case on appeal and defendant's brief, and appointed W. L. Cooke, a competent member of the bar, to perfect defendant's appeal and to represent him on appeal.

Attorney General T. W. Bruton and Deputy Attorney General James F. Bullock for the State.

W. L. Cooke for defendant appellant.

PARKER, C.J. The State offered evidence; defendant offered no evidence. The evidence offered by the State tends to show the following facts: On 26 March 1954 Arthur Byrum was operating a store in Chowan County located about 16 miles from Edenton on U. S. Highway #32 at a crossroad. His home is back of his store. He had been sleeping at this store about a couple of months on a bed behind the counter. He had a 25 automatic pistol and a double-barrel shotgun with him at the store, and he kept both of them by his side at night where he was sleeping. He had with him in the store where he was sleeping $5,700 worth of bonds and about $6,000 in money. Most of the money consisted of twenty and one hundred dollar bills. The bonds and the money were in a metal box right under the counter near the cash register with some goods packed in front of them. Sometime after midnight and before day he heard a noise of someone breaking into the store. When he heard this noise, he was back of the counter lying down. The next thing he looked up and saw a man coming down on him. There was no light in the store, but it was a moonlight night and he could see all right. When the man jumped down on him, he grabbed his pistol; the man got his hand and pressed it on the floor, and he could not use it. The man who jumped on him was a colored man. When he and this person were wrestling about the pistol, another colored man walked up and hit him (Byrum) over the head. This man was armed. He saw three more persons in the store other than these two. They were all colored. He testified as follows:

> "While the man who jumped on me and was taking the gun away from me, the other fellow came up and hit me over the head with a piece of iron. He liked to have 'salivated' me right then. After I got hit with the piece of iron I grabbed the rod of iron and snatched it out. He pulled a gun on me. The second one came up there, pulled a gun on me and I reached up and snatched the piece of iron out of his hand and hit him the best I could. I couldn't get so much force to it. The gun was pointed at me. The third man walked up there and snatched that rod of iron out of my hand, he finished me; that's all I know about it. There was nothing said about the gun then. They carried the gun off. After the gun was pointed at me I was hit until I did not even know where I was at or nothing. I was wounded on the head. My fingers were torn and cut. They took some stitches in my head and sewed up my finger. I was knocked unconscious. When I came to I went to call the sheriff. I told the sheriff I had been robbed. The sheriff came on to my store."

His bonds and money were stolen. Subsequently, he got back all the bonds and $170 of his money. Byrum was in the hospital 13 days.

The next morning after the robbery Byrum's wife went to the store before daylight. When she arrived the sheriff of Chowan County and her brother, Joe Forehand, were there. Her husband was very bloody. There was blood on the walls of the store, back of the counter, in the ceiling, and all over the merchandise.

Lester Griffin testified for the State in substance: Van R. Paige (defendant), Amos Paige, Jasper Boyd, Willie Boyd, and he got together about midnight on Highway #65 near Parmele in Martin County and went to Chowan County. Defendant picked out Byrum's store and said "it just looked like a good place." After the store was picked out, they drove to the church near the store and parked the car. Defendant, Amos Paige, Willie Boyd, and he got out, leaving Jasper Boyd in the car. Defendant had a 45 automatic pistol and a tire tool with him. When they reached the store, defendant pried the door open, and all of them went in. Amos Paige mashed on the cash register, and it rang. They heard a voice saying, "Who is this in here?" Whereupon, he and Amos Paige went outside a few minutes. They heard "some lumbering going on" in the store and went back inside. Defendant and Willie Boyd were behind the counter holding Arthur Byrum. Defendant hit Byrum over the head three or four times with his pistol. Willie Boyd went behind the counter and said "I got it." The last time he saw Byrum he was lying on the counter as they went out. Defendant was holding the metal box containing the bonds and money. All of them got in the automobile and went to defendant's home near Parmele. They went into a back room, and defendant and Willie Boyd counted the money and passed it around. After some of the money had been passed around, defendant took the box and money. The next day all five of them left North Carolina and went to Boston, Massachusetts. They stayed there maybe two or three weeks, and then all of them came back to Martin County. After they returned to Martin County, defendant told them he heard some "root" doctor had taken some $8,000 or $800 from his wife. All of them went back to Boston except defendant, who said he was going to stay home and try to get the money the "root" doctor had taken from his wife. All four of them were arrested in Boston and returned to Chowan County for trial. After he was arrested, he told the officers about what had occurred. He pleaded guilty to the charge against him and is now serving time. He testified on cross-examination in substance: He had known the four men who were with him in robbing Mr. Byrum about four or five years. He had been robbing and stealing with them two or three times in

Edgecombe County. The State Bureau of Investigation and the parole officers did not promise that they were going to help him if he would testify against the defendant. He got $400 out of the robbery. Defendant carried some of the money and the bonds in his suitcase to Boston. He saw the bonds the first time in Boston. He testified on redirect examination that when they went to Boston they stayed in the same apartment. They carried with them some girls from Martin County.

Willie Boyd testified for the State and gave substantially the same testimony as was given by Lester Griffin, with these exceptions: Defendant brought the box containing the bonds and money out of the store. Defendant gave him $250 out of it at Parmele. He told the officers about the robbery. He was tried some years back, pleaded guilty, and was given a sentence of from 20 to 30 years in the penitentiary, of which sentence he served six and one-half years before receiving a parole. He is now out on parole. He testified in substance on cross-examination: Defendant is his first cousin. They have been friends through the years. He (Boyd) has been convicted in Williamston for larceny. He stayed in Boston until he was apprehended by the State Bureau of Investigation. The stolen bonds were in his suitcase, but he did not know what they were. He did not get any of the bonds. The bonds were found in his suitcase in Boston.

W. W. Spence, an agent for the State Bureau of Investigation, testified for the State in substance: Two or three weeks after the robbery, he was in Boston and recovered the stolen bonds in a suitcase in an apartment there. The suitcase belonged to Willie Boyd. W. W. Spence and John B. Edwards, who is also an agent of the State Bureau of Investigation, testified as to what Willie Boyd and Lester Griffin had told them in respect to the robbery, which was in substantial corroboration of the testimony of Lester Griffin and Willie Boyd as witnesses at the trial.

When the State rested, the defendant made no motion for judgment of compulsory nonsuit. It is manifest that the State had plenary evidence to carry the case to the jury for the felony of armed robbery charged in the indictment.

Defendant in his brief states that three questions are presented. First, "Was error committed in the trial below in refusing to sustain the appellant's objections to testimony of officers offered to corroborate accomplices?" The answer to this question is, No.

The evidence challenged by defendant was competent for the purpose of corroborating Griffin and Boyd, and the court carefully instructed the jury before its admission as to how such evidence was to be considered, and also repeated it during his charge. The court

properly instructed the jury during the charge that the testimony of accomplices should be scanned and scrutinized. What the court told the jury when the evidence was admitted and in its charge was in substantial compliance with the law of this State as stated in *S. v. Case,* 253 N.C. 130, 116 S.E. 2d 429; *S. v. Saunders,* 245 N.C. 338, 95 S.E. 2d 876; Stansbury, N. C. Evidence, 2d Ed., §§ 21, 45, 50-52 inclusive.

The second question presented by defendant's brief is: "Did the court err in charging the jury that appellant's failure to offer evidence in his own behalf was a fact and not a circumstance to be considered against him?"

This question is based on this assignment of error to the charge:

> "Now in this case, gentlemen of the jury, the defendant didn't offer any evidence, nor did he go upon the witness stand. This the defendant had a right not to do, for it is a part of the organic law of the State of North Carolina that the defendant in a criminal action has the right to elect whether he will or will not offer evidence in his own behalf. He has the right to elect whether he will or will not testify in his own behalf, for he has, as he contends, the constitutional right to rely upon what he contends is the weakness of the State's case, and it is a fact and not a circumstance to be considered against him, and I so instruct you, gentlemen of the jury."

G.S. 8-54 in relevant part reads as follows:

> "In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him."

In *S. v. Horne,* 209 N.C. 725, 184 S.E. 470, which was a case where defendant appealed from a judgment of death, the Court found no error in the trial and no error in the following instruction to the jury:

> "Now, gentlemen of the jury, the defendant did not see fit to offer any evidence. I charge you that he was within his rights in so doing. The law does not require the defendant to go on the stand as a witness. He has a right to sit mute and say nothing.
>
> "Some people on the street say that if a defendant is not guilty, he will prove it, and will go on the stand for that purpose, but the law does not say so, and I charge you that you

are not to consider the fact that the defendant did not go on the stand as a witness as any evidence of his guilt. The law says that he cannot be forced to go on the stand, and I so charge you."

Reading the challenged instruction in the instant case in its entirety, it seems manifest that the jury must have clearly understood that defendant had a legal right to elect to testify or not to testify in his own behalf, and that he had a right to rely upon the weakness of the State's case. The trial judge in his conclusion of the challenged instruction made an infelicitous choice of words, but we think considering the instruction as a whole the jury could not have gotten the impression, as he contends, that the trial judge instructed the jury that the failure of defendant to testify in his own behalf was a fact to be considered against him. Even if we concede, which we do not, technical error in the concluding portion of the challenged part of the charge which, standing alone, may be subject to criticism, we think it was harmless error that would not amount to a violation of some substantial right, and that it would not justify a new trial. However, we do not approve of it as a model of clarity. Two juries have convicted defendant as charged. A brutal assault was made by defendant on Arthur Byrum, which is not disputed. Two of defendant's accomplices, both of whom were his friends and one of whom was his first cousin, testified as State's witnesses against him, fully implicating defendant. There is no fair probability that defendant could be acquitted if he was tried again.

Johnson, J., said for the Court in *S. v. Rainey,* 236 N.C. 738, 74 S.E. 2d 39:

"The defendant also assigns error in respect to the portion of the charge dealing with the failure of the defendant to take the stand and testify in her own behalf. As to this, the court charged the jury as follows:

" 'The defendant, lady and gentlemen, did not go upon the stand and did not offer evidence. This was her prerogative. She has a right to rely upon what she conceives to be the weakness of the State's evidence, and by her plea of not guilty challenges both the truthfulness and sufficiency of the testimony.'

"It may be conceded that this instruction was incomplete and erroneous for failure of the court to go further and tell the jury that the failure of the defendant to testify 'shall not create any presumption against' her. G.S. 8-54. *S. v. McNeill,* 229 N.C. 377, 49 S.E. 2d 733. And this is so, even though the instruction relates to a subordinate feature of the case on which failure to

instruct ordinarily will not be held for error unless a request for instructions be made (*S. v. Jordan,* 216 N.C. 356, 5 S.E. 2d 156), for the reason that the court having elected to charge on this phase of the case, *i.e.,* failure of the defendant to testify, it then became its duty to charge fully and completely on this circumstance. See *S. v. Bridgers,* 233 N.C. 577, 64 S.E. 2d 867.

"However, verdicts and judgments are not to be set aside for mere error and no more. To accomplish this result it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, and that a different result likely would have ensued, with the burden being on the appellant to show this. [Citing numerous cases.]"

See also *S. v. Woolard,* 260 N.C. 133, 132 S.E. 2d 364; *S. v. Creech,* 229 N.C. 662, 51 S.E. 2d 348; *S. v. Beal,* 199 N.C. 278, 154 S.E. 604, where it is said: "The foundation for the application of a new trial is the allegation of injustice arising from error, but for which a different result would likely have ensued, and the motion is for relief upon this ground. Unless, therefore, some wrong has been suffered, there is nothing to relieve against. The injury must be positive and tangible, and not merely theoretical."

This assignment of error is overruled.

Defendant has in the Record two assignments of error to the charge of the court in respect to corroborative evidence. We have examined these assignments of error, and the learned trial judge charged the jury in this respect in substantial compliance with the law of this State as stated in *S. v. Case, supra; S. v. Saunders, supra; S. v. Hale,* 231 N.C. 412, 57 S.E. 2d 322; Stansbury, N. C. Evidence, 2d Ed., §§ 21, 45, 50-52 inclusive. These assignments of error are overruled.

The third question propounded in defendant's brief is: "Did the court commit error by sentencing appellant at the second trial to a greater punishment than he received at his first trial?"

Defendant was convicted of the felony of robbery with firearms and other dangerous weapons, a violation of G.S. 14-87. G.S. 14-87 provides for imprisonment for not less than five nor more than thirty years for anyone who is convicted of a violation of this statute. Upon his first trial defendant was convicted of a violation of this statute and was sentenced to imprisonment for 25 years. He obtained a new trial because he was not represented by counsel at his first trial. On his second trial he was convicted again of a violation of G.S. 14-87. The judge presiding at the second trial said: "I am going to give the defendant credit for serving from October 1,

1961, until the present time," and sentenced him to imprisonment for 27 years.

The defendant was granted a new trial at his request and under our decisions that resulted in a retrial of the whole case — verdict, judgment, and sentence. *S. v. White,* 262 N.C. 52, 136 S.E. 2d 205. Three United States Courts of Appeals — the 7th, 10th, and 3rd Circuits — have recently affirmed harsher sentences following retrial: *United States v. White,* 382 F. 2d 445 (7th Cir., 1967); *Newman v. Rodriguez,* 375 F. 2d 712 (10th Cir., 1967); *Starner v. Russell,* 378 F. 2d 808 (3rd Cir.), cert. den. 19 L. Ed. 2d 189 (1967). We are aware of a contrary opinion by the 4th Circuit in the case of *Patton v. North Carolina,* 381 F. 2d 636 (4th Cir., 1967). We are also aware that the Attorney General of the State of North Carolina has petitioned the United States Supreme Court for a writ of *certiorari* to review the decision in the *Patton* case. Nothing in the Record before us shows what the evidence against the defendant was at his first trial. The evidence in the Record before us shows that defendant selected the place to be broken into, pried the door of the store open, committed a brutal assault upon Arthur Byrum, and got the major portion of the goods stolen (which he did not retain because the bonds were found in Boston where he carried them and part of the money was taken from his wife by a "root" doctor). Whether the judge in the first trial had that evidence before him or not we do not know from the Record before us. The judgment of Judge Morris in this case of 27 years imprisonment is authorized by the statute, and it is approved. From the Record we are unable to determine if defendant has been given credit for all the time that he has served on the first sentence. The Prison Department is ordered forthwith to give defendant credit for all the time that he served on the first sentence until judgment was pronounced at the September 1963 Session of Chowan County, if Judge Morris did not do so. *S. v. Weaver,* 264 N.C. 681, 142 S.E. 2d 633.

In the trial below we find

No error.

JOHN ALBERT ANDERSON v. JAMES CARTER, JR.

(Filed 12 January, 1968.)

1. Trial § 21—

On motion to nonsuit, plaintiff's evidence must be taken as true and considered in the light most favorable to him, resolving all contradictions therein in his favor and giving him the benefit of every inference which can be reasonably drawn therefrom.

2. Negligence § 26—

Motion for judgment of nonsuit on the ground of contributory negligence is properly granted when plaintiff's own evidence, considered in the light most favorable to him, so clearly establishes his own negligence as a proximate cause of his injury that no other reasonable conclusion can be drawn therefrom.

3. Automobiles § 19—

A pedestrian crossing a highway or street at an intersection not controlled by traffic signals must yield the right of way to vehicles upon the highway unless he is crossing within a marked or an unmarked crosswalk. G.S. 20-173(a), G.S. 20-174(a).

4. Same—

An unmarked crosswalk at an intersection, as that term is used in G.S. 20-173(a) and G.S. 20-174(a), is the area within an intersection which also lies within the lateral boundaries of a sidewalk projected across the intersection.

5. Automobiles § 40—

Evidence that plaintiff pedestrian crossed a T-intersection from the east in a line of travel approximating the projected center line of the intersecting street discloses that he was not walking within an unmarked crosswalk and was therefore required to yield the right of way to vehicular traffic. G.S. 20-174(a).

6. Automobiles § 83—

Plaintiff pedestrian's evidence to the effect that he was crossing a T-intersection from the middle of a street running south which had no crosswalks, that he saw defendant's car, traveling south, approaching him a block away at a speed of 50 to 55 miles per hour, that he kept his eyes on the car at all times but continued to walk at the same pace, and that he was struck by defendant's car within three feet of the boundary line of the southbound traffic lane, *is held* to disclose contributory negligence on the part of the pedestrian barring recovery as a matter of law.

7. Automobiles § 40—

Ordinary care requires that a pedestrian crossing a street or highway do more for his safety than merely walk at the same pace when he sees that an oncoming car is approaching him at a high rate of speed.

8. Same—

A pedestrian crossing a highway may not assume that a motorist thereon will comply with the traffic laws, including speed regulations, when he

observes that the oncoming car of such motorist is exceeding the speed limit.

9. Pleadings § 24—

The Supreme Court may in its discretion allow plaintiff to amend his complaint so that the pleadings conform to the proof where it appears that the defendant was not taken by surprise by such proof and that he failed to object to the admission thereof. Rule of Practice in the Supreme Court 20(4).

APPEAL by defendant from *Froneberger, J.*, at the 20 February Schedule B Civil Jury Session of MECKLENBURG.

The plaintiff sued for damages for personal injuries sustained by him when he, a pedestrian, was struck by an automobile driven by the defendant. The complaint alleges that the plaintiff was walking across Statesville Avenue at its intersection with Alma Court in the City of Charlotte and was walking within an unmarked crosswalk when he was struck and severely injured by the automobile driven by the defendant. The plaintiff alleges that the defendant was negligent in that he: (1) Failed to yield the right of way to the plaintiff; (2) failed to sound his horn; (3) failed to keep a proper lookout; (4) failed to keep his vehicle under proper control; and (5) drove at a speed greater than was reasonable under the circumstances. He alleges that these negligent acts and omissions were the proximate cause of the collision and of his injuries resulting therefrom.

The answer denies all material allegations of the complaint and pleads contributory negligence by the plaintiff in that, among other things, he: (1) Failed to keep a proper lookout; (2) walked from a place of safety into the path of the defendant's automobile when it was so close that a collision was unavoidable by the defendant; and (3) failed to get out of the lane for traffic in which the defendant was traveling when he saw, or should have seen, the automobile approaching.

The jury answered the issues of negligence and contributory negligence in the plaintiff's favor and awarded damages. From a judgment entered upon the verdict the defendant appeals, assigning as error the denial of his motion for judgment of nonsuit and certain portions of the charge to the jury and alleged erroneous omissions therefrom.

The defendant offered no evidence. The following is a summary of that introduced by the plaintiff, other than that relating to the nature and extent of his injuries, which were severe, including compound fractures of both legs:

The accident occurred at 10 p.m., on 20 February 1965, at the intersection of Statesville Avenue and Alma Court. This is a T

intersection, with Statesville Avenue being the top of the T and Alma Court running to the west. The plaintiff had been visiting friends at their residence on the east side of Statesville Avenue directly across the avenue from Alma Court. When struck by the defendant's automobile, the plaintiff was (according to a diagram drawn and offered in evidence by him) in the process of walking across Statesville Avenue, 21 feet in width, on a line which approximates the center line of Alma Court, extended across Statesville Avenue. He was then only three feet from where the west curb line of Statesville Avenue, extended, crosses the mouth of Alma Court. The plaintiff's diagram shows the mouth of Alma Court to be 38 feet wide but shows the court, itself, is 21 feet wide (23 feet according to the plaintiff's testimony), the side lines of the court flaring out as it meets the western line of Statesville Avenue. There was a street light at the northwest corner of the intersection.

The plaintiff, then 25 years of age and having a tenth grade education, was and is employed by the City of Charlotte.

When the plaintiff left the residence on the east side of Statesville Avenue, he walked to the edge of the avenue, looked in each direction and then began to walk across.

To the north of the intersection, 275 to 300 feet from it, there is a hill crest beyond which the plaintiff could not see. When he looked to his right, he saw the lights of the defendant's car, southbound, at the top of the hill. This was before he started to cross the avenue. He testified: "I did not take my eyes off it. The car was going 50 to 55 miles per hour, and it was a block away. I walked right across the street in front of it, keeping an eye on it at all times." Having demonstrated in the presence of the jury the speed at which he was walking, the plaintiff continued to testify as follows: "I would say I would continue across like this because there wasn't any traffic at that time. The way I just walked here is the way I walked that night. I walked at that same pace from the time I started until I got hit. As to whether I speeded up at all, when I realized that the car was gaining on me, I tried to get out of the way because I was almost across the street at the time I was hit. I didn't hear the horn blow, no brakes sliding."

At another point in his testimony, the plaintiff testified: "[T]he first thing I saw was some lights and as I continued across the street, I didn't know that the car was traveling as fast as it was until I got across the northbound lane and crossed to the southbound lane and that is when I realized that it was going faster than I first thought it were [*sic*], and then I tried to get out of the way of it. I didn't hear no horn, no brakes applied. He just had me trapped, and I was hit."

The posted speed limit at this intersection at the time of the accident was 35 miles per hour.

At about 3:30 p.m., approximately six hours prior to the accident, the plaintiff and two friends had consumed three-fourths of a pint of whiskey, he drinking an undesignated part of it. From that time to the time of the accident he had had nothing else to drink.

J. Donnell Lassiter and Kennedy, Covington, Lobdell & Hickman for defendant appellant.

Wardlow, Knox, Caudle & Wade for plaintiff appellee.

LAKE, J. It is elementary that upon a motion for judgment of nonsuit the evidence of the plaintiff must be taken to be true and must be considered in the light most favorable to him, resolving all contradictions therein in his favor, and giving him the benefit of every inference in his favor which can reasonably be drawn from it. Strong, N. C. Index, Trial, § 21. Obviously, the evidence of the plaintiff, so construed, is ample to support a finding of actionable negligence by the defendant. A judgment of nonsuit on the ground of the plaintiff's contributory negligence can be granted only when the plaintiff's evidence, considered in accordance with the above rule, so clearly establishes his own negligence as one of the proximate causes of his injury that no other reasonable inference or conclusion can be drawn therefrom. *Black v. Wilkinson,* 269 N.C. 689, 153 S.E. 2d 333; *Pruett v. Inman,* 252 N.C. 520, 114 S.E. 2d 360; *Bondurant v. Mastin,* 252 N.C. 190, 113 S.E. 2d 292. Conversely, if the plaintiff's own evidence does admit of no other reasonable conclusion, the defendant is entitled to have his motion for judgment of nonsuit granted and it is error to deny it. *Lowe v. Futrell,* 271 N.C. 550, 157 S.E. 2d 92; *Bradham v. Trucking Co.,* 243 N.C. 708, 91 S.E. 2d 891; *Garmon v. Thomas,* 241 N.C. 412, 85 S.E. 2d 589; *Sheldon v. Childers,* 240 N.C. 449, 82 S.E. 2d 396; *Edwards v. Vaughn,* 238 N.C. 89, 76 S.E. 2d 359; *Lyerly v. Griffin,* 237 N.C. 686, 75 S.E. 2d 730.

G.S. 20-173(a) provides:

> "Where traffic control signals are not in place or in operation the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection * * *"

G.S. 20-174(a) provides:

> "Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked cross-

walk at an intersection shall yield the right-of-way to all vehicles upon the roadway."

The area included within the lateral boundary lines of Statesville Avenue and the lateral boundary lines of Alma Court, projected across Statesville Avenue, is an intersection within the definition of that term contained in G.S. 20-38(12). Consequently, the plaintiff was crossing Statesville Avenue at an intersection. This circumstance is not enough, however, to give him the right of way over vehicular traffic on Statesville Avenue. Under the foregoing statutes, the pedestrian crossing any highway, even at an intersection, must yield the right of way to vehicles upon the roadway unless the pedestrian is crossing within either a marked crosswalk or an unmarked crosswalk.

The term "unmarked crosswalk" is not defined in the Motor Vehicle Laws and this Court has not defined it heretofore. The term is obviously not coextensive with the term "intersection," for the Legislature has not provided that a pedestrian crossing a highway at an intersection shall have the right of way over vehicles, but has conferred such right of way only upon pedestrians crossing "within an unmarked crosswalk at an intersection." The statutes of many states define the term "unmarked crosswalk" as the area lying between the extensions of the sidewalk lines over a street at an intersection. In *Skaff v. Dodd,* 130 W.Va. 540, 44 S.E. 2d 621, the Supreme Court of West Virginia was faced with the task of defining the term, as used in an ordinance which, like the North Carolina statute, did not contain a definition of it. It said, "A crosswalk whether marked or unmarked is an extension of the sidewalk lines over streets at street intersections." See also *Ellis v. Glenn* (Ky.) 269 S.W. 2d 234, where the Court held a pedestrian was within an unmarked crosswalk when crossing the through street of a T intersection within what would be an extension of the sidewalk lines of the street forming the stem of the T. In *Van v. McPartland,* 242 Md. 543, 219 A. 2d 815, the statute defined a crosswalk as "that portion of a roadway ordinarily included within the prolongation or connection of the lateral lines of sidewalks at intersections." The Maryland Court rejected the contention that this statute permitted pedestrians by common usage to establish a crosswalk elsewhere and thus acquire the right of way over vehicular traffic.

We construe the term "unmarked crosswalk at an intersection," as used in G.S. 20-173(a) and G.S. 20-174(a), to mean that area within an intersection which also lies within the lateral boundaries of a sidewalk projected across the intersection. See G.S. 20-155(c) with respect to a "regular pedestrian crossing."

The diagram of the intersection of Statesville Avenue and Alma Court, prepared by the plaintiff and introduced in evidence as his Exhibit 1, shows no sidewalk on Alma Court. If this be a correct portrayal of the intersection, and for the present purposes we must take it to be so, there is no "unmarked crosswalk" crossing Statesville Avenue at this intersection. In any event, this diagram shows, as his line of travel across Statesville Avenue, a line which is a projection across Statesville Avenue of the center line of Alma Court. We are, therefore, compelled to conclude that the plaintiff's evidence shows conclusively that he was not "within an unmarked crosswalk" when struck by the defendant's automobile.

This is not to say that the plaintiff was acting unlawfully in crossing Statesville Avenue at that point or that he had no right to cross Statesville Avenue on the line which he was following through the intersection. G.S. 20-173(a) and G.S. 20-174(a) do not prohibit pedestrians from crossing streets on highways at places other than marked crosswalks or unmarked crosswalks at intersections. There is no showing in this record of any city ordinance affecting the right of the plaintiff to do so at this intersection. If, however, the pedestrian elects to cross a street or a highway at a place which is not a marked crosswalk and not an unmarked crosswalk at an intersection, these statutes require that he yield the right of way to vehicles. Thus, the plaintiff's evidence shows that he did not have the right of way over the oncoming automobile of the defendant.

Before starting to cross Statesville Avenue, the plaintiff saw the lights of the defendant's car at the crest of the hill 275 to 300 feet away, headed south, and underestimated its speed. Under these circumstances, it was not contributory negligence, as a matter of law, for him to start walking across the northbound lane of Statesville Avenue, which he did. However, he testified that he continued to watch the automobile as it traveled down to the intersection and did not take his eyes off it until the instant that it struck him. He further testified that he walked at the same pace from the time he started across the street until he was struck. In that interval, he noted that the car was going faster than he had at first supposed and observed its movement sufficiently to enable him to testify that the car was going 50 to 55 miles per hour on a street where the speed limit was 35 miles per hour. Though he testified that he tried to get out of the way, his evidence shows conclusively that the only effort made by him was to continue walking across the path of the oncoming vehicle at the same pace at which he started to cross the street. He was struck, according to his statement, when within three feet of the west line of Statesville Avenue.

The plaintiff was neither a child nor an elderly person unable to accelerate his pace quickly. He was a 25 year old man, with no physical disability and in full possession of his faculties, taking as true his statement that he had had nothing intoxicating to drink since 3:30 p.m. and inferring therefrom that he was not under the influence of any intoxicant at the time of the accident. The plaintiff's evidence leads inescapably to the conclusion that he could have avoided the collision, either by coming to a stop and yielding the right of way before entering the southbound lane of Statesville Avenue, or by accelerating his pace across it. Without ever taking his eyes off the oncoming vehicle, traveling at a speed substantially above the speed limit, he elected to do neither of these but to continue to walk at the same pace.

In *Garmon v. Thomas, supra,* this Court reversed a judgment for the plaintiff, holding that the action should have been nonsuited because his testimony showed that he walked across a highway, into the path of an oncoming vehicle, without seeing it. Here, the plaintiff walked into the path of an oncoming vehicle though he saw it approaching at a high rate of speed and did not even accelerate his own pace in order to escape a collision.

In *Blake v. Mallard,* 262 N.C. 62, 136 S.E. 2d 214, this Court affirmed a judgment of nonsuit on the ground of contributory negligence. There, the plaintiff was a 65 year old woman. She walked "normally" across the through street of a T intersection until she observed the oncoming car when it was only 45 feet from her and then began to run in order to cross its path without being struck. Except for the difference in age and sex and the consequent difference in the abilities of the respective plaintiffs to run or jump from a path of danger, and except that the plaintiff in this case at all times saw the approaching vehicle, the facts in this case and those in *Blake v. Mallard* are substantially similar. These differences in the facts of the two cases are not favorable to the present plaintiff. Sharp, J., speaking for the Court, said in *Blake v. Mallard,* "The law imposes upon a person *sui juris* the duty to use ordinary care to protect himself from injury."

Ordinary care surely requires a 25 year old man, under no disability, who observes that he is in the path of an automobile approaching at 50 miles per hour to do more for his own protection than merely walk at the same pace across the path of the automobile, when safety lies only some three or four steps ahead. Under such circumstances, ordinary care requires the young man to jump or run from the path of danger, even though there may be some risk or loss of dignity in that process.

The plaintiff in this case does not derive any benefit from the well established rule that, nothing else appearing, a pedestrian crossing a highway may assume that motorists thereon will conform to and comply with traffic laws, including laws regulating speed. See: *Gaskins v. Kelly*, 228 N.C. 697, 47 S.E. 2d 34; *Jones v. Bagwell*, 207 N.C. 378, 387, 177 S.E. 170; Blashford, Cyclopedia of Automobile Law and Practice, § 1432. Such presumption ceases when, as here, the pedestrian observes that the oncoming automobile is exceeding the speed limit.

The plaintiff's evidence leads inescapably to the conclusion that he did not use the care for his own safety that an ordinarily prudent man in the same circumstances would have used, and that his failure so to do was one of the proximate causes of his injuries. It was, therefore, error to deny the defendant's motion for judgment of nonsuit. Since we so conclude, we do not reach the questions presented by the defendant's exceptions to the charge of the court to the jury.

The plaintiff filed a motion in this Court for permission to amend his complaint to allege, as further specifications of negligence by the defendant, that the defendant drove his automobile in excess of the posted speed limit of 35 miles per hour, in violation of G.S. 20-141; that he failed to decrease the speed of his automobile when approaching and crossing an intersection; and that he failed to decrease the speed sufficiently to avoid colliding with the plaintiff. To allow such amendment merely makes the pleading conform to the proof. Obviously, the defendant was not taken by surprise by such proof. He did not object thereto on the ground of variance or otherwise. We have, in our discretion, allowed the motion to amend. See: Rule 20(4), Rules of Practice in the Supreme Court; *Stathopoulos v. Shook*, 251 N.C. 33, 110 S.E. 2d 452. The allowance of this amendment to the complaint does not, however, absolve the plaintiff from the consequences of his own contributory negligence.

Reversed.

MRS. ANNIE LAURA CLARK, ADMINISTRATRIX OF THE ESTATE OF H. P. CLARK, AND NEXT FRIEND OF HAROLD WAYNE CLARK, MINOR SON, AND WILLIAM BLANCHARD CLARK, MINOR SON; H. P. CLARK, DECEASED, v. BURTON LINES, INC., EMPLOYER AND SECURITY INSURANCE COMPANY, CARRIER.

(Filed 12 January, 1968.)

1. Master and Servant § 93—

The findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence.

2. Master and Servant § 53—

The death of an employee is compensable under the Workmen's Compensation Act only if it results from an injury by accident arising out of and in the course of his employment.

3. Master and Servant § 54—

The words "out of" refer to the origin or cause of the accident, and the words "in the course of" to the time, place and circumstance under which the accident occurred.

4. Same—

Findings that the deceased, an employee of a trucking line, was instructed by the company dispatcher to drive to a truck terminal and await the arrival of another employee in order that they might together return a trailer to the home office, that the deceased arrived at the terminal, had dinner, went to a movie and returned to the trailer for the night, and that the other employee found the deceased the next morning in the trailer dead of suffocation from a smoldering fire, *held* sufficient to show a causal relation between the employment and the death.

5. Master and Servant § 69—

Where the method of computing the average weekly wage set out in the first section of G.S. 97-2(5) would be unfair because of exceptional circumstances, the Industrial Commission is authorized to use such other method of computation as would most nearly approximate the amount the injured employee would be earning if he were living.

6. Same—

Evidence that the deceased leased four tractor-trailers to a trucking firm under an arrangement whereby the firm was to receive twenty-five per cent of the gross income earned by the trucks, and that all expenses incurred by the firm in the operation and maintenance of the trucks were to be deducted from the net income and the balance then paid over to the deceased, who was also employed by the firm to drive the trucks, *is held* sufficient to constitute an exceptional reason to employ the method of computation used by the commission in this case.

APPEAL by plaintiff from *McKinnon, J.*, May 1967 Regular Civil Session, ALAMANCE County Superior Court.

H. P. Clark owned four tractor trailers which he leased to Burton Lines, Inc. (Burton). It was a common carrier operating from Reidsville and owned some twenty-five other tractor trailers. Under the lease, Burton was to receive twenty-five per cent of the gross earnings of Clark's equipment. The remainder was paid to him, and from it he paid the expenses of their operation. Burton had control of the tractors and trailers and paid workmen's compensation premiums on Clark. He did not have an I.C.C. franchise to operate his trucks but did so under Burton's franchise. In the year 1963, Clark's equipment earned a gross of $22,984.34. From this amount the expenses advanced by Burton for the operation and repair to

trucks were deducted, and the balance of $14,260.79 was paid direct to Clark. This constituted an overpayment of approximately $1,500.00.

On 18 November 1963 Burton's dispatcher, Thomas J. Price, instructed Clark to take a truckload of tobacco to Lumberton, N. C. and then go to Darlington, S. C. where he was to await the arrival of Troy Goss. Goss was the driver of one of the four tractor trailers owned by Clark which was leased to Burton. Upon Goss's arrival at Darlington, Clark was to load a trailer owned by Burton, which was used in Darlington as an office and sleeping quarters for its employees. The trailer was to be hooked up to Clark's tractor and hauled back to Reidsville. Goss was to load Clark's trailer onto his own and return to Reidsville also.

Clark followed his instructions: he delivered the tobacco to Lumberton and then went to Darlington, arriving there about 3:00 p.m., 19 November 1963. He called a friend, had dinner, went to a movie and then about 11:00 p.m. went to the trailer which he was to haul to Reidsville the next day. The next morning Clark was found dead in the trailer "due to accidental suffocation."

Goss arrived at the Burton terminal on the morning of November 20. Clark's truck was sitting in the yard. Goss knocked on the door of the trailer, got no answer, saw the results of smoke and entered. He found Clark sitting in a chair and thought he was dead. He called the local police officers, and Burton, to give them this information.

Upon supporting evidence, the Hearing Commissioner found the facts summarized above, that the deceased was an employee of Burton and that he "sustained an injury by accident arising out of and in the course of his employment with defendant employer, which resulted in his death by accidental suffocation," and made the maximum award of $12,000. Upon appeal to the Full Commission, the above findings, conclusions and award were eventually affirmed. The defendant appealed to the Superior Court of Alamance County which vacated and set aside the Commission's orders, holding that there was no competent evidence to support the Commission's finding that the average weekly wage of the deceased was more than $62.50 or that Clark's death arose out of and in the course of his employment.

The plaintiff appealed.

John D. Xanthos, attorney for plaintiff appellant.

Sanders & Holt by Emerson T. Sanders, attorneys for defendant appellees.

PLESS, J. The Workmen's Compensation Act and dozens of decisions of this Court are emphatic in holding that if there is any

competent evidence to support a finding made by the Commission the court is bound by it. *Latham v. Grocery Co.*, 208 N.C. 505, 181 S.E. 640. The lower court set aside the award upon the two grounds set forth in the statement of facts which will be here examined separately.

The first of these is that there was no competent evidence to support the finding that Clark's death arose out of and in the course of his employment. We cannot agree. The dispatcher for Burton testified that he gave Clark instructions to deliver a load of tobacco to Lumberton and "that when he delivered his hogsheads of tobacco in Lumberton to go from there to our terminal in Darlington, South Carolina, and wait; that he was to wait there for one of his drivers, Troy Goss. That upon Troy's arrival he was to take the cinder blocks from underneath the house trailer, load his trailer up on Troy's flat trailer, and for him to pull the house trailer to Reidsville." The witness also testified that he was sure that Clark obeyed his order.

Goss testified that upon his arrival in Darlington that morning "Mr. Clark's truck was sitting in the yard and everything was quiet. I got out of my truck and checked my watch for logging purposes, and I went up to the door and I knocked on the door and no one opened the door and no one answered, and so I looked around the door and saw the results of smoke, so I opened the door, and that is when I seen Mr. Clark . . . sitting in the kitchen area in the chair. . . . I called his name, but there was no answer. . . . I thought he was dead. . . . I . . . made the call to the law [and] also telephoned Burton Motor Lines after we found that Mr. Clark had passed away."

The area where the deceased was sitting was charred and smoked, as were the living room and bedroom, and the mattress on the bed was in a state of disintegration, smoldering fire.

The deceased was instructed to go to Darlington and *wait*, and his dispatcher was *sure* he followed his instructions. From the evidence it cannot be disputed that the deceased was where he was instructed to be and doing what he was instructed to do at the time he suffered death by suffocation. It follows that his death would not have occurred had he not been at the place his employer ordered and at the time he was supposed to be there. Even had there been any deviation from the employer's business on the previous evening — which is not to be assumed inasmuch as he did not expect to meet Goss until the following morning — he had returned to the place of his employment and to the duties connected with it at the time of his death.

In *Jackson v. Creamery*, 202 N.C. 196, 162 S.E. 359, the employee, having worked for fifteen hours, stopped and parked his employer's

truck in front of a cafe and had supper, got a shave and haircut, and also shot a game or two of pool. Thereafter, while returning the truck to the Creamery he had an accident and was injured. The Industrial Commission concluded that even if the claimant temporarily abandoned his master's business when visiting the barber shop and poolroom and other places for his personal business and for his personal amusement, he resumed it on starting to return the truck of the master to its proper place, and awarded compensation.

To be compensable under the Workmen's Compensation Act, an employee must be injured by accident arising out of and in the course of his employment. "The words 'out of,' refer to the origin or cause of the accident and the words 'in the course of,' to the time, place and circumstances under which it occurred." *Cole v. Guilford County,* 259 N.C. 724, 131 S.E. 2d 308.

> "An accident arising 'in the course of' the employment is one which occurs while 'the employee is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing'; or one which 'occurs in the course of the employment and as the result of a risk involved in the employment, or incident to it, or to conditions under which it is required to be performed.' " *Conrad v. Foundry Company,* 198 N.C. 723, 153 S.E. 266.

In *Perry v. Bakeries Co.,* 262 N.C. 272, 136 S.E. 2d 643, Moore, J., speaking for the Court, said:

> " 'The term "arising out of employment," it has been said, is broad and comprehensive and perhaps not capable of precise definition. It must be interpreted in the light of the facts and circumstances of each case, and there must be some causal connection between the injury and the employment.' To be compensable an injury must spring from the employment or have its origin therein. An injury arises out of the employment when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so that there is some causal relation between the injury and the performance of some service of the employment. An accident arises out of and in the course of the employment when it occurs while the employee is engaged in some activity or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business." (Citations omitted.)

> " 'Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown.' " *Kiger v. Service Co.,* 260 N.C. 760, 133 S.E. 2d 702.

All of the cases quoted are fully supported by many previous decisions or have been frequently followed in later cases.

The other ground upon which the court set aside the award was that there was no competent evidence to support the finding that the average weekly wage of the deceased was more than $62.50. While the Commission did not state the method used in computing the average weekly wage, it is apparent, and is assumed by the appellant in his brief, that the authority of paragraph 2 of subsection 5 of section 2 of the Workmen's Compensation Act was utilized:

> "But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury."

In commenting upon this paragraph, Justice Winborne (later C.J.) stated in *Early v. Basnight & Co.,* 214 N.C. 103, 198 S.E. 577:

> "The words 'the foregoing' clearly refer to the preceding paragraph, which includes the three methods of computation above described. Hence, it is manifest that where exceptional reasons are found which make the computation on the basis of either of 'the foregoing' methods unfair to the employee, the Legislature intended that the Industrial Commission might resort to such other method of computing the average weekly wages as would most nearly approximate the amount the injured employee would be earning if he were living."

Here, the evidence showed that Burton was to receive twenty-five per cent of the income earned by Clark's trucks. In the forty-six weeks of 1963 which preceded his death, Clark was entitled to $22,984.34 after the payment of the commission to Burton. From this was deducted charges made to Burton for gas, oil, parts and repairs, leaving a balance due Clark of approximately $13,000.00. It is only logical to assume that the owner of four trucks would get no less than one fourth of the amount paid, or approximately $3,200.00; and the Commission would be justified in making such an assumption. These computations mathematically sustain a finding that the average weekly wage of the deceased was more than $62.50 and that the

injured employee would be earning in excess of this amount if he were living. This finding of an average weekly wage in excess of $62.50, in turn, supports the maximum award made by the Commission.

The cause is remanded to the Superior Court of Alamance County with the direction that judgment be entered in accordance with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. PAUL DAVID HILL,
CASE NOS. 50-249, 50-249A, 50,249B.

(Filed 12 January, 1968.)

1. Statutes § 10—

A criminal statute must be strictly construed, and the import of the statute may not be extended by implication to include an offense not clearly described.

2. Safecracking § 1—

The offense of safecracking is the forcing open of a safe kept and customarily used for the storing of money or other valuables.

3. Safecracking § 2—

Evidence of the State that the defendant forced open a newly acquired safe not yet used by the owner to store money or other chattels, *is held* insufficient to be submitted to the jury on the issue of defendant's guilt of the offense of safecracking.

4. Criminal Law § 106—

If there is evidence, circumstantial, direct, or a combination of both, amounting to substantial evidence of each element of the offense charged, motion to nonsuit should be denied, it being in the province of the jury to determine whether the circumstantial evidence excludes every reasonable hypothesis of innocence.

5. Burglary and Unlawful Breakings § 5; Safecracking § 2—

Evidence of the State that a locked building occupied by an automobile dealer was broken into at night, that an acetylene torch owned by the company was used to open a two-door safe where money and records were kept, that the defendant was seen shortly after the breaking with smut on his arms and hair and with small particles of burned metal and safe insulation material in his clothing, and that defendant admitted to an uncle that he had robbed the safe, *held* sufficient to be submitted to the jury on the issue of defendant's guilt of breaking and entering and of safecracking.

6. Criminal Law § 43—

Color slides taken of burn marks and blisters on the hands and arms of a defendant accused of safecracking by use of an acetylene torch are properly admitted into evidence to illustrate the testimony of witnesses.

APPEAL by defendant from *Snepp, J.*, at the 7 August 1967 Schedule "C" Criminal Session of MECKLENBURG.

By separate indictments, each proper in form, the first containing two counts, the defendant was charged with: (1) Feloniously breaking and entering a building occupied by Lee A. Folgers, Incorporated; (2) larceny of goods and money of Lee A. Folgers, Incorporated, as a result of such unlawful breaking and entering; (3) wilfully and feloniously forcing open a two-door safe of Lee A. Folgers, Incorporated, by the use of an acetylene torch; and (4) the wilful and felonious forcing open of a second safe of Lee A. Folgers, Incorporated, by the use of an acetylene torch.

A motion for judgment of nonsuit was allowed upon the larceny count of the first indictment. The jury found the defendant guilty upon the charge of felonious breaking and entering and upon the two charges of safe breaking. Upon each of the safe breaking charges the defendant was sentenced to confinement in the State Prison for 25 years, the sentence in the second to run concurrently with that in the first. Upon the breaking and entering charge the defendant was sentenced to confinement in the State Prison for 10 years, this sentence to run concurrently with that imposed in the first safe breaking case. From all of these judgments the defendant appeals, assigning as error the denial of his motions for judgment as of nonsuit, certain rulings upon the admission of evidence and the denial of his motions to arrest judgment, set the verdict aside, and grant a new trial.

The State offered evidence tending to show the following:

Between the closing hour on the day before and the reopening hour on the day named in the bills of indictment, the locked building occupied by Lee A. Folgers, Incorporated, an automobile dealer, was broken and entered. Valuable property, including automobiles and automobile parts belonging to the corporation, were in the building at that time. Acetylene torch equipment for cutting metal, normally kept in the corporation's service department, had been moved into and left in the portion of the building where the two safes, owned by the corporation, were located. Each safe had a combination lock. The two-door safe was used for the keeping therein of records, money and documents of the corporation. The other safe had just been acquired for the keeping therein of money, but had not yet been placed in its intended location in the office or put in

use and there was nothing in it. The two safes had been opened by burning with an acetylene torch. Metal containers, which had been in the two-door safe, had also been burned open with such a torch and contents thereof had been burned in the process.

William Hildreth, uncle of the defendant, testified for the State. The material portion of his testimony was to the effect that: The defendant arrived in Charlotte a few days before the break in and from then until after the break in was a guest in the Hildreth home. In the early morning of the day of the break in, a few minutes after it was discovered, the defendant drove up to the Hildreth home, in the uncle's car, having last been seen there at 9:30 p.m. the previous evening. His clothes had numerous little holes in them and he had smut on his arms and in his hair. He promptly went to bed and to sleep. Thereafter, the uncle heard about the break in. Being suspicious that the defendant had committed the offense, he awakened the defendant and told him of his suspicion. The defendant first denied responsibility and then admitted to his uncle that he was the one who had broken into the building and "robbed the safe." He showed his uncle some old coins which he had acquired in the process. (These coins were similar in denomination and vintage to some belonging to an officer of the corporation, who had kept them in his office.) Thereafter, the defendant and his uncle drove around in the uncle's automobile. In the meantime, the defendant had changed his clothes and had put in the back of the car the clothing worn by him when he returned to the uncle's house on the morning following the break in.

After the defendant was arrested the following day, the officers, with the uncle's permission, removed these articles of clothing from the car. They also removed from the defendant's feet the shoes worn by him when he returned to his uncle's home on the morning after the break in occurred, giving him other shoes to wear. The trousers, undershirt, and socks so taken from the automobile had burn holes in them. These articles of clothing and the shoes were examined in the F.B.I. laboratory, together with samples of debris taken from the safes and the surrounding floor area in the building of Lee A. Folgers, Incorporated. Upon the soles of the shoes and upon the shirt, undershirt, trousers and socks were found numerous small particles of burned metal and of safe insulation material. In the opinion of the expert making the examination, the particles of insulation material so found upon the clothing came from one of the safes of Lee A. Folgers, Incorporated, or from another safe made by the same manufacturer at about the same period of time.

At the time of the arrest, the arresting officer observed the defendant had a number of pock mark burns on his arms and burn

blisters on his finger tips. Color photographs and slides of his arms and hands, taken by a police officer while the defendant was in jail, were put in evidence by the State, over objection, to illustrate the testimony of the officer who took them, and of the F.B.I. agent who made the arrest, concerning the presence of burns on the defendant's arms and hands.

The defendant testified in his own behalf. He denied any connection with the break in or with the opening of the safes. To establish an alibi, he testified that on the night of the break in he left his uncle's home a few minutes after his uncle and aunt had done so. From there, he testified, he went to a place called "Jerry's Lounge," where he met a girl with whom he spent most of the evening and early morning hours, the rest of the time being accounted for, according to his testimony, by trouble with her automobile, in which they went for a ride and parked, and by his getting lost after leaving her due to his unfamiliarity with Charlotte. He denied telling his uncle that he had committed the break in and "robbery." He explained the burns on his hands and arms as having been caused when he was attempting to cook his own breakfast at his uncle's home and, in the process, splashed hot grease upon himself. He denied that the clothing in question was his or had been worn by him.

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

Charles B. Merryman, Jr., for defendant appellant.

LAKE, J. In Case No. 50-249B, the indictment charges that the defendant "unlawfully, wilfully and feloniously did, by the use of an acetylene torch force open a Herring Hall-Marvin safe, of Lee A. Folgers, Incorporated, a corporation, *used for storing chattels, money and other valuables.*" (Emphasis added.) As to this safe, the evidence for the State was:

> "Not anything was kept in that safe on June 13th and 14th of 1967. Not a thing. It had just been purchased for money, for a money safe. * * * Its design and purpose was for keeping the valuables of this corporation inside of it. We were to bolt it to the floor in the showroom in full view of the public and we just hadn't got to it."

G.S. 14-89.1 is the statute creating and describing the offense charged in this bill of indictment. It provides:

> "Any person who shall by the use of explosives, drills, or other tools unlawfully force open or attempt to force open or

'pick' the combination of a safe or vault *used for storing money or other valuables,* shall, upon conviction thereof, receive a sentence, in the discretion of the trial judge, of from ten years to life imprisonment in the State penitentiary." (Emphasis added.)

It is elementary that a criminal statute must be construed strictly. *State v. Garrett,* 263 N.C. 773, 140 S.E. 2d 315; *State v. Heath,* 199 N.C. 135, 153 S.E. 855, 87 A.L.R. 37; Strong, N. C. Index, Statutes, § 5. Adams, J., speaking for the Court in the *Heath* case, said: "The forbidden act must come clearly within the prohibition of the statute, for the scope of a penal statute will not ordinarily be enlarged by construction to take in offenses not clearly described; and any doubt on this point will be resolved in favor of the defendant."

In *State v. Whitehurst,* 212 N.C. 300, 193 S.E. 657, 113 A.L.R. 740, Stacy, C.J., speaking for the Court said:

> "By the rule of strict construction, however, is not meant that the statute shall be stintingly or even narrowly construed (*S. v. Earnhardt,* 170 N.C. 725, 86 S.E. 960), but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used. *U. S. v. Wiltberger,* 5 Wheat. 76. Criminal statutes are not to be extended by implication or equitable construction to include those not within their terms, for the very obvious reason that the power of punishment is vested in the legislative and not in the judicial department. It is the General Assembly which is to define crimes and ordain their punishment."

In G.S. 14-89.1 the General Assembly has seen fit to provide for the imposition of a sentence of imprisonment up to life upon conviction of the offense there described. It has made an element of that offense the fact that the safe forced open be one "used for storing money or other valuables." Obviously, this phrase was intended to qualify and restrict the words "safe or vault." At least three constructions of this qualifying phrase are conceivable: (1) Intended or designed for use for the storing of money or other valuables; (2) actually containing money or other valuables at the time of the forcible opening; (3) kept and customarily used for the storing of money or other valuables as of the time of the forcible opening.

To adopt the first of these possible constructions would deprive the qualifying phrase of meaning, for all practicable purposes, since the words "safe or vault," in themselves, connote a receptacle for the keeping of things of value. To adopt the second of the above possible constructions of the qualifying phrase would, in our opinion, be a strained construction of the statute, for to give it that meaning

would prevent a conviction of one who, by the means specified in the statute, forces open a safe habitually used by the owner for the keeping of money or other valuables, but which, at the time of the forcible opening, happens to contain nothing of value. The third of the above possible constructions, therefore, is, in our opinion, the meaning intended by the Legislature and we so construe the statute.

We are brought, therefore, to the question of whether one has committed the offense forbidden by this statute, for which he may be imprisoned for the remainder of his life, when, with the requisite intent and by one of the specified methods, he forcibly opens a newly acquired safe, not yet installed in its intended location in the owner's place of business and which has never been used by the owner as a container for anything. We think the answer must be "No," and that the evidence of the State in Case No. 50-249B showed conclusively that one of the essential elements of the crime charged in the indictment was not present. Therefore, the defendant's motion for judgment of nonsuit in that case should have been allowed and the judgment in that case must be reversed.

In case No. 50-249, in which the defendant was charged in the indictment with breaking and entering the building, and in Case No. 50-249A, in which the defendant was charged in the indictment with the forcible opening of the two-door safe, the evidence of the State was clearly sufficient to require the submission of the issue to the jury, and the denial of the motion for judgment of nonsuit in each of those cases was proper.

The test of the sufficiency of the State's evidence to withstand a motion for judgment of nonsuit in a criminal action is the same whether the evidence is circumstantial, direct, or a combination of both. *State v. Tillman,* 269 N.C. 276, 152 S.E. 2d 159; *State v. Bogan,* 266 N.C. 99, 145 S.E. 2d 374. To survive the motion for nonsuit, it is not necessary that the Court be of the opinion that the evidence is sufficient to establish each element of the offense beyond a reasonable doubt. It is enough that there is substantial evidence of each element of the offense. If so, the issue must be submitted to the jury, and it is a question for the jury whether the evidence establishes each element of the crime beyond a reasonable doubt. *State v. Bogan, supra; State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431. When the evidence relied upon to establish an element of the offense charged is circumstantial, the court must charge the jury that 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.* It is not necessary, however, that the judge must so appraise the evidence in order to overrule the motion for judgment of nonsuit.

The State introduced substantial evidence of each element of the offense of breaking and entering the building and of the offense of the forcible opening of the two-door safe, as charged in the indictment in Case No. 50-249 and 50-249A, respectively. The State also introduced substantial evidence to show that the defendant was the person who committed both of these offenses. The question of his guilt or innocence was, therefore, properly submitted to the jury in those two cases.

There was no error in admitting in evidence the color photographic slides prepared by the witness Toomey from photographs taken by him of the arms and hands of the defendant while the defendant was in jail two days after the break in occurred, or in permitting them to be exhibited to the jury by flashing them upon a screen in the courtroom. This evidence was offered and admitted for the purpose of illustrating the testimony of this witness. He testified that the slides accurately depicted the condition which he observed upon the defendant's hands and arms. With the respective slides so shown upon the screen, he pointed out burn marks and blisters on each hand. "[W]here there is evidence of the accuracy of a photograph, a witness may use it for the restricted purpose of explaining or illustrating to the jury his testimony relevant and material to some matter in controversy." *State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824.

In any event, the witness Carr had previously testified that, at the time of the defendant's arrest on the preceding day, he observed pock mark burns and blisters on his arms and fingers, and the defendant himself testified to the presence of such burns. Mr. Carr's testimony that when he saw the burns, on the day before the pictures were taken, the burns were "much worse" because they were fresher than they appeared in the pictures does not support the defendant's contention that the introduction of the pictures in evidence prejudiced his case. It was for this reason only that Mr. Carr testified that the pictures did not correctly represent the appearance of the defendant's arms and hands as they were when he saw them on the day before the pictures were taken. There was nothing in his testimony to suggest that the pictures showed any burn marks or blisters which he did not observe on the day of the arrest.

The remaining assignments of error with reference to the admission of evidence have not been discussed in the defendant's brief and are, therefore, deemed abandoned. We have, nevertheless, examined these portions of the record and concur in the conclusion, ap-

parently reached by the defendant's counsel, that these exceptions are without merit.

As to Case No. 50-249: No error.
As to Case No. 50-249A: No error.
As to Case No. 50-249B: Reversed.

PARKER, C.J., concurs in result.

DARWIN JACOB DENNIS v. RONNIE VONCANNON.

(Filed 12 January, 1968.)

1. Negligence § 11—

Where defendant relies upon contributory negligence, he is required specifically to plead in his answer the acts and omissions of plaintiff relied upon as constituting contributory negligence and to prove them at the trial. G.S. 1-139.

2. Same—

Contributory negligence is negligence on the part of plaintiff which concurs with the negligence of the defendant as alleged in the complaint, and contributory negligence does not negate negligence as alleged in the complaint but presupposes the existence of such negligence.

3. Automobiles § 43— Answer negating allegations of complaint fails to raise issue of contributory negligence.

Plaintiff's allegations were to the effect that he was driving in a southerly direction entirely on the shoulder of the northbound traffic lane when defendant's truck traveling in the northbound lane suddenly cut to the right and struck plaintiff's car. Defendant alleged in the answer that he was proceeding north in the righthand lane and that plaintiff was proceeding south in the opposite lane when plaintiff suddenly turned to his left, crossed the center line and into plaintiff's lane and struck defendant's truck on the shoulder of the northbound lane. *Held:* The answer is insufficient to support a finding of contributory negligence as a matter of law, since it does not allege any negligence on the part of plaintiff concurring with the negligence of defendant as alleged in the complaint.

4. Automobiles § 53—

Plaintiff's evidence tended to show that he was delivering newspapers in his automobile on the east side of a highway running in a north-south direction and that he was driving slowly in a southerly direction, entirely on the shoulder of the northbound lane, and that defendant's truck proceeding north in the northbound lane suddenly cut to the right and collided headon with plaintiff's car on the shoulder of the road. *Held:* Plaintiff's evidence was sufficient to go to the jury on the issue of defendant's negligence in causing the collision.

5. Trial § 31—

An instruction that the jury should answer an issue in a specified way if the jury should find the facts to be as the evidence tends to show is a peremptory instruction, and such instruction is improperly given where the evidence bearing on the issue is in conflict.

6. Pleadings § 28—

Defendant must make out his cross action *secundum allegata.*

7. Trial § 33—

An instruction to the jury relating to a factual situation of which there is no evidence is erroneous.

APPEAL by plaintiff from *McConnell, J.,* April 3, 1967 Civil Session of RANDOLPH.

Action and cross action growing out of a collision in Randolph County, N. C., at a point on U. S. Highway 220 between Asheboro and Seagrove, on November 25, 1966, between 5 and 6 a.m., involving a 1966 Volkswagen, owned and operated by plaintiff, and a 1959 Ford pickup truck, owned and operated by defendant.

The highway runs generally north-south. A paved portion, 24 feet wide, is divided into two lanes, the east lane for northbound traffic and the west for southbound traffic. The two lanes are divided by a broken white center line; and, in the area where the collision occurred, there was a solid yellow line along and on each side of said center line.

Along the east and west edges of said 24-foot paved portion constituting the traffic lanes, solid white lines separate the lanes for northbound and southbound traffic, respectively, from the east and west shoulders of the highway. The east shoulder, pertinent to this appeal, is fourteen feet wide, of which the five or six feet immediately adjoining the east line of the lane for northbound traffic is paved, and the remaining portion is sod.

The highway is "substantially level and curves slightly to the west" a short distance north of the scene of collision.

The weather was clear, the road was dry. It was dark, "necessitating the use of headlights."

Plaintiff's action and defendant's cross action are to recover for personal injuries and property damage, each alleging the negligence of the other was the sole proximate cause of the collision and its consequences.

In respect of plaintiff's action, the pleadings consist of the complaint and defendant's answer thereto, which includes a plea of contributory negligence. In respect of defendant's cross action, the pleadings consist of defendant's cross complaint and plaintiff's reply thereto,

which includes a plea treated by the court below as a plea of contributory negligence.

Evidence was offered by plaintiff and by defendant.

The factual situation described in plaintiff's allegations and evidence is as follows: Plaintiff was delivering newspapers in a rural section. He had delivered a paper to a customer whose box was on the east side of the highway. After depositing a paper in this box, he drove his Volkswagen, slowly, in a southerly direction on and along the east shoulder, partly on the paved portion thereof and partly on the sod portion thereof, a distance of approximately 250 feet en route to the box where he would next deliver a paper. Defendant's truck, with bright lights burning, which had been proceeding north in the lane for northbound traffic, suddenly "cut to the right," colliding "partially head-on" with plaintiff's Volkswagen *on said east shoulder.* Plaintiff alleged this factual situation as the basis for the cause of action alleged in the complaint and also as the basis for the affirmative plea asserted in his reply.

The factual situation described in defendant's allegations and evidence is as follows: Defendant was proceeding north in the lane for northbound traffic. Plaintiff was proceeding south in the lane for southbound traffic. When the vehicles were approximately 200 feet apart, plaintiff turned to his left, crossing the center line and into defendant's traffic lane, at an angle of approximately 45°. Defendant applied his brakes, cut to his right onto the east shoulder and had almost stopped when the left front of defendant's truck, which was then on the east shoulder, was struck by the front of the Volkswagen, the front portion of which was then on the east shoulder and the back portion in the lane for northbound traffic. Defendant alleged this factual situation as the basis of his plea of contributory negligence in respect of plaintiff's action and also as the basis for the cross action alleged in his cross complaint.

At the conclusion of *all* the evidence, the court, allowing defendant's motion therefor, entered judgment of involuntary nonsuit as to plaintiff's action.

With reference to defendant's cross action, the court submitted and the jury answered the following issues: "1. Was the defendant injured and damaged by the negligence of the plaintiff, as alleged in the answer? ANSWER: Yes. 2. If so, did the defendant, by his own negligence, contribute to his injuries and damages? ANSWER: No. 3. What amount, if any, is the defendant entitled to recover of the plaintiff for: (A) His personal injuries? ANSWER: $2,500. (B) Property damages? ANSWER: $800.00."

Judgment for defendant in accordance with the verdict was entered. Plaintiff appealed, assigning as error (1) the judgment non-

suiting his action, and (2) errors in the trial with reference to defendant's cross action.

Hugh R. Anderson and John Randolph Ingram for plaintiff appellant.

Dock G. Smith, Jr. and Miller, Beck & O'Briant for defendant appellee.

BOBBITT, J. We consider first whether plaintiff's action should have been nonsuited.

Plaintiff's evidence, in accord with his allegations, tends to show plaintiff's Volkswagen, with headlights dim, was moving slowly in a southerly direction, entirely on the east shoulder, one wheel on the paved portion of the shoulder and the other on the sod portion thereof, when defendant, who had been driving his truck in the lane for northbound traffic, turned to his right onto the east shoulder and there collided with plaintiff's Volkswagen; and that, when defendant turned from his traffic lane onto the east shoulder, no other traffic was then using either of the two traffic lanes.

In our view, this evidence, when considered in the light most favorable to plaintiff, was sufficient to support a finding that defendant was actionably negligent as alleged in the complaint.

The record shows the court, in allowing defendant's motion to nonsuit plaintiff's action, held "as a matter of law that the plaintiff is guilty of contributory negligence."

G.S. 1-139 provides: "In all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it must be set up in the answer and proved on the trial." As stated by Ervin, J., in *Hunt v. Wooten,* 238 N.C. 42, 49, 76 S.E. 2d 326, 331: "The defendant must meet the two requirements of this statute to obtain the benefit of the affirmative defense of contributory negligence. The first requirement is that the defendant must specially plead in his answer an act or omission of the plaintiff constituting contributory negligence in law; and the second requirement is that the defendant must prove on the trial the act or omission of the plaintiff so pleaded."

Recently, Lake, J., in *Jackson v. McBride,* 270 N.C. 367, 372, 154 S.E. 2d 468, 471, speaking for this Court, said: "Contributory negligence, as its name implies, is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains. It does not negate negligence of the defendant as alleged in the complaint, but presupposes or concedes such negligence by him. Contributory negligence by the plaintiff 'can

exist only as a co-ordinate or counterpart' of negligence by the defendant as alleged in the complaint."

The factual situation on which defendant bases his plea of contributory negligence and the factual situation on which plaintiff bases his allegations as to defendant's actionable negligence are irreconcilably different. In plaintiff's action, the first issue raised by the pleadings was whether plaintiff was injured and his property damaged by the negligence of defendant *as alleged in the complaint.* Defendant alleges plaintiff was contributorily negligent in that the Volkswagen, while proceeding in the lane for southbound traffic, cut to its left across the center line and across the lane for northbound traffic, striking defendant's truck as it was attempting to evade the Volkswagen by pulling onto the east shoulder. Defendant's evidence, if accepted, would negate plaintiff's allegations and require that the first issue be answered, "No." If this first issue were answered, "Yes," such answer would establish that plaintiff was injured and damaged in the way and manner *alleged in the complaint;* and such answer would in turn negate the allegations on which defendant bases his plea of contributory negligence. In the factual situation here considered, as in *Jackson v. McBride, supra,* there was no basis for the submission of a contributory negligence issue in respect of plaintiff's action. Under these circumstances, it is manifest the ruling of the court in granting nonsuit on the ground plaintiff was guilty of contributory negligence as a matter of law was erroneous.

In the trial of plaintiff's action, if the jury should find that plaintiff was injured and his property damaged by the negligence of defendant *as alleged in the complaint,* such finding would preclude defendant from recovery on his cross action. *Nicholson v. Dean,* 267 N.C. 375, 148 S.E. 2d 247. The jury would not reach the issues in defendant's cross action unless it answered, "No," the issue as to whether plaintiff was injured and his property damaged by the negligence of defendant *as alleged in the complaint.* If and when the cross action is reached, there would seem to be no basis for submission of a contributory negligence issue.

The foregoing requires reversal of the nonsuit of plaintiff's action. Error in this respect, on account of the interrelation of plaintiff's action and defendant's cross action, would seem sufficient to require that there be a new trial of defendant's cross action. Be that as it may, the error in the charge discussed below requires that such new trial be awarded.

The issues submitted to and answered by the jury relate solely to defendant's cross action. The first of these issues was as follows: "Was the defendant injured and damaged by the negligence of the

plaintiff, *as alleged in the answer?*" (Our italics.) With reference thereto, the court instructed the jury as follows: "I charge you on this first issue that if you find the facts to be as the evidence tends to show, and believe the testimony of these witnesses; that is, *if you find that the plaintiff, operated his motor vehicle at nighttime proceeding in a southerly direction with one wheel on the east side of the highway, facing traffic going north, and one wheel was on the pavement just east of the line designating the lanes of traffic;* or if you find that the plaintiff drove his car across the center line for traffic and over into the northbound lane and then over off of the road where the defendant contends he had pulled over, and that the cars collided there in that manner, if you find that the plaintiff failed to exercise due care in that respect; or if you find that he failed to keep a proper lookout, or if you find that he failed to keep his car under proper control, or drove his car across the center line, *or drove his car some two hundred feet facing traffic, with one wheel on the pavement;* if you believe the testimony of the witnesses and find the facts to be as the evidence tends to show, it would be your duty to answer the first issue, Yes. That is, that the defendant was injured and damaged by the negligence of the plaintiff, *as alleged in the answer.*" (Our italics.)

Immediately following the quoted portion of the charge, to which plaintiff excepted, the court instructed the jury as follows: "Now, if you fail to so find, or if you don't believe the testimony of the witnesses, it will be your duty to answer the first issue, 'No.' That is, that the defendant was not injured and damaged by the negligence of the plaintiff, *as alleged in the answer.*" (Our italics.)

The portions of the challenged instruction, (1) "if you find the facts to be as the evidence tends to show, and believe the testimony of these witnesses," and (2) "if you believe the testimony of the witnesses and find the facts to be as the evidence tends to show," are in words and phrases appropriate to a peremptory instruction. 2 McIntosh, North Carolina Practice and Procedure, Second Edition, § 1516, 1964 pocket parts (Phillips). "The rule is that where the evidence bearing upon an issue is susceptible of diverse inferences, it is improper for the presiding judge to give the jury a peremptory instruction." *Gouldin v. Insurance Co.*, 248 N.C. 161, 168, 102 S.E. 2d 846, 851. Here, the evidence for plaintiff and the evidence for defendant is *in direct conflict.*

It is noted that the portions of the instruction quoted in the preceding paragraph refer to "these witnesses" and "the witnesses." Presumably, the reference is to all witnesses. No distinction is made between plaintiff's and defendant's witnesses. Moreover, no distinc-

tion is made between what plaintiff's evidence tends to show and what defendant's evidence tends to show.

The instruction includes, as a basis for an affirmative answer to the first issue, factual predicates, *e.g.*, "if you find that the plaintiff, operated his motor vehicle at nighttime proceeding in a southerly direction with one wheel on the east side of the highway, facing traffic going north, and one wheel on the pavement just east of the line designating the lanes of traffic," or if you find that plaintiff "drove his car some two hundred feet facing traffic, with one wheel on the pavement," which are neither alleged by defendant nor supported by his evidence.

These legal principles are applicable: (1) Defendant must make out his cross action *secundum allegata*. 3 Strong, N. C. Index, Pleadings § 28. (2) An instruction relating to a factual situation of which there is no evidence is erroneous. *McGinnis v. Robinson*, 252 N.C. 574, 578, 114 S.E. 2d 365, 368, and cases cited.

In the respects indicated, the challenged portions of the charge are erroneous and deemed sufficiently prejudicial to entitle plaintiff to a new trial.

Re plaintiff's action: Judgment of nonsuit reversed.

Re defendant's action: New trial.

SUSAN WALKER GUSTAFSON v. BRUCE A. GUSTAFSON.

(Filed 12 January, 1968.)

1. Divorce and Alimony § 22—

An order awarding custody of the children is not final but is subject to modification upon change of condition.

2. Same—

The use of affidavits by the wife in a hearing to award the custody of the children does not deprive the defendant of a fair hearing, since at the trial of the cause the defendant will be afforded the right to cross-examine the witnesses.

3. Same; Evidence § 14—

The provisions of G.S. 8-53 authorizing "the presiding judge of a superior court" to compel a physician to disclose confidential matters is limited to a judge presiding at the trial and does not authorize a judge in a hearing pursuant to G.S. 50-16 to compel the examination of a physician who submitted affidavits in support of the wife.

4. Evidence § 14; Constitutional Law § 31—

A medical witness for plaintiff in a custody hearing brought notes relating to his treatment of the wife for mental disability but he did not

refer to them during the examination to refresh his memory. *Held:* There was no error in denying defendant's motion that he be allowed to inspect the notes, and further, the notes being in the nature of a privileged communication, the court will not compel the person within the privileged relation to produce them.

5. Divorce and Alimony § 22—

The resident judge or the presiding judge of a district has the authority to award the custody of a child.

BOBBITT, J., concurring.

APPEAL by defendant from *Mintz, J.*, July 22-24, 1967 (Order dated July 24, 1967), NEW HANOVER Superior Court.

On 4 January 1967 plaintiff brought an action against her husband under G.S. 50-16 in which she sought the custody of their daughter and support and counsel fees. A complaint was filed at that time, and later on 5 May 1967, in accordance with a written stipulation, she filed an amended complaint. It alleged that the parties were married to each other on 29 June 1957 and that their child, Frances Holbrook Gustafson, was born 23 May 1962; that at the time of their marriage the defendant was a lieutenant in the U. S. Marine Corps stationed at Quantico, Virginia; that the following year he obtained his discharge from the Marine Corps and then resumed his studies at the University of North Carolina, preparing himself to practice Orthodontics; that because the defendant was unable to finance his education that her family assisted them financially and that she sold stock owned by her, worth $3695.69, for that purpose; that she worked while they lived in Chapel Hill in order to help the family financial condition; that in 1964 they moved to Winston-Salem where the defendant established his practice as an orthodontist and is now earning in excess of $35,000.00 a year.

She alleged that all during their marriage the defendant had neglected, abused and mistreated her, all of which resulted in a deterioration of her health; that his constant cruel criticism and ridicule caused her to become emotionally and acutely depressed; that her life became burdensome and intolerable and that as a result she was admitted to the Institute of Living at Hartford, Connecticut on 17 November 1964 where she remained until December 1966. In January 1966 her condition had improved and she was looking forward to being discharged when the defendant telephoned her that he had decided they should go their separate ways and that she should resume her teaching and support herself.

In March he wrote the Institute of Living that he would no longer be responsible for her treatment and from that date refused to pay for her hospitalization. This action caused her condition to

worsen and as a result she was compelled to spend approximately twelve months more in the hospital.

She alleged that she had at all times been a dutiful and loyal wife and that the mistreatment accorded her by her husband was without provocation on her part and was solely due to his cruel and barbarous treatment, which caused her humiliation, embarrassment and serious impairment to her health. She further alleged that upon her discharge from the hospital she went to her parents' home in Wilmington, N. C. at which time the defendant delivered her clothes to her but refused to furnish any money for support, though she requested it on many occasions.

She alleged that their daughter stayed with her husband while she was in the hospital and that he had asserted that he intended to keep her under his exclusive control and custody. She prayed that she be awarded the custody of their daughter and that the defendant be required to provide support for her and the child and pay counsel fees.

Upon the filing of the original complaint, the defendant moved for a change of venue to Forsyth County upon the grounds that the convenience of witnesses and the ends of justice would be promoted and set forth in some detail the basis for this motion. It was denied.

The defendant then made a motion to strike many sections of the complaint which resulted in a stipulation that the plaintiff might file the amended complaint which has been summarized above. The defendant then obtained an order for the adverse examination of the plaintiff in order to prepare his answer, pursuant to which she was examined at great length. The record of this examination requires one hundred thirteen pages of the case on appeal.

After some continuances, a hearing on the plaintiff's motion for a temporary order was held before Judge Mintz at Wilmington on 24 July 1967. The plaintiff offered evidence in support of her allegations and testified that she was now fully recovered from her disability. The defendant through the adverse examination of the plaintiff, which in effect was a cross examination, elicited evidence tending to refute the plaintiff's position under the present condition of this litigation. The hearing resulted in an order *pendente lite* which awarded the primary custody of the child to the plaintiff but permitted the defendant to have her visit him on frequent occasions. The order further provided that he should pay counsel fees, but made no award for the support of the plaintiff and her child, with the provision that she could make application therefor upon proper notice. From this order the defendant appealed, assigning as error (1) the use of affidavits upon the hearing and the denial to the defendant of the right of cross examination of the affiants; (2) the

denial of his motion to take the deposition of physicians who had treated the plaintiff; (3) the authority of the resident judge, sitting in chambers, to determine the custody of the child; and (4) the refusal of the Court to permit defendant's attorneys to see the notes of one of the plaintiff's witnesses.

The evidence at the hearing will be further summarized and the legal positions of the parties considered in the opinion.

Hudson, Ferrell, Petree, Stockton, Stockton and Robinson by Dudley Humphrey and W. G. Smith, attorneys for defendant appellant.

Burney & Burney by John J. Burney, Jr.; Marshall & Williams by Alan A. Marshall, attorneys for plaintiff appellee.

PLESS, J. The order of Judge Mintz relates only to the custody of the little girl, and as is said in *In Re Marlowe,* 268 N.C. 197, 150 S.E. 2d 204, "the control and custody of minor children cannot be determined finally. Changed conditions will always justify inquiry by the courts in the interest and welfare of the children, and decrees may be entered as often as the facts justify." From its very nature the order is temporary, and the exception of the defendant to the use of *ex parte* affidavits is not well taken. He insists that he should be permitted to cross examine the makers of the affidavits which were presented by the plaintiff. This was denied in the discretion of the Court, and in this ruling there was no abuse. Affidavits may be prepared by the attorneys in advance, with some regard for the convenience of the witnesses, and thereby a written record is provided. Should we accept the contentions of the defendant and forbid the use of affidavits and require the presence, examination and cross examination of each of the witnesses at preliminary and temporary hearings and motions pending trial, it would cause serious and unnecessary delay. The ultimate right of cross examination will be afforded the parties at the trial of the cause, and this is within the purview of the Court's decision in *Stanback v. Stanback,* 266 N.C. 72, 145 S.E. 2d 332 and 270 N.C. 497, 155 S.E. 2d 221. We have examined the authorities cited by the defendant in support of his position but find none of them applicable under the conditions of the hearing before Judge Mintz.

The defendant contends that he is entitled to examine the physicians that treated the plaintiff for the illness she alleges in her complaint to have been caused by his conduct. The plaintiff invokes G.S. 8-53 which provides that the relationship between physician and patient is confidential and that under it a physician shall not be

required to disclose any information he acquired in attending a patient which was necessary to enable him to prescribe for the patient. It further provides "the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice." Remembering that Judge Mintz was not "a presiding judge" in that the proceedings did not constitute a trial but merely an inquiry to determine the temporary custody of the child, we are of the opinion that he was not authorized under the proviso quoted above to compel the disclosures sought by the defendant. In fact, the defendant's contention is decided adversely to him in *Yow v. Pittman,* 241 N.C. 69, 84 S.E. 2d 297. In that case the defendant sought an order to take the deposition of a doctor, and upon a hearing before the resident judge at chambers, the application was denied. In affirming this action, Higgins, J., speaking for the Court, said:

> "The statute contemplates a Superior Court in term. As stated in the cases cited, the presiding judge must enter his findings upon the record. This he can do only in term and after hearing. While Judge Rudisill was a Judge of the Superior Court, he was not at the time *the presiding judge of a Superior Court in term.* He had no authority to enter the requested order in Chambers."

In her complaint Mrs. Gustafson made no allegations concerning the treatment given her by any physician. True it is that the defendant adversely examined her and in her testimony she answered the questions of defendant's attorneys with regard to the names of the physicians and the dates and nature of treatment prescribed by each of them. As a result of the information thus elicited by the plaintiff's involuntary appearance for examination, he now seeks to obtain the evidence of the physicians named. The plaintiff through her attorneys has notified the physicians that they have not been released from the confidential character of their association with Mrs. Gustafson and have been forbidden to disclose information gained in that manner; and since no "presiding judge" has found that "the same is necessary to a proper administration of justice," we are of the opinion that the rule stated in *Lockwood v. McCaskill,* 261 N.C. 754, 136 S.E. 2d 67, is applicable:

> "In our view, the proviso in G.S. 8-53 does not authorize a superior court judge, based on the circumstance that he is then presiding in the county in which the action is pending, to strike down the statutory privilege in respect of any and all matters concerning which the physician might be asked at a deposition

> hearing. Doubtless, in practically all personal injury actions the defendant would deem it advisable, if permitted to do so, to examine before a commissioner or notary public in advance of the trial the physician(s) of the injured party to 'evaluate the case' and 'to prepare his defense.' Obviously, if this course were permitted, the privilege created by the statute would be substantially nullified. This practice, if considered desirable, should be accomplished by amendment or repeal of the statute."

It must be recalled that at the trial of the case affidavits will not be admissible and that the witnesses must appear in person. Therefore the fact that in this hearing for a *temporary* purpose the plaintiff used the affidavits of physicians who treated her does not bring into play the proviso of G.S. 8-53.

The defendant further excepts to the failure of Judge Mintz to allow him to inspect the "notes that were relied upon by a witness during his testimony," citing *State v. Carter,* 268 N.C. 648, 151 S.E. 2d 602. However, the facts of that case are quite distinguishable from the situation here. The defendant called Dr. R. H. Fisscher as a witness in his behalf. He testified that he saw Mrs. Gustafson on two occasions and that he took notes relating to them. He stated that he had the notes with him in response to the subpœna served upon him at the behest of the defendant. The defendant then asked that he be permitted to see the notes. Upon inquiry it appeared that the doctor was not using the notes at the time of his examination, although they were in the possession of someone else in the courtroom. Had the doctor been refreshing his memory from the use of his notes as he testified, *State v. Carter, supra,* might be applicable; but the very fact that he had notes somewhere under his control would not require that the defendant be allowed to inspect them. Also, the privileged communication rule extends to writing as well as to oral testimony; and when a paper is of a privileged character and in the hands of a person within the privileged relation, the Court will not compel him to produce the paper. 58 Am. Jur., Witnesses, § 366.

Again emphasizing that all custody orders are temporary in that they are founded upon conditions existing at the time of the hearing, we can see no validity in the defendant's claim that a resident judge in chambers does not have authority to determine custody of a child. There may be seven or eight months between terms in our less populated counties. The welfare and custody of a little child is an urgent matter in which substantial harm can be caused by delay. There is nothing about such proceeding that requires term-time consideration. A jury is not needed — the judge alone decides the question of cus-

tody. Further, both G.S. 50-13 and G.S. 50-16, relating to custody, refer to "the resident or presiding judge of the district," and G.S. 7-65 gives the resident judge and the presiding judge of the district "concurrent jurisdiction in all matters and proceedings where the superior court has jurisdiction out of term" and provides further that in all matters and proceedings not requiring the intervention of a jury, the resident judge shall have concurrent jurisdiction with the presiding judge of the district.

From the record it appears that both the plaintiff and the defendant are of good character and that the court could well have adjudged that both were fit and suitable persons to have the custody of this child. In view of the exceptions taken, we find it unnecessary to further discuss the evidence offered before Judge Mintz. In a three-day hearing he observed both parents, heard their evidence, noted their demeanor and attitude and thereupon made his order.

When the case comes on for trial and the jury has answered the issues within its province, it is to be assumed that the presiding judge will then make further orders respecting the custody of this little girl, although the verdict will not necessarily govern those orders. It is to be hoped that the "polar star" will control the destiny of this unhappy ship of marriage and result in the innocent child coming into a safe and secure harbor.

In the order below we find

No error.

BOBBITT, J., concurring: In my view, G.S. 8-53 confers upon a superior court judge discretionary authority to compel a doctor to disclose the confidential information referred to therein only in a trial or hearing conducted by such superior court judge. Hence, I agree Judge Mintz had no authority to order such disclosure by a doctor at a deposition hearing. I reserve the question, not presented for decision on this appeal, as to whether a superior court judge, when conducting a custody hearing, either at term or in chambers, is a presiding judge within the meaning of G.S. 8-53. In such case, the superior court judge has sole responsibility and authority for decision. Subject to this reservation, I concur.

FRED PAUL WOODY v. CATAWBA VALLEY BROADCASTING COMPANY.

(Filed 12 January, 1968.)

1. Libel and Slander § 2—

A false charge that one has been arrested for a crime is libelous *per se*.

2. Same—

Words imputing a violation of the liquor laws are actionable *per se*.

3. Libel and Slander § 14—

Plaintiff's evidence was to the effect that a news broadcast over defendant's radio station recited that plaintiff had been arrested by Federal agents and charged with violation of the prohibition laws, that plaintiff's wife notified defendant that plaintiff was on a business trip in another state at the time of the alleged offense and requested that the publication not be repeated, that defendant refused to withdraw the item unless the agents repudiated the story, and that the publication was repeated that evening. *Held:* The evidence is sufficient to be submitted to the jury in plaintiff's action for libel.

4. Same—

Evidence relating to the making of a retraction or an apology is a matter of defense and is not to be considered on motion to nonsuit in an action for libel or slander.

5. Libel and Slander § 16—

Punitive damages are not recoverable as a matter of right in an action for libel or slander but may be awarded as punishment for intentional acts which are wanton, wilful and in reckless disregard of plaintiff's rights.

APPEAL by plaintiff from *Riddle, S.J.*, April 17, 1967 Civil Session, CATAWBA Superior Court.

In this civil action, the plaintiff, in short summary, alleged: He is a citizen and resident of Burke County. The defendant is a corporation operating a radio broadcasting station located in Hickory. Its broadcasts are heard throughout Catawba, Burke and other nearby counties.

At 12:30 p.m., May 11, 1966, the defendant, over its station, broadcast this announcement: "A Hildebran man, Fred Paul Woody, was reportedly arrested last night by A. T. T. U. agents in Mecklenburg County and charged with violation of the prohibition laws. Woody was allegedly picked up in a 1954 Chevrolet containing 140 gallons of illicit liquor." The plaintiff's wife, hearing of the broadcast, and ascertaining her husband was on his freight run to Pennsylvania, so advised the defendant and requested that the item not be repeated. Notwithstanding the advice, request and information that the plaintiff was not involved, the defendant repeated the announcement at its 6:00 p.m. broadcast. These broadcasts were false and defamatory. The second was malicious and the result of gross

negligence after the defendant was put on notice the charges were false, and a careless and reckless indifference to the plaintiff's rights. The plaintiff's good character and reputation were injured and he was humiliated and damaged by the false broadcast. Although the defendant was informed the charges were false, notwithstanding that information, repeated the broadcast charging that the plaintiff was transporting 140 gallons of illicit liquor — a felony under the federal laws and a misdemeanor under state laws.

The plaintiff served notice and demand for correction, etc. as required by G.S. 99-1(a)(b); neither retraction nor apology was offered. A copy of the demand was attached to the complaint.

The defendant filed answer, admitting broadcasting the item quoted above, both at its 12:30 and 6:00 p.m. broadcasts. The answer contained this admission: "X. It is admitted that the statement contained in said broadcasts concerning the plaintiff was not true." The defendant alleged "that the defendant's action in broadcasting said statement was due to a natural and honest mistake" and upon ascertaining the mistake, the defendant, in four subsequent broadcasts, made "a full and fair correction, apology and retraction". The parties stipulated:

> "5. That on May 11, 1966, at or around 12:30 p.m., an agent or employee of the defendant, acting within the scope and course of his agency or employment, broadcast over defendant's radio station in the course of its regular operation the following announcement:
>
> * * *
>
> 6. In addition to the broadcast covered by Stipulation No. 5, another identical broadcast was made by an agent or employee of the defendant, acting within the scope and course of his agency or employment and in the regular operation of the defendant's radio station at or around 6:00 p.m. on May 11, 1966, and that this was the only subsequent broadcast of the message."

The plaintiff introduced copy of the defendant's correction of the error:

> "Yesterday, you heard a news story on this station that a Hildebran man, Fred Paul Woody, had allegedly been arrested by A. T. T. U. agents in Mecklenburg County on violation of prohibition law charges.
> Today we were able to reach the officer in Charlotte, who was involved in the case, and found that THIS IS NOT TRUE. The Charlotte A. T. T. U. agent said that a car, bearing a license

tag listed to Fred Paul Woody, was stopped and 140 gallons of liquor was confiscated.
The officer further stated, however, that no arrests were made and the tag was apparently stolen from Mr. Woody's car, while parked in Cherryville where he works.
As a result of further investigation, we have learned that Mr. Woody was in Pennsylvania, at the time, and knew nothing of the liquor or the car, which was stopped."

The plaintiff's wife testified a friend called her and repeated the news broadcast. She called the plaintiff's employer, Carolina Freight in Charlotte. She was told the plaintiff checked out at 9:00 on May 10 and was on the road. Thereafter, she called the defendant:

"I called the WHKY office and got Mr. Whitener on the telephone at about 4:15 or 4:30. I asked Harold, I told him what Mrs. Buchanan had said. I asked him if he knew anything about it. He said, 'Let me go get the paper.' The news was on that day. He got the paper and he said, 'Here is something about it.' He didn't even connect it with Fred at the time. I asked him to read it to me, and he read it to me. I asked him to read it to me, so he did. And I kept saying over and over, 'Well, I don't understand it.' And I definitely told him Fred was in Pennsylvania, I did not say he is supposed to be. I knew definitely he was not hauling the whiskey. I said, 'Please don't report that, Harold, until you know something definite.' Harold said, 'I have to report it.' I said, 'Well, who could I call to find out anything about it.' I said 'Could I call Sheriff Oakes?' And he said that I could call. He did not know whether he would know anything. He said, 'If you call the A. T. T. U. office in Charlotte or some reliable source calls me and tells me that this is not true, I won't report it any more; otherwise I have to.' And that was all that was said.
Thereafter, I did listen to the radio at 6:00 and I did hear it broadcast. I was in my car and heard it, I definitely remember. I don't remember word for word because that is hard to do. I definitely remember the last sentence, and I do not remember them saying 'allegedly' and 'reportedly' anywhere in it. They could have. I don't know, but I remember in the last sentence it said Woody was taken into custody, arrested and taken into custody."

At the close of the plaintiff's evidence, the Court granted defendant's motion for nonsuit. From the judgment dismissing the action, the plaintiff appealed.

James O. Cobb, William H. McNair, G. Hunter Warlick for plaintiff appellee.

Patrick, Harper & Dixon by Bailey Patrick and Charles D. Dixon for defendant appellant.

HIGGINS, J. The pleadings and the evidence in this case disclose the news broadcast here involved was first written and later read over the defendant's radio broadcasting station at 12:30 p.m. The broadcast recited the plaintiff was reportedly "arrested last night by A. T. T. U. agents in Mecklenburg County and charged with violation of the prohibition laws. Woody was allegedly picked up in a 1954 Chevrolet containing 140 gallons of illicit liquor." The defendant argues it was justified in broadcasting the news item by reason of the fact the officers in Charlotte had seized a 1958 Mercury automobile whose driver escaped and was not identified. The Mercury evidently carried a license tag which had been stolen from the plaintiff's automobile, the theft reported to the Motor Vehicles Department, and replacement issued months before May 11, 1966.

After the 12:30 publication, plaintiff's wife ascertained plaintiff was on a freight run to Pennsylvania. She so notified the defendant and requested the publication not be repeated. She was told by the agent in charge that if she would get in touch with the officers in Charlotte and have them make a correction, or repudiate the charge, it would be withdrawn from further broadcast, but in the absence of such correction, the broadcast would be repeated. Plaintiff's wife was unable to contact the officers and have them get in touch with the defendant. The defendant repeated the broadcast at 6:00 p.m. This second publication is the gist of the plaintiff's cause of action.

The news item involved plaintiff's arrest by federal authorities for the unlawful possession and transportation of 140 gallons of illicit liquor. 26 U.S.C.A., § 5205(a)(2) makes it unlawful to transport, possess, buy, sell, or transfer any distilled spirits until the container has affixed thereto a tax stamp showing the internal revenue tax has been paid. § 5605 provides for a fine not to exceed $10,000, or imprisonment for not more than five years, or both, for the offense. § 7302 provides for the forfeiture of the vehicle used in the transportation. U.S.C.A., Title 18, § 1 provides: "1. Offenses Classified. Notwithstanding any act of Congress to the contrary (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony."

A charge that one has been arrested for a crime is libelous, *per se*, if false. *Lay v. Publishing Co.*, 209 N.C. 134, 183 S.E. 416. Words

imputing a violation of the liquor laws are actionable *per se. Lynch v. Lyons,* 303 Mass. 116, 20 N.E. 2d 953; 53 C.J.S., Libel and Slander, § 96; *Lancour v. H & G Ass'n.,* 111 Vt. 371, 17 A. 2d 253, 132 A.L.R. 486; 33 Am. Jur., Libel and Slander, § 9. After notice that plaintiff was not involved, the responsibility of verifying the charge would seem to rest on the defendant — to make the verification before it repeated the broadcast.

The question here is whether plaintiff's evidence made out a case for the jury. At this stage, we need not concern ourselves with the question whether the defendant answered plaintiff's demand for the publication of a correction, retraction and apology. These are matters of defense. The burden of establishing them rests on the defendant. They arise only if the plaintiff has made out his case for the jury. *Roth v. News Co.,* 217 N.C. 13, 6 S.E. 2d 882.

The plaintiff's evidence was sufficient to require its submission to the jury on the issues raised by the pleadings. While punitive damages are not recoverable as a matter of right, sometimes they are justified as additional punishment for intentional acts which are wanton, wilful, and in reckless disregard of a plaintiff's rights. We do not weigh the evidence. We discuss it here only to the extent necessary for our decision on the questions of law and legal inference presented by the appeal. What the evidence proves or fails to prove is for the jury.

For the reasons assigned, the plaintiff's evidence made out a case for the jury. The judgment of involuntary nonsuit is

Reversed.

STATE v. ROY E. PORTER.

(Filed 12 January, 1968.)

1. Public Officers § 7—

A *de facto* officer is one who exercises the duties of his office under color of a known and valid appointment or election but who has not conformed to some precedent requirement or condition.

2. Same—

The acts of a *de facto* officer are valid in law in respect to the rights of third persons or of the public.

3. Same; Indictment and Warrant § 6—

The issuance of a warrant by a justice of the peace who had not given bond upon appointment to the office in compliance with G.S. 7-141.1 is the

act of a justice of the peace *de facto*, and the warrant is not subject to collateral attack.

4. Criminal Law §§ 83, 162—

A wife is incompetent to testify against her husband unless the evidence comes within the exceptions of G.S. 8-57, and where the wife is allowed to testify as to matters incriminating to her husband, it is the duty of the court to exclude the testimony notwithstanding defendant's lack of objection, and its failure to do so is reversible error.

5. Criminal Law § 162—

The failure to object in apt time to incompetent testimony will not be regarded as a waiver of objection where the evidence admitted is forbidden by statute.

APPEAL by defendant from *Carr, J.*, August 1967 Session of ALAMANCE.

Criminal action on a warrant charging defendant with assaulting Brenda Walker, a female person, by striking her in the face with his fist, he being a male person over eighteen years of age. From a conviction and sentence of imprisonment by the Municipal Recorder's Court in Burlington, defendant appealed to the Superior Court where he was tried *de novo*.

Plea: Not guilty. Verdict: Guilty as charged in the warrant.

From a sentence of imprisonment, defendant appeals to the Supreme Court.

Attorney General T. W. Bruton and Assistant Attorney General George A. Goodwyn for the State.

John D. Xanthos for defendant appellant.

PARKER, C.J. Defendant contends that the warrant upon which he was tried was issued by a justice of the peace and was void, because the justice of the peace at the time of the issuance of the warrant had not given a bond as provided by G.S. 7-114.1. Subsection (a) of that statute reads as follows:

> "(a) Amount and Conditions; Premiums. — Every justice of the peace shall, before exercising any of the functions of his office, furnish a bond, either corporate or personal, with good and sufficient surety, approved by the clerk of the superior court, in the amount of one thousand dollars ($1,000.00) payable to the State of North Carolina and conditioned upon the faithful performance of his duties and upon a correct and proper accounting for all funds coming into his hands by virtue or color of his office. Premiums on such bonds shall be paid by the justice of the peace concerned."

Subsection (b) of that statute reads as follows:

> "(b) Penalty for Violation. — Any person exercising any of the official functions of a justice of the peace without having first complied with the provisions of this section shall be subject to a penalty of one hundred dallors ($100.00) for every such violation, such penalty to be recoverable in a civil action by any taxpayer of the county in which such violation occurs."

The justice of the peace who issued the warrant in this case was Daniel S. Walker. The record shows that he was duly appointed to the office of justice of the peace for a term of one year beginning on the 1st day of April 1967 and ending on the 1st day of April 1968. The affidavit upon which the warrant was issued was sworn to and subscribed before Daniel S. Walker, justice of the peace, on 15 June 1967, and the warrant was issued by him on the same day. Walker filed his official bond as a justice of the peace on 19 June 1967 at 11:30 a.m., approximately four days after the issuance of the warrant. This being true, Daniel S. Walker was a *de facto* justice of the peace under the rule that a person is a *de facto* officer where the duties of the office were exercised "under color of a known and valid appointment or election, but where the officer failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like." *S. v. Lewis,* 107 N.C. 967, 12 S.E. 457, 13 S.E. 247, 11 L.R.A. 105; *Hinson v. Britt,* 232 N.C. 379, 61 S.E. 2d 185. The words in quotation marks set forth in *S. v. Lewis, supra,* are quoted from the scholarly and exhaustive opinion by Chief Justice Butler of the Supreme Court of Connecticut in the leading case of *S. v. Carroll,* 38 Conn. 449, 9 Am. Rep. 409.

A comprehensive definition of a *de facto* officer is found in *Waite v. Santa Cruz,* 184 U.S. 302, 323, 46 L. Ed. 552, 566, as follows:

> ". . . A *de facto* officer may be defined as one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper. When a person is found thus openly in the occupation of a public office, and discharging its duties, third persons having occasion to deal with him in his capacity as such officer are not required to investigate his title, but may safely act upon the assumption that he is a rightful officer."

The same general idea has been expressed by this Court in *S. v. Lewis, supra.*

The acts of a *de facto* officer are valid in law in respect to the

public whom he represents and to third persons with whom he deals officially. *In re Wingler,* 231 N.C. 560, 58 S.E. 2d 372; *Hinson v. Britt, supra.*

We held as far back as 1844 in an opinion bearing the illustrious name of Chief Justice Ruffin in the case of *Gilliam v. Reddick,* 26 N.C. 368, as correctly summarized in the headnote, as follows:

> "The acts of officers *de facto,* acting openly and notoriously in the exercise of the office for a considerable length of time, must be held as effectual, when they concern the rights of third persons or the public, as if they were the acts of rightful officers."

In *State of Delaware v. Ronald D. Pack* (Superior Court of Delaware), 188 A. 2d 524, the Court held, under a statute substantially similar to our G.S. 7-114.1, as correctly summarized in the second headnote, as follows:

> "A party who was properly appointed to office of justice of the peace under a valid certificate of appointment under which he took office and exercised powers thereof openly and notoriously for about two months was a *de facto* officer, and his official act in hearing and disposing of charge against defendant of operating an automobile at an excessive rate of speed could not be attacked collaterally by defendant through motion to dismiss the information on ground such party was not a justice of the peace on date of the trial in that he had failed to file statutory bond."

In *People v. Payment,* 109 Mich. 553, 67 N.W. 689, the Court held, as correctly summarized in the first headnote in the North Western Reporter series:

> "Notwithstanding How. Ann. St. § 649, providing that every office shall become vacant on the neglect of the officer to deposit his oath of office or official bond in the manner and within the time prescribed by law, a justice of the peace is a *de facto* officer, though he does not file his oath of office and bond within the time stipulated by sections 767-769."

See to the same effect: *Canty v. Bockenstedt,* 170 Minn. 383, 212 N.W. 905; *Cox v. State* (Criminal Court of Appeals of Oklahoma), 206 P. 2d 1005.

In *In re Wingler, supra,* the Court said:

> "For all practical purposes, a judge *de facto* is a judge *de jure* as to all parties other than the State itself. His right or

title to his office cannot be impeached in a *habeas corpus* proceeding or in any other collateral way. It cannot be questioned except in a direct proceeding brought against him for that purpose 'by the Attorney-General in the name of the State, upon his own information or upon the complaint of a private person,' pursuant to the statutes embodied in Article 41 of Chapter 1 of the General Statutes. So far as the public and third persons are concerned, a judge *de facto* is competent to do whatever may be done by a judge *de jure*. In consequence, acts done by a judge *de facto* in the discharge of the duties of his judicial office are as effectual so far as the rights of third persons or the public are concerned as if he were a judge *de jure*. The principles enunciated in this paragraph arose at common law, and have been accorded full recognition in this State. (Citing numerous authority.)"

It cannot be gainsaid that Daniel S. Walker was at least a justice of the peace *de facto* when he issued the warrant in the instant case. The Court in *In re Wingler, supra,* further said:

"The *de facto* doctrine is indispensable to the prompt and proper dispatch of governmental affairs. Endless confusion and expense would ensue if the members of society were required to determine at their peril the rightful authority of each person occupying a public office before they invoked or yielded to his official action. An intolerable burden would be placed upon the incumbent of a public office if he were compelled to prove his title to his office to all those having occasion to deal with him in his official capacity. The administration of justice would be an impossible task if every litigant were privileged to question the lawful authority of a judge engaged in the full exercise of the functions of his judicial office."

The issuance of the warrant in this case was effectual in law, for Daniel S. Walker was at least a justice of the peace *de facto* when he issued the warrant. His issuance of the warrant cannot be collaterally attacked, because the acts done by him as a justice of the peace *de facto* in issuing this warrant are as effectual so far as the rights of third persons or the public are concerned as if he were a justice of the peace *de jure*. The *de facto* doctrine was introduced into the law as a matter of policy and necessity, to protect the interests of the public and individuals, where those interests were involved in the official acts of persons exercising the duties of an office, without being lawful officers. The public cannot reasonably be compelled to inquire into the title of an officer, nor be compelled to show

a title, and these have become settled principles in the law. In 1461, on the accession of Edward IV, Parliament declared the previous Henrys of Lancaster usurpers, but to avoid great public mischief, also declared them Kings *de facto*, and persons were punished in that reign for treason to Henry VI, not in aid of the lawful claimant of the crown. 1 Blackstone's Commentaries (reprint of the first edition, London, 1966) 197. Defendant's contention that the warrant in this case was void because the justice of the peace at the time of the issuance of the warrant had not given a bond as provided by G.S. 7-114.1 finds no support in our decisions, or in the law elsewhere, and is untenable.

A study of the record shows that the State offered plenary evidence sufficient to carry the case to the jury.

Defendant assigns as error that defendant's wife, Betty Porter, was called by the State as a witness and testified against him as follows:

> "That her name is Betty Porter and she is the wife of the defendant; that they have been married six years; that they were married April 1; that she was at home when the defendant was accused of assaulting her sister; that she saw what happened."

By the provisions of G.S. 8-57 defendant's wife was not competent as a witness to testify against him in this trial except to prove the fact of marriage and in other respects not material here. *S. v. Cotton*, 218 N.C. 577, 12 S.E. 2d 246; *S. v. Dillahunt*, 244 N.C. 524, 94 S.E. 2d 479. The defendant was not represented by counsel in his trial in the Superior Court and did not except to his wife's testimony. In this Court he is represented by counsel and he excepts to this testimony and assigns it as error. Ordinarily, failure to object in apt time to incompetent testimony will be regarded as a waiver of objection, and its admission is not assignable as error, but this rule is subject to an exception where the introduction or use of the evidence is forbidden by statute as here by the provisions of G.S. 8-57. When the evidence rendered incompetent by statute was admitted, it became the duty of the trial judge to exclude the testimony, and his failure to do so must be held reversible error whether exception was noted or not. *S. v. Warren*, 236 N.C. 358, 72 S.E. 2d 763.

While the testimony of defendant's wife does not contain a direct and positive statement of guilt on the part of her husband, the inference is unmistakably incriminating and harmful.

For the admission in evidence of the testimony of defendant's wife, defendant is entitled to a

New trial.

STATE v. GRAYSON R. DAVIS AND ALBERT GARRANT SMITH.

(Filed 12 January, 1968.)

1. Burglary and Unlawful Breakings § 10—

Evidence of the State tending to show that the defendants were observed at midnight at the door of a post office, that the defendants ran at the approach of two officers, and that one defendant dropped at the rear of the building a brown bag containing two screwdrivers, a cold chisel of more than ordinary length, a punch and a wood chisel, *held* sufficient to be submitted to the jury on the issue of defendant's guilt of possessing implements of storebreaking without lawful excuse.

2. Criminal Law § 9—

Where two or more persons aid or abet each other in the commission of a crime, all being present, all are principals and equally guilty without regard to any previous confederation or design.

3. Burglary and Unlawful Breakings § 10—

In a prosecution under G.S. 14-55 the burden is upon the State to show that the accused had in his possession implements of housebreaking within the purview of the statute and that the possession of such implements was without lawful excuse.

4. Criminal Law § 104—

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 inference to be drawn therefrom.

5. Criminal Law § 166—

Assignments of error not brought forward and discussed in the brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

6. Criminal Law § 158—

When the charge of the court is not in the record, it will be presumed that the court correctly instructed the jury with respect to the law and to the evidence.

APPEAL by defendants from *Carr, J.*, 7 August 1967 Criminal Session of ORANGE.

Criminal prosecution on an indictment that charges defendants on 5 April 1967 with unlawfully, wilfully, and feloniously having in their possession, without lawful excuse, implements of storebreaking, to wit, a cold chisel, a wood chisel, a screwdriver, and a crowbar, a violation of G.S. 14-55.

Defendants, who were represented at the trial by their lawyer, A. B. Coleman, Jr., entered pleas of not guilty. Verdict as to each defendant: Guilty of possession without lawful excuse of implements for storebreaking as charged in the indictment.

From a judgment of imprisonment as to each defendant, each defendant appeals.

Attorney General T. W. Bruton, Deputy Attorney General Harrison Lewis, Trial Attorney Charles M. Hensey, and Staff Attorney Charles W. Wilkinson, Jr., for the State.

Alonzo B. Coleman, Jr., for defendant appellants.

PARKER, C.J. It appearing to the trial court that both defendants were indigents, the trial court entered an order that the County of Orange should pay the court reporter for furnishing a transcript of the evidence to their counsel and pay the cost of mimeographing their case on appeal and their brief in the Supreme Court. In the Supreme Court the defendants are represented by their trial counsel, A. B. Coleman, Jr.

The State introduced evidence; defendants offered no evidence. The sole assignment of error brought forward and discussed in defendants' brief is that the court erred in denying their motion for a judgment of compulsory nonsuit made at the close of the State's evidence.

The State's evidence tends to show the following facts: A few minutes before midnight on 5 April 1967 defendants were seen by two deputy sheriffs of Orange County "right up at the Post Office door" in the village of Efland. The post office was closed at that time of night. The two deputy sheriffs were in an Orange County patrol car and were checking out stores and places of business in Efland. When they first saw the defendants they were about 150 feet from them. They threw the hand light on them. The front of the post office was lighted, and the rear was lighted by a light from the F. & F. Supermarket which joins the post office building. The officers drove immediately to the building. They saw a sack or a brown bag under defendant Smith's arm. Evidently the defendants saw them approaching because "they went at almost a run" around the post office building. Defendants were out of the officers' sight momentarily, or "a matter of a second or so." When the officers got around to the back of the post office, the defendants were standing there without anything under their arms, and the sack or brown bag was not in sight. The officers asked them what they were doing at the post office. Defendants said they pulled into the place and went back to relieve themselves. About ten minutes later one of the officers found within two or three feet of the back door of the post office a sack or brown bag right up against the side of the building. It was about 12 or 15 feet from the back door to where the defendants were standing when the officers stopped them. This sack or brown bag contained two screwdrivers, a longer than ordinary cold chisel which can be used as a pinch bar or crowbar, a punch, and a wide faced chisel or wood chisel which can also cut through cement blocks when

one is prizing around a door. They were wrapped in cloth. The long chisel was sticking out of one end of the bag. These instruments can be purchased at any hardware store. Defendants denied having these instruments in their possession. Defendant Smith said that an automobile on the west side of the building belonged to his niece and that he had driven the car up there, but he did not have his driver's license. The next day a .32 automatic pistol was found by a third deputy sheriff under a compressor unit on the south side of the post office. The pistol was lying up against the post office building, and it was chipped on cement.

It is hornbook law in this jurisdiction that in considering a motion to nonsuit in a criminal action 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 to be drawn therefrom. Considered in that light, the State's evidence would permit, but not compel, a jury to find these facts: About midnight on 5 April 1967 defendants came to the post office in the village of Efland; that they were seen right up at the post office door; that the post office was closed at that time; that when the defendants became aware of the officers approaching in the patrol car they went "at almost a run" around to the rear of the post office, Smith carrying in his right hand a sack or brown bag; that defendants were out of the officers sight momentarily, or "a matter of a second or so"; that when the officers reached the back of the building they found up against the back of the post office a sack or brown bag containing two screwdrivers, a longer than ordinary cold chisel which can also be used as a crowbar, a punch, and a wood chisel which can be used to cut cement; that the defendants were standing about 12 or 15 feet from this sack or brown bag; that the defendants had these instruments in their possession at the front door of the post office when the officers first saw them; that the instruments found in the sack or brown bag were capable of legitimate use, nevertheless the circumstances disclosed by the evidence permitted the reasonable inference that they were intended for use by defendants for the purpose of breaking into the post office; that at that time of the night in front of a closed post office defendants had these instruments in their possession, without lawful excuse, with intent to use them as instruments for breaking into the post office; and that they were acting in concert and were guilty as charged in the bill of indictment.

This Court said in *S. v. Craddock*, 272 N.C. 160, 158 S.E. 2d 25: "It is thoroughly established law in this State that, without regard to any previous confederation or design, when two or more persons

aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty."

In a prosecution under the provisions of G.S. 14-55, upon which the indictment in this case is based, the burden is on the State to show two things: (1) That the person charged was found having in his possession an implement or implements of housebreaking enumerated in, or which come within the meaning of the statute; and (2) that such possession was without lawful excuse. *S. v. Craddock, supra; S. v. Boyd,* 223 N.C. 79, 25 S.E. 2d 456.

S. v. Chavis, 270 N.C. 306, 154 S.E. 2d 340, strongly relied on by defendants in their brief, is factually distinguishable, in that in the *Chavis* case, *inter alia,* the State introduced evidence that defendant said the hat he had been wearing was borrowed and that he had given it back to the fellow to whom it belonged, and in that the hat was found by an officer about four or five feet from where the officer had observed defendant and another man talking. In the instant case no person was seen by the officers at the post office in Efland near defendants or in the vicinity.

Considering the State's evidence in the light most favorable to it and giving it the benefit of every reasonable and legitimate inference to be drawn therefrom, it is our opinion, and we so hold, that the total combination of facts shown by the State's evidence, even though circumstantial, shows substantial evidence of all essential elements of the felony charged in the indictment and is amply sufficient to carry the case to the jury. *S. v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431. The trial court properly overruled the defendants' motion for judgment of compulsory nonsuit.

Defendants have several assignments of error in the record but as they have not carried them forward and discussed them in their brief they are deemed to be abandoned. *S. v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781; Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783 at 810; 1 Strong's N. C. Index 2d, Appeal and Error, § 45 at 188.

The charge of the court is not in the record. When the charge of the court is not in the record, it will be presumed that the court correctly instructed the jury on every phase of the case, with respect to both the law and the evidence. 1 Strong's N. C. Index 2d, Appeal and Error, § 42 at 185.

In the trial below we find

No error.

MRS. LINDA LASSITER, ADMINISTRATOR OF THE ESTATE OF ROBERT THURMAN LASSITER, DECEASED, v. FLOYD JACKSON WILLIAMS, JR.

(Filed 12 January, 1968.)

1. Automobiles § 17—

The violation of G.S. 20-146 and G.S. 20-148 requiring drivers of vehicles proceeding in opposite directions to stay on the right side of the highway in passing is negligence *per se*, and when an accident results as a proximate cause of the failure of one of the drivers to stay on his right side of the highway, such failure constitutes actionable negligence.

2. Automobiles § 53—

In an action to recover damages for wrongful death resulting from a headon collision between two vehicles traveling in opposite directions, evidence that defendant's car came to rest entirely on plaintiff's intestate's side of the highway, that the two vehicles were locked together by force of the collision, that there was debris under and about each car, but that no skid marks from either car were visible, *is held* sufficient to support the inference that the defendant was traveling in the deceased's lane of travel when the collision occurred, and the issue of negligence was properly submitted to the jury.

3. Automobiles § 78—

In an action for damages for wrongful death resulting from a headon collision, the physical evidence was to the effect that defendant's car came to rest entirely in the deceased's lane of travel, and that deceased's vehicle extended partially across the center line into defendant's lane. *Held:* The evidence is insufficient to support a finding of contributory negligence on the part of the deceased as a matter of law.

4. Negligence § 26—

Nonsuit on the ground of contributory negligence should be allowed only when the plaintiff's evidence, taken in the light most favorable to him, so clearly establishes this defense that no other reasonable inference or conclusion can be drawn therefrom.

APPEAL by defendant from *McKinnon, J.*, 20 March 1967 Civil Session of ORANGE.

This is an action to recover damages for the wrongful death of plaintiff's intestate, Robert Thurman Lassiter, and for property damage.

Plaintiff's intestate died as a result of injuries sustained in a collision between a 1962 Chevrolet automobile driven by him and a 1963 Plymouth automobile driven by the defendant. The collision occurred about 12:30 a.m., 18 December 1963, on U. S. Highway #15-501 between Pittsboro and Chapel Hill, in Chatham County. Each driver was alone in his automobile and there were no other known eye witnesses. Plaintiff's intestate was driving south toward Pittsboro and defendant was driving north toward Chapel Hill.

Plaintiff alleged that defendant was negligent in driving his au-

tomobile in a careless and reckless manner, on the wrong side of the highway, at a high rate of speed, and while under the influence of alcoholic beverages. Defendant denied that he was negligent, pleaded negligence and contributory negligence on the part of plaintiff's intestate, and counterclaimed for personal injuries and property damage.

Plaintiff's case on the issue of negligence is based primarily upon the testimony of a State Highway Patrolman who investigated the accident. He testified substantially as follows: At the point where the collision occurred the highway is straight. Approximately 150 to 200 yards north of the point there is a curve in the highway. To the south of this point there is a knoll over which a car proceeding to the north would pass. The highway was dry. It was a cold and windy evening. The highway at the point of collision is 23 feet and 5 inches wide. When the witness arrived at the scene he found the two automobiles in the right-hand lane for south-bound traffic. Both drivers had been taken to the hospital. The defendant's vehicle was entirely on plaintiff's intestate's side of the highway, headed in a northeasterly direction, its right front wheel two feet to the driver's left of the center line and the right rear wheel five feet nine inches to the driver's left of the center line. The vehicle driven by plaintiff's intestate was headed south, parallel to the center line of the highway, approximately 6 to 8 inches to the driver's left of the center line. This estimate was as to the distance between the center line and inside of the left wheels of the Chevrolet.

The investigating patrolman further testified that he observed debris at the scene of the accident consisting of dirt and mud under each vehicle in the immediate vicinity of the sides, and shattered glass around the front of each vehicle. There were no visible skid marks from either vehicle. There were no skid marks through the debris. The front end of each vehicle was "smashed up very seriously." The Chevrolet was more damaged on the right front than the left front. "There were no tire marks of any sort or skid marks of any other kind whatsoever." The two vehicles appeared to be locked together at the front. A wrecker was hooked to each and after four or five attempts to "jerk" them apart, they broke loose. The witness went to the hospital after completing his investigation and saw plaintiff's intestate who was deceased at that time. He saw defendant several weeks after the accident and talked with him about it. Defendant told him that he had been to a Christmas party in Sanford, had a couple drinks of alcoholic beverage about dinner time, did not drink anything else, and did not remember anything about the accident.

Plaintiff offered the testimony of a deputy sheriff of Chatham

County who assisted in the investigation and report of the accident. His testimony corroborated the highway patrolman. He testified: "There was debris lying immediately under each wheel. There was mud under each wheel base, directly under. There was glass around the front of the automobiles. There were no visible skid marks at all and there were no other kinds of marks in the debris."

The mother of the deceased testified that the defendant visited her in January. Defendant told her that he did not remember anything about the accident. In response to a question from her, defendant stated that he had had a few drinks.

Defendant offered no evidence. His motion for judgment as of nonsuit was denied. Plaintiff's motion for judgment as of nonsuit as to the defendant's counterclaim was allowed. The jury answered the issues of negligence and contributory negligence in favor of the plaintiff and awarded damages. Defendant excepted to and assigned as error the refusal of the court to grant his motion for judgment of nonsuit.

Maupin, Taylor & Ellis by Frank W. Bullock, Jr., for defendant appellant.

Cooper and Winston by Robert E. Cooper for plaintiff appellee.

PARKER, C.J. The sole assignment of error is to the failure of the court below to allow defendant's motion for judgment of nonsuit. Thus, the first question is whether there was sufficient evidence of negligence on the part of the defendant to go to the jury. The pleadings establish the fact that defendant was driving his automobile north toward Chapel Hill at the time and place alleged.

Plaintiff alleged that defendant was negligent, *inter alia,* in driving on the wrong side of the highway. G.S. 20-146 and G.S. 20-148, insofar as they apply to the facts of this case, require motor vehicle operators to drive upon the right half of the highway and to give to drivers of vehicles proceeding in the opposite direction one-half of the main-traveled portion of the highway. "A violation of either of these statutes is negligence *per se,* and, when the proximate cause of injury, constitutes actionable negligence." *Anderson v. Webb,* 267 N.C. 745, 148 S.E. 2d 846. See *McGinnis v. Robinson,* 258 N.C. 264, 128 S.E. 2d 608; *Bondurant v. Mastin,* 252 N.C. 190, 113 S.E. 2d 292; *Wallace v. Longest,* 226 N.C. 161, 37 S.E. 2d 112.

"When a plaintiff suing to recover damages for injuries sustained in a collision offers evidence tending to show that the collision occurred when the defendant was driving to his left of the center of the highway, such evidences makes out a *prima facie* case of actionable negligence." *Anderson v. Webb, supra.*

Evidence that defendant was driving to his left of the center of the highway when this collision occurred is circumstantial, *i.e.*, based on testimony as to the physical facts at the scene. Such evidence may be sufficiently strong to infer negligence and take the case to the jury. *Barefoot v. Joyner*, 270 N.C. 388, 154 S.E. 2d 543; *Anderson v. Webb, supra; Trust Co. v. Snowden*, 267 N.C. 749, 148 S.E. 2d 833; *Yates v. Chappell*, 263 N.C. 461, 139 S.E. 2d 728; *Randall v. Rogers*, 262 N.C. 544, 138 S.E. 2d 248; *Lane v. Dorney*, 252 N.C. 90, 113 S.E. 2d 33; *Etheridge v. Etheridge*, 222 N.C. 616, 24 S.E. 2d 477.

The evidence must be considered in the light most favorable to plaintiff in passing upon a motion to nonsuit. 4 Strong, N. C. Index, Trial, § 21; *Thames v. Teer Co.*, 267 N.C. 565, 148 S.E. 2d 527. When so considered, the evidence here, *i.e.*, the location of the vehicles locked together on the highway, the impact area on the vehicles, the debris on the highway under them, the absence of any tire or skid or other marks either in or outside the debris, is sufficient to support the inference that the collision occurred substantially where the vehicles were found and therefore that defendant was driving approximately in the center of deceased's lane of travel when the collision occurred. Therefore, the evidence was sufficient to go to the jury. *Anderson v. Webb, supra.*

There remains the question of whether nonsuit should have been allowed on the basis of contributory negligence of deceased. The evidence indicates that plaintiff's intestate's vehicle was partially across the center line when the vehicles came to rest locked together at the front with the Chevrolet being more damaged on the right front than the left front. Although this would support an inference of negligence in driving on the wrong side of the highway, there are other equally valid inferences consistent with absence of negligence on the part of the deceased. The force of the impact which was primarily on the right front of deceased's vehicle could have knocked his vehicle across the center line. Deceased may have been taking evasive action such as a person of ordinary prudence would have taken under similar circumstances to avoid a collision, as the law requires a driver to do. *Forgy v. Schwartz*, 262 N.C. 185, 136 S.E. 2d 668; *Henderson v. Henderson*, 239 N.C. 487, 80 S.E. 2d 383.

"Nonsuit on the ground of contributory negligence should be allowed only when the plaintiff's evidence, taken in the light most favorable to him, so clearly establishes this defense that no other reasonable inference or conclusion can be drawn therefrom." *Barefoot v. Joyner, supra; Thames v. Teer Co., supra.* The court ruled correctly in denying defendant's motion for judgment as of nonsuit. The judgment below is

Affirmed.

CARROLL A. PERKINS v. RUTH COOK, JOAN COOK CLAY AND JOAN COOK CLAY, GUARDIAN AD LITEM FOR RUTH COOK.

(Filed 12 January, 1968.)

1. Negligence § 26—

Nonsuit on the ground of contributory negligence is properly granted when plaintiff's own evidence so clearly establishes his negligence as a proximate cause of the injury that no other conclusion is reasonably permissible therefrom.

2. Trial § 21—

On motion to nonsuit, plaintiff's evidence is to be taken in the light most favorable to him, with all discrepancies therein to be resolved in his favor, and giving him the benefit of every favorable inference which can be reasonably drawn therefrom.

3. Automobiles §§ 57, 79—

Plaintiff's evidence tending to show that he approached an intersection along a dominant highway, that he observed defendant's automobile approaching the intersection from a street to his left and assumed from defendant's conduct that she would yield the right of way in compliance with a traffic sign erected for the servient street, but that defendant continued across the intersection without stopping and collided with plaintiff's vehicle, *is held* sufficient to take the issue of defendant's negligence to the jury and insufficient to establish contributory negligence on the part of plaintiff.

4. Automobiles § 19—

A motorist intending to go through an intersection is entitled to assume that all other motorists will observe traffic signs at the intersection requiring them to yield the right of way.

5. Automobiles § 105—

Admission by a *femme* defendant that title to the car driven by the other defendant was registered in her name is *prima facie* proof of ownership and that the driver was the owner's agent, G.S. 20-71.1, and the issue is properly submitted to the jury despite testimony tending to rebut the presumption of agency.

6. Same—

Where there is sufficient evidence of negligence of the operator of a motor vehicle to be submitted to the jury on that issue, evidence that the vehicle was registered in the name of another defendant takes the issue of such other defendant's liability to the jury.

APPEAL by plaintiff from *Latham, S.J.*, at the Regular March 1967 Session of BURKE.

The plaintiff sues for personal injuries and property damages sustained when the motor scooter, owned and operated by him, collided with an automobile driven by Ruth Cook and alleged to have been owned by Joan Cook Clay and maintained by her as a family purpose car. He alleges that Ruth Cook was negligent in that she

operated the automobile without keeping a proper lookout, at a speed in excess of that which was reasonable under the circumstances, and without yielding the right of way to the plaintiff. The answer denies all allegations of negligence by Ruth Cook, denies that Mrs. Joan Cook Clay was the owner of the automobile or responsible for its operation, and pleads contributory negligence by the plaintiff in that he operated a motor scooter at a speed in excess of that which was reasonable under the circumstances, failed to keep a proper lookout, failed to apply his brakes and failed to yield the right of way.

At the conclusion of the plaintiff's evidence, a motion by the defendant for judgment of nonsuit was allowed. From the entry of such judgment the plaintiff appeals, this being the only assignment of error.

The evidence is that the collision occurred at a five-point intersection in the City of Morganton. The plaintiff was proceeding west upon U. S. Highway 70, also known as East Union Street. This is a five lane street, three lanes for traffic headed west and two for traffic headed east. The plaintiff was in the center lane for westbound traffic. Center Street runs north from the intersection, that is, to the plaintiff's right. Huffman Street runs south from the intersection. East Meeting Street runs southwest from the intersection. A traffic island lies in the intersection. Stop signs were erected at the intersection facing traffic coming into it from Center Street and Huffman Street and that proceeding eastwardly on Highway 70 (East Union Street). Traffic moving northeastwardly out of East Meeting Street had the right of way over eastbound traffic on Highway 70 (East Union Street). There was, however, either a stop sign or a "Yield Right of Way" sign on the traffic island for traffic moving from East Meeting Street across the intersection to Center Street, as the Cook vehicle did. Traffic approaching the intersection from the east on Highway 70 (East Union Street), as the plaintiff did, came over a crest of a slight hill about 250 feet east of the intersection and proceeded through it on a gradual curve to its left.

The plaintiff testified that as he approached the intersection, he saw the automobile driven by Ruth Cook approaching the intersection on East Meeting Street in the left lane of that street. The plaintiff had reduced his speed as he approached the intersection and was traveling 10 to 15 miles per hour. Ruth Cook drove into the intersection and started across the westbound lane of Highway 70 (East Union Street) headed for Center Street, without stopping or checking her speed, which was 30 miles per hour. When the plaintiff was 50 feet from the point of impact, Ruth Cook came to and passed the traffic sign on the traffic island. The plaintiff applied his

brakes and further reduced his speed, turning to his right, that is, toward Center Street, but was unable to avoid the collision. The motor scooter struck the automobile at the rear of the right fender. Both vehicles continued for a short distance to the plaintiff's right. The motor scooter stopped just short of the crosswalk across Center Street and the automobile continued a few feet into Center Street. Debris was found in the northernmost lane for westbound traffic on Highway 70 (East Union Street).

Mrs. Joan Cook Clay, called as an adverse witness by the plaintiff, testified that title to the automobile was registered in her name but Ruth Cook, her minor sister, was the owner of it, the title being in Mrs. Clay's name solely for financing purposes. Mrs. Clay had and exercised no control over the operation of the vehicle by Ruth Cook.

Upon allowance of the motion by the defendants for judgment of nonsuit as to the action by the plaintiff, Ruth Cook took a voluntary nonsuit of her counterclaim for property damage.

Byrd, Byrd & Ervin Law Firm for plaintiff appellant.
James C. Smathers for defendant appellees.

LAKE, J. In their brief the defendants concede that the evidence offered by the plaintiff is sufficient to carry the case to the jury on the issue of negligence by Ruth Cook, and that the nonsuit was error unless it can be supported on the ground of contributory negligence by the plaintiff. We are in accord with this conclusion. The defendants do not concede, of course, that the facts with reference to negligence by Ruth Cook are as the plaintiff's evidence indicates, and we do not so suggest, that being a question to be determined by the jury.

A judgment of nonsuit on the ground of contributory negligence is proper only when the plaintiff's evidence establishes his negligence as a proximate cause of the injury so clearly that no other conclusion is reasonably permissible therefrom. Strong, N. C. Index, Negligence, § 26, and cases there cited. It is also well established that upon a motion for judgment of nonsuit the plaintiff's evidence is to be taken in the light most favorable to him, all discrepancies therein are to be resolved in his favor and he must be given the benefit of every inference favorable to him which can be reasonably drawn from his evidence. Strong, N. C. Index, Trial, § 21. So interpreted, the plaintiff's evidence is to the effect that there was a traffic sign upon the island in the intersection requiring Ruth Cook to yield the right of way to the plaintiff. He was entitled to assume that she would do so until a contrary intent by her became apparent,

or should have been apparent to him. *Carr v. Stewart,* 252 N.C. 118, 113 S.E. 2d 18; *Brady v. Beverage Co.,* 242 N.C. 32, 86 S.E. 2d 901; *State v. Hill,* 233 N.C. 61, 62 S.E. 2d 532; Strong, N. C. Index 2d, Automobiles, § 19. According to the plaintiff's evidence, so interpreted, he had slowed down for the intersection and was within 50 feet of the point of impact when the automobile driven by Ruth Cook reached the traffic sign. Her speed, prior to that time, was not such as to put him on notice that she could not or did not intend to stop, as required by that sign, in order to yield the right of way to his motor scooter. His testimony was that he then applied his brakes and turned to his right to avoid the collision. This evidence does not compel the conclusion that the plaintiff was guilty of negligence contributing to his own injury. Therefore, the motion for nonsuit against Ruth Cook should have been denied.

G.S. 20-71.1(b) provides:

> "Proof of the registration of a motor vehicle in the name of any person, firm, or corporation, shall for the purpose of any such action [*i.e.,* action for damages arising out of a collision involving a motor vehicle], be *prima facie* evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment."

The judgment of nonsuit having been improperly entered as to the driver of the automobile, it follows that there was error in nonsuiting the plaintiff's action against Mrs. Joan Cook Clay, the registered owner of the automobile. *Ennis v. Dupree,* 258 N.C. 141, 145, 128 S.E. 2d 231; *Hamilton v. McCash,* 257 N.C. 611, 619, 127 S.E. 2d 214. It is true that the plaintiff's evidence on this point, consisting of the testimony of Mrs. Clay, herself, called as an adverse witness by the plaintiff, is sufficient, if true, to rebut the *prima facie* evidence that Ruth Cook was driving the automobile as her agent. Mrs. Clay testified, however, that the title to the vehicle was registered in her name. Thus, the plaintiff introduced evidence which the statute makes *prima facie* proof that Ruth Cook was driving as agent of Mrs. Clay and in the course of her employment. Discrepancies and conflict in the evidence of the plaintiff do not justify a judgment of nonsuit. Therefore, the judgment of the court below was erroneous as to both defendants.

Reversed.

STATE OF NORTH CAROLINA v. WOODROW BOWDEN

(Filed 12 January, 1968.)

1. Indictment and Warrant § 9—

An indictment is sufficient if it alleges all essential elements of the offense with sufficient particularity to apprise the defendant of the specific accusations against him so as to enable him to prepare his defense and to protect him from a subsequent prosecution.

2. Witnesses § 1—

The competency of a girl who at the time of the trial was seven years old, and at the time of the rape was six years old, is addressed to the sound discretion of the trial court, and where the record discloses that upon the *voir dire* the court inquired into the child's intelligence and understanding and admitted her testimony upon evidence supporting the conclusion of competency, the discretionary action of the court will not be disturbed on appeal.

APPEAL by defendant from *Harry C. Martin, S.J.*, May 22, 1967 Session, GUILFORD Superior Court.

In this criminal prosecution, the defendant, Woodrow Bowden, was charged in this bill of indictment:

STATE OF NORTH CAROLINA GUILFORD COUNTY	SUPERIOR COURT February 27 Criminal Term, AD 1967

The Jurors for the State Upon Their Oath Present, That Woodrow Bowden, late of the County of Guilford, on the 21st day of January AD, 1967, with force and arms, at and in the County aforesaid, unlawfully, wilfully, and feloniously did assault one Diane Marie Williams, a female, age 6 years, a female, and her the said Diane Marie Williams, a female, age 6 years, unlawfully, feloniously, by force and against her will did ravish and carnally know, against the form of the statute in such case made and provided and against the peace and dignity of the State.

/s/ Charles T. Kivett
Solicitor

After the defendant was arrested and upon a showing of indigency, Judge Clark, on April 11, 1967, appointed Perry N. Walker as defense counsel. Upon his demand, the Solicitor furnished information in lieu of a bill of particulars. The Court ordered a special venire. The defendant filed two motions: (1) challenging the validity of the indictment, and (2) challenging the array of the trial jurors summonsed under the writ of venire *facias*. The Court denied

these motions and upon arraignment the defendant entered a plea of not guilty.

When Diane Marie Williams was called as a State's witness, defense counsel challenged her testimony upon the ground of lack of age and understanding sufficient to make her a competent witness. The Court, in the absence of the jury, conducted a detailed *voir dire* examination into the question of Diane's competency to testify and concluded that she qualified as a competent witness. Her testimony was hesitant on certain matters, nevertheless, with respect to the defendant's having assaulted her, and the manner in which he committed the assault, her story was clear and amply sufficient to make out a case for the jury on the charge of rape.

Within a very short time after the alleged assault, the victim was taken to the hospital where Dr. Barker examined her. Here quoted is the material part of Dr. Barker's testimony:

> ". . . I first saw her on the evening of January 21st of this year. I saw her first at the emergency room of the L. Richardson Hospital when I was called to the emergency room to see a child that was bleeding. I examined her at that time and found that she was bleeding rather profusely from the vaginal area, and I couldn't do much with her because she was extremely tender, as you can well imagine. It was necessary to have her put to sleep in order to do a thorough examination.
> Once she was asleep and I could see what was going on, she had a laceration that extended from the entrance to the vagina up to the top part of the vagina and she was bleeding quite profusely. I repaired the laceration and she did well afterwards with no complications."

The defendant, age 26, stepfather of Diane Marie Williams, testified in his own behalf. He denied harming or having caused any of the child's injuries. He admitted that he saw some blood but did not know how Diane Marie sustained the injuries. He left home soon after the victim claimed the assault had occurred. He was arrested at the home of his mother. The defendant's wife, mother of Diane Marie Williams, testified for the defendant and stated that he had been kind and considerate of Diane at all times. She was not at home at the time the assault is alleged to have occurred.

After the defendant was arrested, the officers went to the home, made an examination, and found some clothing and cloths in the bathroom which contained stains which were analyzed and found to be human blood. Whose blood was not disclosed by the evidence.

At the close of the State's evidence and at the close of all the evidence, the defendant's motions to dismiss were overruled. The

jury returned this verdict: "We find the defendant guilty as charged in the indictment with recommendation for life imprisonment." From the Court's judgment in accordance with the verdict, the defendant appealed.

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

Perry N. Walker for defendant appellant.

HIGGINS, J. The challenge to the bill of indictment is not sustained. An indictment is sufficient if it charges all essential elements of the offense with sufficient particularity to apprise the defendant of the specific accusations against him and (1) will enable him to prepare his defense and (2) will protect him against another prosecution for that same offense. The indictment in this case sufficiently charges all essential elements of rape. G.S. 15-153; *State v. Courtney,* 248 N.C. 447, 103 S.E. 2d 861; *State v. Gibbs,* 234 N.C. 259, 66 S.E. 2d 883; *State v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166; *State v. Ballangee,* 191 N.C. 700, 132 S.E. 795.

The exception to the trial jury panel is not seriously relied on by the defendant. The method of selecting the jury followed accepted procedure. The objection based on the introduction of articles of clothing showing blood stains are not deemed of sufficient importance to require discussion. The testimony of the doctor that the child was bleeding when he examined her, together with her testimony as to what caused her injury would seem to render the discovery of blood stains in the home of little significance. The defendant admitted he saw blood stains in the house before he left to go to his mother's home.

The main thrust of defendant's objection to the trial involves the Court finding the victim of the assault was of such mentality and understanding to testify as a witness for the State. Judge Martin conducted a very extensive examination in the absence of the jury. The victim, Diane Marie Williams, age 7 at the time of trial, was examined by the Solicitor and cross-examined by defense counsel. The child's teacher, and the lady police officer who investigated the case, testified as to the child's mental development and her ability properly to answer questions and to explain what happened to her. These witnesses were certain of her mental competency. The trial judge observed the child's demeanor during the *voir dire* examination and cross-examination. The finding by Judge Martin that she was qualified to testify was supported by competent evidence. The question of the victim's competency to testify rested in the sound discretion of the trial court. *McCurdy v. Ashley,* 259 N.C. 619, 131 S.E.

2d 321; *State v. Merritt,* 236 N.C. 363, 72 S.E. 2d 754; *State v. Jackson,* 211 N.C. 202, 189 S.E. 510; *State v. Satterfield,* 207 N.C. 118, 176 S.E. 466.

The evidence was sufficient to support the verdict and judgment. No error.

HARDWARE DEALERS MUTUAL FIRE INSURANCE COMPANY v. GORRELL R. SHEEK.

(Filed 12 January, 1968.)

1. Insurance § 53—

Payment by the insurer to the insured subrogates the insurer *pro tanto* to insured's claim against the tort-feasor causing the damage; where insurer pays the full damages it is subrogated to the entire cause of action and alone may sue; where the sum paid is partial compensation of the damages the insured must bring the suit in his own name; and where the insured refuses to bring the suit, the insurer may bring it and join insured as a defendant.

2. Pleadings § 24; Notice § 1—

If an answer is subject to amendment, the allowance of such amendment is addressed to the sound discretion of the trial court, and where motion for leave to amend is made at term, notice is not required.

3. Parties § 8—

Where an action to recover a loss partially compensated by insurance is brought in the name of the insurer, the court is without authority to allow an amendment to permit the insured to be made an additional party, since, the sole right to sue being in the insured, the court may not allow an amendment amounting to a substitution or entire change of parties.

APPEAL by plaintiff from *Gambill, J.,* April 24, 1967 Session, FORSYTH Superior Court.

The plaintiff, Hardware Dealers Mutual Fire Insurance Company, instituted this civil action against Gorrell R. Sheek to recover the sum of $10,045, the amount the plaintiff paid to its insured, Ogburn Station Furniture and Hardware Store, Inc. as a result of its fire loss on April 5, 1963. The plaintiff alleged the fire loss resulted from the defendant's negligence in starting and leaving unattended a trash fire near the insured store. The sparks from the fire were carried to and ignited the defendant's building adjoining the insured store, and the fire spread to and damaged the insured building and merchandise.

The summons was issued July 24, 1964. The verified complaint was filed that day. On September 4, 1964 (time having been ex-

tended) the defendant filed a verified answer denying negligence. However, on April 24, 1967 the defendant filed the affidavit of Karl G. Williams, President of the insured, stating his company's loss amounted to $12,300 and the amount collected was $10,045, the full amount of the insurance coverage. The defendant did not know the plaintiff had paid only a part of the insured's loss until April 22, 1967. The affidavit and motion to amend the answer were filed on April 24, 1967. The Court permitted the defendant to amend his answer by adding the following:

> "For a FURTHER DEFENSE the defendant alleges that the total fire loss sustained by the insured on April 15, 1963 [*sic*] exceeded the sum of $15,000; that the plaintiff paid to the insured only the sum of $10,045; that, therefore, this action cannot be maintained by the plaintiff insurance company in its own name, but any action against this defendant for the damages alleged in the complaint can be maintained only by the insured, Ogburn Station Furniture and Hardware Store, Inc., and in its name.
>
> The defendant prays that the action be dismissed on the ground that the plaintiff is not the real party in interest and has no cause of action."

On April 24, 1967, the plaintiff filed the following:

> "The plaintiff moves that it be allowed to file an amendment to its complaint adding as a party defendant Ogburn Station Furniture and Hardware Company, Inc. for the reasons stated hereinbelow:
>
> (1) The plaintiff is an insurance company who insured Ogburn Station Furniture and Hardware Company, Inc. against fire loss and paid under its insurance policy the sum of $10,045.00 thereon.
>
> (2) The loss under the aforesaid policy which is the subject of this action was in excess of $10,045.00 amount prayed for in the complaint.
>
> (3) Ogburn Station Furniture and Hardware Company, Inc. has refused to be joined as a plaintiff in a prosecution of an action for negligence against Gorrell R. Sheek.
>
> (4) Ogburn Station Furniture and Hardware Company, Inc. is, under the rules of pleading, a necessary party to this action. WHEREFORE, the plaintiff prays that it be allowed to amend its

complaint to name as an additional party defendant Ogburn Station Furniture and Hardware Company, Inc.
This 24th day of April, 1967."

The Court refused to allow the plaintiff to amend the complaint. In a pre-trial conference, the Court found the plaintiff had paid only a part of the insured's actual loss. The Court entered an order dismissing the action at plaintiff's costs. The plaintiff appealed, assigning errors.

Womble, Carlyle, Sandridge & Rice by W. P. Sandridge, Jr., for plaintiff appellant.

Deal, Hutchins and Minor by Roy L. Deal for defendant appellee.

HIGGINS, J. By proper assignments of error, the plaintiff contends the trial court committed errors of law: (1) by allowing the defendant's motion to amend his answer to allege the plaintiff, having paid only a part of the loss, is not the real party in interest; (2) by refusing to permit the plaintiff to amend the complaint by making the insured an additional party; and (3) by dismissing the action.

Our cases seem to establish the proposition that when an insurer of property pays the insured's loss, he is subrogated to the extent of the payment to insured's claim against the wrongdoer who caused the damage. If the sum paid covers the entire loss, the insurer is subrogated to the entire cause of action and may sue the wrongdoer without making the insured a party. When the insurer pays only a part of the loss, the insured must bring the suit for the entire loss in his own name. He becomes a trustee for the insurer to the extent of the amount the insurer has paid. If the insured refuses to bring the suit, the insurer may sue in its own name, for the amount it has paid, and make the insured a party defendant. The wrongdoer is entitled to have the amount of his liability determined in a single action. *Shambley v. Heating Co.*, 264 N.C. 456, 142 S.E. 2d 18; *Phillips v. Alston*, 257 N.C. 255, 125 S.E. 2d 580; *Burgess v. Trevathan*, 236 N.C. 157, 72 S.E. 2d 231; *Gaither Corp. v. Skinner*, 241 N.C. 532, 85 S.E. 2d 909; *Smith v. Pate*, 246 N.C. 63, 97 S.E. 2d 457.

The defendant, in term, applied for leave to amend his answer two days after he ascertained the plaintiff insurer had paid the full amount of the coverage but had not paid the full amount of insured's loss. The plaintiff does not challenge this contention. The application for leave to amend the answer was addressed to the sound discretion of the trial court. The order allowing the amendment was made in term. Notice was not necessary. *Burrell v. Transfer Co.*, 244 N.C. 662, 94 S.E. 2d 829; *Harris v. Board of Education*, 217

N.C. 281, 7 S.E. 2d 538; *Coor v. Smith,* 107 N.C. 430, 11 S.E. 1089; *Chappell v. Winslow,* 258 N.C. 617, 129 S.E. 2d 101. The Court did not commit error of law in allowing the amendment to the answer.

The answer, as amended, discloses a complete defense to the plaintiff's action. It was not brought by the real party in interest. The plaintiff moved to amend the complaint by making Ogburn Station Furniture and Hardware Company, Inc. a party. In the written motion to amend, the plaintiff alleges the insured's loss exceeded the amount of plaintiff's coverage. When the Court ascertained this fact in the pre-trial conference, the Court concluded the plaintiff could not maintain the action. This Court said, in *Shambley v. Heating Co., supra,* at 458:

> "The defendants have the right to demand that they be sued by the real party in interest and by none other. . . . Having decided the plaintiffs cannot maintain this action, the court, even under its broad power to allow amendment, was without power in this case to permit the addition of a new party whose presence before the court might bring back to life a dead cause of action. 'The court has no authority, over objection, to convert a pending action which cannot be maintained into a new and independent action by admitting a party who is solely interested as plaintiff.' *Graves v. Welborn,* 260 N.C. 688, 133 S.E. 2d 761; *Exterminating Co. v. O'Hanlon,* 243 N.C. 457, 91 S.E. 2d 222. 'Ordinarily, an amendment of process and pleading may be allowed in the discretion of the court to correct a misnomer or mistake in the name of a party. . . . But not so where the amendment amounts to a substitution or entire change of parties.' *Bailey v. McPherson,* 233 N.C. 231, 63 S.E. 2d 559."

The sole right to sue in this case was in Ogburn, the insured whose property was negligently damaged. The plaintiff discharged a part of the loss, but the sole right to sue still remained in Ogburn. The plaintiff had the legal right to demand that the insured assert its claim against the wrongdoer and to hold in trust for it so much of the recovery as was required to reimburse it for the amount paid. In the event the insured refused to prosecute its claim, the insurer could sue both the insured and the wrongdoer.

In denying the motion to amend the complaint by inserting a new party who had the sole right to assert the cause of action against the wrongdoer, the trial court followed the decisions of this Court. The judgment dismissing the action is

Affirmed.

STATE OF NORTH CAROLINA v. PAUL BRUCE RAYNES.

(Filed 12 January, 1968.)

1. Searches and Seizures § 1—

Where testimony on the *voir dire* discloses that evidence is obtained by a search of an automobile with the consent of the owner, a defendant who was merely a passenger in the automobile may not object to the admission of incriminating articles found therein.

2. Larceny §§ 3, 8—

In a prosecution for the larceny of goods of a value of more than $200 and for the felonious breaking and entering of a home, the failure of the court to instruct the jury that they should convict only for misdemeanor larceny if they find the value of the goods stolen to be less than $200 *is held* not erroneous, since larceny in consequence of a felonious breaking and entering is a felony regardless of the value of the property stolen.

3. Criminal Law § 137—

Where there is a general verdict on a bill of indictment containing two or more counts charging distinct offenses, a judgment of imprisonment imposed thereon will be sustained where the punishment does not exceed the statutory maximum on the count which carried the greater punishment.

4. Larceny § 8—

An instruction in a larceny prosecution to the effect that, where a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances will support conviction, *held* not error, since immediately before the challenged instruction the court correctly instructed the jury as to the presumption arising from the possession of recently stolen goods.

APPEAL by defendant from *Braswell, J.*, May, 1967 Regular Criminal Session, WAKE Superior Court.

In this criminal prosecution, Paul Bruce Raynes, Calvin Sylvester Winslow and Polly Lane were indicted in a two count bill charging: (1) the felonious breaking and entering into the home of H. S. Tutor on Highway 55 near Fuquay in Wake County; (2) the felonious stealing, taking and carrying away certain specifically described articles, including cigarette lighters, strand of pearls, two watches, one razor, one pillowcase and a great number of nickels, dimes, quarters, half-dollars and dollars contained in a piggybank and in a glass jar, of the total value of $541.75.

The State's evidence disclosed that the H. S. Tudor home near Fuquay was broken into on Saturday, November 5, 1966, at some hour between 12:30 p.m. and 8:30 p.m. The lock on the door had been broken, a cedar chest had been forced open, the contents of three closets dumped on the floor, and the beds upset. Missing from the home were $400 to $450 in coins. The other missing articles had a value of $300 to $350.

Upon arraignment the State took a nol pros as to Winslow and Lane. Winslow testified as a State's witness. According to his story, he came to Cary from his home in Elizabeth City. The defendant Raynes and his two friends, Joe Pinyatello and William Edward Hill, left the home of one Barber, together in Hill's automobile, at about 7:00 p.m. on November 5. At about 10:00 that night, Raynes called witness at the Barber home and requested witness meet him at Fuquay. Witness and Mrs. Lane, in her car with witness driving, finally around 10:00 in the morning, picked up Raynes and Pinyatello. Following Pinyatello's instructions, witness left the highway and drove over a dirt side road to a point where Pinyatello instructed the witness to stop. Pinyatello left the automobile, crossed the road, and picked up a pillowcase with a number of articles in it. The parties went to the Barber home to divide the contents, consisting of coins, one, or possibly two, watches, cigarette lighters, a razor, and a strand of pearls. Raynes and Pinyatello divided up the contents of the pillowcase and Raynes took one share. Pinyatello took one share for himself and one for Hill.

The pillowcase and one of the watches were positively identified as having been taken from the Tutor home. The pearls and the other articles fitted the description of the articles missing from the home. Officers found the pillowcase and the Hamilton watch in the automobile in which appellant was riding. The vehicle belonged to Mrs. Lane. Winslow was driving.

On the morning of November 7, near Fuquay, officers arrested Raynes, Winslow and Polly Lane in Mrs. Lane's automobile. They searched the trunk of the automobile and found the pillowcase, a wedding band, a three-strand set of pearls (the pearls in Mrs. Lane's purse), a Norelco razor and about $300 in silver, "mostly half-dollars, quarters, nickels and dimes".

The State took a nol pros as to Winslow and Lane. The defendant, through court appointed counsel, entered a plea of not guilty. After hearing the evidence, including the evidence of Winslow, the jury returned this verdict: "Guilty of breaking and entering and larceny as charged in the bill of indictment". The Court imposed a prison sentence of 3 to 5 years. The defendant appealed.

T. W. Bruton, Attorney General; Ralph Moody, Deputy Attorney General, for the State.

Douglas F. DeBank for defendant appellant.

HIGGINS, J. The appellant's Assignments of Error No. 1, 2, 3 and 4 involve (1) the Solicitor's leading questions; (2) the Court's permitting Tutor to testify about, and identify certain stolen articles

because they were not set out in the bill of indictment; (3) the same objection with reference to the testimony of the State's witness Winslow, and (4) the introduction in evidence of an unidentified Hamilton watch, although the owner testified he recognized it because of certain scratches on the case. These assignments of error are without merit. Likewise, Assignment of Error No. 6, based upon the failure to direct a verdict of not guilty, and No. 9 for failure to set the verdict aside, are without merit.

By Assignment of Error No. 5, the appellant challenges the admissibility of the articles found in the Lane automobile at the time appellant and Winslow and Mrs. Lane were arrested. The ground for the objection is the lack of authority to make the search. The appellant was a passenger in the vehicle. He was neither the driver nor the owner. The Court, on the *voir dire,* heard evidence and ruled the search was consented to by the owner, Mrs. Lane, and that this being so, the search was legal as to all occupants. The evidence supported the finding and the conclusion. *State v. Temple,* 269 N.C. 57, 152 S.E. 2d 206; *State v. Belk,* 268 N.C. 320, 150 S.E. 2d 481; *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506; *State v. McPeak,* 243 N.C. 243, 90 S.E. 2d 501. The case of *Jones v. U. S.,* 362 U.S. 257 is not in conflict. In that case, Jones was in charge of premises searched without a warrant.

The defendant, by Assignment of Error No. 7, alleges the Court committed error in failing to charge on the larceny count that if the jury failed to convict on the breaking and entering count and failed to find the value of the stolen goods exceeded $200, that the jury should convict only of a misdemeanor. The bill charged larceny of goods of the value of $541.75. The evidence disclosed that $400 to $500 in money was taken and other personal property extending the value to $700 to $800. The jury found the defendant "guilty of breaking and entering and larceny as charged in the bill of indictment". Larceny in consequence of a felonious breaking and entering is a felony regardless of the value of the property stolen from the building. *State v. Hagler,* 268 N.C. 360, 150 S.E. 2d 521. When one judgment is entered after conviction of more than one count in a multiple count bill, the judgment will be sustained if the punishment does not exceed that which is permissible on the count which carries the greater or greatest punishment. In this case, either count would support a judgment of imprisonment up to 10 years.

Finally, the defendant contends he is entitled to a new trial because of this instruction: "When a person is found in possession of recent *(sic)* stolen property, slight corroborative evidence of other inculpatory circumstances tending to show guilt will support con-

viction". Immediately before giving the challenged instruction, the Court charged:

> ". . . The presumption that the possessor is the thief which arises from the possession of stolen goods, is a presumption of fact and not of law, and is strong or weak as the time elapsing between the stealing of the goods and the finding of them in the possession of the defendant is short or long.
> This presumption is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of his guilt."

It is the general rule in this State that one found in the unexplained possession of recently stolen property is presumed to be the thief. This is a factual presumption and is strong or weak depending on circumstances — the time between the theft and the possession, the type of property involved, and its legitimate availability in the community. The possession of an unmarked carton of Camel cigarettes, even in a short time after cigarettes have been stolen, in the absence of some further identification, will not be as strong as the possession of a recently stolen pillowcase, a three-strand pearl necklace, a diamond wedding band, a Hamilton watch, and a Norelco electric razor, and several hundred dollars in nickels, dimes, quarters and half-dollars. The possession of these stolen articles on Sunday morning following a breaking on the previous afternoon presents a strong case of circumstantial evidence. Careful review discloses

No error.

STATE v. ROBERT M. HUNDLEY.

(Filed 12 January, 1968.)

1. Indictment and Warrant § 14—

A motion to quash a warrant made for the first time in the Superior Court on appeal from a conviction in an inferior court may be determined by the judge of the Superior Court in his discretion.

2. Indictment and Warrant § 6—

A warrant issued by a desk officer appointed by a chief of police is a void warrant and may not support a criminal prosecution based thereon.

3. Criminal Law § 8—

The issuance of a void warrant in a misdemeanor prosecution does not toll the running of G.S. 15-1, and where on appeal from a conviction upon such warrant in an inferior court defendant is tried upon an identical in-

dictment returned by the grand jury more than two years after the commission of the offense, he is entitled to quashal of the indictment.

APPEAL by the State of North Carolina from *Braswell, J.*, January 16, 1967 Regular Criminal Session of WAKE.

On June 15, 1965, "E. M. Meekins, Desk Officer," issued three purported warrants for the arrest of defendant. Each charged that defendant, in violation of G.S. 105-236(7), by filing a false and fraudulent sales tax return, had wilfully attempted to evade and defeat the collection of sales tax by the State of North Carolina. The returns involved were those filed August 12, 1963, October 15, 1963, and May 14, 1964, for the months of July, 1963, September, 1963, and April, 1964, respectively. The purported warrants were made returnable to the City Court of Raleigh.

On November 5, 1965, after trial in the City Court of Raleigh, defendant was adjudged guilty of the criminal offenses charged in the purported warrants; and, from the judgments pronounced, defendant appealed to the superior court.

At said January 16, 1967 Session, the grand jury returned as true bills three indictments which, in substance, charged defendant with the commission of the identical offenses charged in said purported warrants.

The cases were called for trial in the superior court *upon said bills of indictment.* Before pleading thereto, defendant moved to quash each bill on the ground, *inter alia,* the indictment was returned more than two years after the alleged criminal offense. Thereupon, the State, over objection by defendant, offered in evidence each of the three warrants. Defendant moved to quash said warrants on the ground they were issued by an unauthorized person, to wit, a "Desk Officer."

The court quashed the warrants; and, allowing defendant's motion therefor, quashed the bills of indictment and dismissed the action.

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

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

Vaughan S. Winborne for defendant appellee.

BOBBITT, J. The purported warrants and the bills of indictment charge violations of G.S. 105-236(7), misdemeanors. They allege these criminal offenses were committed by defendant on August 12, 1963, and on October 15, 1963, and on May 14, 1964, respectively, by the filing of false and fraudulent sales tax returns on these dates.

The purported warrants were issued June 15, 1965, within two years after the alleged criminal offenses. The indictments were returned at said January 16, 1967 Session, more than two years after the alleged criminal offenses.

When the solicitor announced the State was proceeding on the indictments, defendant moved to quash on the ground, *inter alia,* that prosecution on said indictments was barred by the statute of limitations.

G.S. 15-1, the pertinent statute of limitations, provides: "The crimes of deceit and malicious mischief, and the crime of petit larceny where the value of the property does not exceed five dollars, and *all misdemeanors* except malicious misdemeanors, *shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards:* Provided, that if any indictment found within that time shall be defective, so that no judgment can be given thereon, another prosecution may be instituted for the same offense, within one year after the first shall have been abandoned by the State." (Our italics.) (Note: G.S. 105-236(7) as amended, effective July 1, 1967, by S. L. 1967, c. 1110, s. 9(a)(2), now provides a special three-year statute of limitations for prosecutions for violations thereof.)

G.S. 15-1 refers to criminal prosecutions based on grand jury action. For the distinction between a presentment and an indictment, see *State v. Morris,* 104 N.C. 837, 10 S.E. 454, and *State v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283, and cases cited. Suffice to say, grand jury action is prerequisite to both. "In criminal cases where an indictment or presentment is required, the date on which the indictment or presentment has been brought or found by the grand jury marks the beginning of the criminal proceeding and arrests the statute of limitations. G.S. 15-1; *S. v. Williams,* 151 N.C. 660, 65 S.E. 908." *State v. Underwood,* 244 N.C. 68, 70, 92 S.E. 2d 461, 463.

G.S. 15-1 contains no reference to warrants. In *State v. Underwood, supra,* it was held "that in all misdemeanor cases, where there has been a conviction in an inferior court that had final jurisdiction of the offense charged, upon appeal to the Superior Court the accused may be tried upon the original warrant and that the statute of limitations is tolled from the date of the issuance of the warrant."

The court, in quashing the indictments and dismissing the actions, ruled correctly unless, as contended by the State, the running of the statute of limitations was tolled by the issuance of the purported warrants.

It does not appear defendant moved to quash the purported warrants in the City Court of Raleigh. However, as in *State v. Matthews,* 270 N.C. 35, 153 S.E. 2d 791, Judge Braswell, in his discretion, per-

mitted defendant to so move for the first time in the superior court. Having elected to entertain defendant's said motions to quash the warrants, Judge Braswell properly ruled, in accordance with *State v. Matthews, supra,* that the warrants should be quashed. Criminal prosecutions cannot be based on void warrants. Doubtless, the solicitor's awareness of the invalidity of the warrants caused him to obtain the bills of indictment and attempt to prosecute thereon.

In *State v. Wilson,* 227 N.C. 43, 46, 40 S.E. 2d 449, 451, Barnhill, J. (later C.J.), states: "At the trial in the Superior Court, on an appeal from an inferior court having exclusive original jurisdiction, the solicitor may amend the warrant, *S. v. Patterson,* 222 N.C. 179, 22 S.E. 2d 267, *S. v. Brown,* 225 N.C. 22, *S. v. Grimes,* 226 N.C. 523, or he may put the defendant on trial under a bill of indictment, charging the same offense, returned in the case. *S. v. Razook,* 179 N.C. 708, 103 S.E. 67; *S. v. Thornton,* 136 N.C. 610; *S. v. Crook,* 91 N.C. 536; *S. v. Quick,* 72 N.C. 241. The appeal vests jurisdiction in the court." In *State v. Razook,* 179 N.C. 708, 103 S.E. 67, Clark, C.J., states: "Whether the solicitor should send a bill to the grand jury and try the defendant upon the indictment, or upon the original warrant, was a matter entirely within his discretion." Application of these well established legal principles presupposes a *valid* warrant. The statute of limitations is not involved in any of the cited cases.

The purported warrants having been declared void, they must be considered void for all purposes. The issuance of such purported warrants does not toll the statute of limitations in respect of criminal prosecutions on bills of indictment.

The conclusion reached is that the attempted prosecutions on said indictments is barred by the statute of limitations. Hence, the action of the court in quashing the bills of indictment and in dismissing the actions is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. CHARLES DEWEY PEEDEN AND MARSHALL JOSEPH JARVIS.

(Filed 12 January, 1968.)

1. Criminal Law § 30—

A solicitor has the authority to prosecute a defendant for a lesser included offense.

2. Courts § 9; Criminal Law § 153—

A Superior Court judge is without authority to vacate an order of another Superior Court judge to the effect that a defendant had abandoned

his appeal, since any error in the first judgment could only be corrected by the Supreme Court.

SHARP, J., did not participate in this decision.

ON *certiorari* to review trial, conviction and sentence imposed at the August 8, 1960 Criminal Term, GUILFORD Superior Court, Greensboro Division.

The record before us discloses that Charles Dewey Peeden and Marshall Joseph Jarvis were indicted, tried, convicted, and sentenced to prison for the second degree murder of Walter Cary Washburn. At the trial, Peeden was represented by attorney Adam Younce. Jarvis was represented by attorney T. Glenn Henderson. After conviction and sentence, both defendants, through counsel, gave notice of appeal to the Supreme Court. The Judge allowed 30 days in which each should serve his case on appeal. Jarvis complied and served his case in time.

At a subsequent term, and after time for filing his case had expired, Judge Gwyn had Peeden brought into court and (in his presence) adjudged that he had abandoned his appeal and ordered commitment issued to put the prison sentence into effect.

The appeal by Jarvis was heard at the 1960 Fall Term of this Court. The decision, finding no error in the trial, is reported in 253 N.C. 562.

On November 1, 1966 Peeden filed in the Superior Court of Guilford County a petition for post conviction review, alleging that in his trial his constitutional rights were violated:

(1) His preliminary hearing before the Justice of the Peace was upon an invalid warrant;

(2) The Grand Jury having indicted him for first degree murder, the Solicitor had no legal right to amend the indictment by reducing the offense to murder in the second degree;

(3) The Court committed error in adjudging he had abandoned his appeal; and

(4) The Court failed to furnish him a transcript of his trial.

Upon the filing of the petition for review, the Superior Court, on March 30, 1967, appointed Blair L. Daily as counsel to represent the petitioner. After hearing, the Court held the petitioner's constitutional rights had been violated by failure to appoint counsel to perfect his appeal. The court ordered (1) the County to furnish a transcript of the trial, and (2) the order dismissing the appeal be

vacated and the appeal to this Court be perfected by his present attorney. Pursuant to our order, the transcript of the trial and assignments of error were filed here at this term and argued on November 21, 1967.

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

Blair L. Daily for defendant appellant.

HIGGINS, J. The defendant's jury trial, about which he complains, was held in August, 1960. Upon failure of the defendant (represented by counsel) to perfect his appeal, Judge Gwyn, in term, and in the presence of the defendant, adjudged he had abandoned the appeal and ordered that commitment be issued to enforce the judgment. That order was not challenged until July 7, 1966 when the defendant filed the petition for post conviction review. We doubt the authority of one Superior Court Judge to reverse another Superior Court Judge holding an appeal had been abandoned. It would seem error, if committed, could only be corrected by this Court. In view of the particular background of this case, we granted *certiorari* and have reviewed the entire record. According to the testimony of Officer Jones, Peeden stated soon after the fight (referring to the deceased Washburn and his companion Eagle), "I cut the hell out of both of them. . . ." The defendants were tried upon a Grand Jury indictment. Hence, any defects in the preliminary hearing are without significance. The Solicitor has power to try for a lesser included offense. *State v. Miller,* 272 N.C. 243. After review, we are unable to find in the record any error of law committed by the trial court.

No error.

SHARP, J., having presided at the trial in 1960, did not participate in this decision.

STATE OF NORTH CAROLINA v. FRANK ZISER LOVELACE, JR.

(Filed 12 January, 1968.)

1. Burglary and Unlawful Breakings § 10—

Evidence of the State tending to show that two defendants were observed at the entrance of a restaurant early one morning, that at the approach of officers one defendant tossed away a screwdriver and hammer, and that the door to the entrance of the restaurant showed evidence of tool marks around the lock, *held* sufficient to be submitted to the jury on

the issue of defendants' guilt of possessing housebreaking implements without lawful excuse.

2. Criminal Law § 9—

A defendant who enters into a common design for a criminal purpose is equally deemed in law a party to every act done by others in furtherance of such design.

APPEAL by defendant from *Bundy, J.*, August 7, 1967 Schedule "A" Session, MECKLENBURG Superior Court.

William Joseph Dixon and the appellant, Frank Ziser Lovelace, Jr., were jointly indicted for the unlawful and felonious possession, without lawful excuse, of certain implements of housebreaking, to wit, a large screwdriver and hammer. At the trial, both defendants entered pleas of not guilty. The State's evidence disclosed this factual situation: At 1:45 on Sunday morning, February 5, 1967, Officers Eidson and Reynolds of the Charlotte Police Department were on routine patrol in an unmarked police car. As they passed Albert's Restaurant a movement near the front door attracted their attention. The lights at the front door were very dim, more so than those at the rear of the building. The officers circled the building and stopped in front. Eidson testified:

". . . I saw Mr. Dixon and Mr. Lovelace right at the entrance door. I drove my car across through the parking lot and pulled in front of the front door with my headlights shining right at the door. The defendants, Dixon and Lovelace, were not more than two feet from this front door.

At the time I pulled up and put my lights on them there by the door, I saw Mr. Dixon throw something through the air. This object landed approximately ten to twelve feet away on the walk in front of the restaurant, about a three foot sidewalk. I went to this object and it was a screw driver approximately 14 or 16 inches in length, and what I called a machinist's hammer, or a ball peen hammer, about average size.

* * *

The front door of this restaurant is an aluminum frame door, made out of aluminum with large plate glass in the door. At that time, I had an occasion to examine the door jamb or door frame, as well as the aluminum door, and I found two small indentations or marks on the side of the door with the lock and latch, approximately even with the door handle and latch. . . ."

The two men were placed under arrest and warned of their constitutional rights. Neither made any statement except on the way to the police station one of them said, "Our car was out of gas. We

were going to get some gas." There was no automobile anywhere near the building. Both men had been drinking.

The defendants did not offer evidence. The jury returned a verdict of guilty as to both. From judgment of three years imprisonment, the defendant Frank Ziser Lovelace, Jr. appealed.

T. W. Bruton, Attorney General; James F. Bullock, Deputy Attorney General, for the State.

Eugene C. Hicks, III, for defendant appellant.

HIGGINS, J. Both Dixon and Lovelace were charged with the felonious possession of implements of housebreaking. Both were at the entrance to the restaurant at 1:45 on Sunday morning. They were within three feet of the front entrance door which, when examined, showed evidence of tool marks around the lock. As the two men became alerted to the presence of the officers, Dixon attempted to prevent the discovery of the large screw driver and hammer, both of which he held, by throwing them away.

The tools, though capable of legitimate use, nevertheless under the circumstances disclosed by the evidence, permitted a legitimate inference they were intended for the purpose of breaking into the restaurant. Obviously, the attempt to hide them tends to show their possession was without lawful excuse. Although the tools were seen in the hands of Dixon only, who did not appeal, nevertheless, if the men were acting together in the attempt to use them to force entry into the restaurant, both in law would be equally guilty of the unlawful possession. This Court said, in *State v. Maynard,* 247 N.C. 462, 101 S.E. 2d 340:

> ". . . 'Everyone who enters into a common purpose or design is equally deemed in law a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any one of the others, in furtherance of such common design.' *S. v. Jackson,* 82 N.C. 565; *S. v. Smith,* 221 N.C. 400, 20 S.E. 2d 360; *S. v. Summerlin* — 'Hole-in-the-Wall' case, — 232 N.C. 333, 60 S.E. 2d 322; *S. v. Anderson,* 208 N.C. 771, loc. cit. 786, 182 S.E. 643; *S. v. Herndon,* 211 N.C. 123, 189 S.E. 173."

The evidence was sufficient to warrant the finding that Dixon and Lovelace were acting together at the time of discovery, shortly after midnight on Sunday morning. Both were together at the dimly lighted door of a closed building. Both had been drinking. After arrest, they were placed in the rear seat of the police car and on the way to headquarters, one of the men volunteered the statement,

"Our car was out of gas. We were going to get some gas." The evidence warranted the finding the men were acting together and although the tools were only seen in the hands of Dixon, yet the evidence warranted the finding that both were there attempting to use them to force entry into the restaurant.

We have reviewed the objections to the charge. When considered contextually, we find it free from valid objection.

No error.

LEWIN D. MITCHELL v. IRA JONES, ALFRED N. GRAY, GLASGOW & DAVIS COMPANY, AND WILLIE LEE RADFORD.

(Filed 12 January, 1968.)

1. Venue § 2—

Where none of the parties to an action for personal injury resides in the State, the suit may be tried in any county designated by the plaintiff; where plaintiff is a nonresident and any defendant is a resident, the action must be tried in the county in which the defendant resides. G.S. 1-82.

2. Venue § 1—

Where plaintiff fails to bring suit in the proper county, defendant waives the right to remove the cause to the proper venue unless he demands in writing before time for answer has expired that the venue be changed. G.S. 1-83.

3. Venue § 7—

When demand for change of venue as a matter of right is made in apt time and in the required manner, the court has no discretion as to the removal.

4. Trial § 29—

When the defendant has asserted no counterclaim and demanded no affirmative relief, the plaintiff may take a voluntary nonsuit as a matter of right at any time before the verdict.

5. Same; Venue § 7— Voluntary nonsuit as to resident defendant deprives nonresident of right to demand change of venue.

Plaintiff, a nonresident, commenced an action in one county to recover for personal injuries; a resident defendant, together with a nonresident defendant, moved as a matter of right and in apt time that the cause be removed to the county of the resident defendant; thereafter, and prior to the hearing on the defendants' motion, plaintiff took a voluntary nonsuit as to the resident defendant, and the motion to change the venue was subsequently denied. *Held:* Plaintiff's voluntary nonsuit as to the resident defendant was properly taken, and the nonresident defendant thereafter had no standing to demand a change of venue as a matter of right.

6. Venue § 8—

The denial of a nonresident's motion to remove the action to another county as a matter of right does not preclude the defendant from thereafter moving that the cause be removed to another county for the convenience of witnesses, but such motion is addressed to the discretion of the court. G.S. 1-83(2).

APPEAL by defendants Jones and Gray from *Copeland, S.J.*, June 1967 Non-Jury Civil Session of WAKE.

Plaintiff commenced this action in Wake County on 8 March 1967 to recover for personal injuries sustained on 11 March 1964 in a highway accident near Lucama in Wilson County. In his complaint, plaintiff, a resident of Maryland, alleges that defendants Jones and Gray are citizens of Virginia; that defendant Radford is a resident of Maryland; and that the Glasgow and Davis Company is a foreign corporation with its principal place of business in Salisbury, Maryland. These allegations were correct except as to defendant Gray; at the time of the institution of the action, he was a resident of Edgecombe County, North Carolina.

On 10 April 1967, defendants Jones and Gray filed a motion, "made as a matter of right," that the cause be removed from Wake County to Edgecombe, the county of defendant Gray's residence. On 18 May 1967, prior to the hearing on the motion, plaintiff took a voluntary nonsuit as to defendant Gray, and the clerk entered a judgment dismissing the action as to him. Thereafter, on the same day, the clerk denied the motion for removal upon the ground that it had become moot, since defendant Gray was no longer a party-defendant.

Defendants appealed to the judge of the Superior Court, who heard the matter *de novo*. G.S. 1-583. Judge Copeland found the facts as detailed above and concluded as a matter of law that the judgment of nonsuit had rendered the motion moot as to defendant Gray and that defendant Jones, a nonresident of this State, had no standing to demand a change of venue. He thereupon denied their motions to remove the action to Edgecombe County. Both defendants excepted and appealed.

Smith, Leach, Anderson & Dorsett by Henry A. Mitchell, Jr., for plaintiff appellee.

Gardner, Connor & Lee by Cyrus F. Lee for defendant appellants.

SHARP, J. If none of the parties to an action for personal injuries resides in the State at the time of its commencement, it may be tried in any county designated by the plaintiff in his summons and complaint. If the plaintiff is a nonresident and any defendant is a

resident of the State, the action must be tried in the county in which that defendant resided at the time suit was instituted. G.S. 1-82. Should, however, the plaintiff not bring the suit in the proper county, the defendant will waive his right to have it tried there unless, before the time for answering expires, he demands in writing that the trial be conducted in the proper county. G.S. 1-83. When demand is made in apt time, and in the required manner, the court has no discretion as to removal. *Casstevens v. Membership Corp.*, 254 N.C. 746, 120 S.E. 2d 94; *Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 71 S.E. 2d 54; *Palmer v. Lowe*, 194 N.C. 703, 140 S.E. 718; *Roberts v. Moore*, 185 N.C. 254, 116 S.E. 728; 1 McIntosh, N. C. Practice and Procedure § 832 (2d Ed. 1956).

Defendant Gray's motion (in which defendant Jones joined) was made in writing. The parties and the court below treated it as having been timely made, and we do likewise. Clearly, but for the judgment of nonsuit, which dismissed defendant Gray from the action prior to the ruling on the motion to remove, he would have been entitled to the change of venue which he demanded. It is the contention of appellants, however, that the Clerk of the Superior Court of Wake County was without power after the motion for removal had been filed "to proceed further in essential matters" until the motion had been determined. This contention has no merit. The taking of the voluntary nonsuit was the act of plaintiff and not that of the court. When the defendant has asserted no counterclaim and demanded no affirmative relief, the plaintiff may take a voluntary nonsuit as a matter of right at any time before the verdict. *Insurance Co. v. Walton*, 256 N.C. 345, 123 S.E. 2d 780; *Sink v. Hire*, 210 N.C. 402, 186 S.E. 494; 4 Strong, N. C. Index, Trial § 29 (1961). "So long as he is merely a plaintiff, the Court has no means by which he can be compelled to appear and prosecute the suit against his will, and no injury can result from allowing him to abandon it." Rodman, J., in *McKesson v. Mendenhall*, 64 N.C. 502, 504.

In *Harvey v. Rich*, 98 N.C. 95, 3 S.E. 912, the plaintiff instituted suit in Lenoir County against Rich, the sheriff of Buncombe County, and three others on a cause of action growing out of a levy upon the plaintiff's stock of goods. The defendants made a motion to remove the case to Buncombe County under § 191 of the Code (now G.S. 1-77). "A *nolle prosequi* was entered by the plaintiff as to the said sheriff." Whereupon the judge refused the motion. Upon appeal, this Court, speaking through Smith, C.J., said: "[T]he *nolle prosequi* having separated them (the defendants) and the officer being no longer in the suit, we see no reason why it may not proceed against the others as if he had never been a party, when done in proper

time. We therefore affirm the judgment, refusing the motion to remove." *Id.* 96-97, 3 S.E. at 912.

It has also been held that a plaintiff is entitled to take a nonsuit at the time of a defendant's application for judgment on the certificate of the Supreme Court reversing an order of the Superior Court denying defendant's motion for a removal as a matter of right. In *Mortgage Co. v. Long,* 206 N.C. 477, 174 S.E. 312, the plaintiff instituted in Wake County an action on a note secured by a deed of trust on land in Forsyth County. As a matter of right, the defendants moved for a change of venue to Forsyth County. The judge's ruling denying the motion was reversed on appeal. Before the opinion was certified to the Superior Court of Wake County, the plaintiff took a voluntary nonsuit before the clerk. Thereafter, without notice to the plaintiff, the judge, who had knowledge of the nonsuit, entered a judgment on the mandate of the Supreme Court in which he directed the clerk to transfer the case to Forsyth County. Immediately thereafter, the defendant filed a counterclaim against the plaintiff, who appealed. This Court, speaking through Stacy, C.J., rendered the following opinion:

"Conceding, without deciding, that the judgment of voluntary nonsuit taken before the clerk was ineffectual, because entered prior to receipt of opinion from this Court . . . still it would seem that plaintiff's counsel was entitled to notice of application for judgment on the certificate, so that nonsuit might then be entered before the judge, if the plaintiff so desired. . . . This right will yet be accorded. Error." *Id.* at 477-78, 174 S.E. at 312 (citations omitted). See *Casstevens v. Membership Corp., supra* at 751, 120 S.E. 2d at 97.

Plaintiff had an absolute right to take a nonsuit as to Gray, who could not complain that the action against him had been dismissed. With Gray removed from the case, it proceeded as if he had never been a party, and defendant Jones had no standing to demand a change of venue to the county of Gray's residence. *Allen-Fleming Co. v. R. R.,* 145 N.C. 37, 58 S.E. 793; *Harvey v. Rich, supra.*

The order of Judge Copeland denying defendants' motion to remove this cause to Edgecombe County is upheld. The defendants who remain in the case, however, still have the right to file a motion to remove the cause to another county for the *convenience of witnesses.* G.S. 1-83(2). Such a motion, if interposed, will be addressed to the discretion of the court. *Teer Co. v. Hitchcock Corp., supra; R. R. v. Thrower,* 213 N.C. 637, 197 S.E. 197; *Riley v. Pelletier,* 134 N.C. 316, 46 S.E. 734.

As to defendant Gray, appeal dismissed.

As to defendant Jones, affirmed.

STEPHEN EUGENE BAYLETT v. IRA JONES, ALFRED N. GRAY, GLASGOW & DAVIS COMPANY, AND WILLIE LEE RADFORD.

(Filed 12 January, 1968.)

APPEAL by defendants Jones and Gray from *Copeland, S.J.*, June 1967 Non-Jury Civil Session of WAKE.

Action for personal injuries.

Yarborough, Blanchard, Tucker & Yarborough for plaintiff appellee.

Gardner, Connor & Lee for defendant appellants.

PER CURIAM: The facts pertinent to this appeal are identical with those stated in the opinion in *Mitchell v. Jones, ante,* p. 499, a companion case. The decision there controls here.

As to defendant Gray,

Appeal dismissed.

As to defendant Jones,

Affirmed.

J. WILEY THOMPSON, PLAINTIFF, v. HUGH D. HORRELL, DEFENDANT.

(Filed 12 January, 1968.)

1. Venue § 5—

The form of action alleged in the complaint determines whether a cause is local or transitory.

2. Same—

An action to recover monetary damages for the breach of a contract to construct a house is not a local action within the purview of G.S. 1-76(1), and the cause may not be transferred as a matter of right to the county wherein the house is located.

3. Same—

An action is local and must be tried in the county wherein the land is located if the judgment to which the plaintiff would be entitled upon the allegations of the complaint will affect the title to the land; otherwise, the action is transitory and must be tried in the county where one or more of the parties reside at the commencement of the action. G.S. 1-82.

4. Venue § 8—

In an action brought by plaintiff in his resident county to recover damages for breach of contract in constructing a house located in another county, it is premature for the court to grant a motion for change of venue for the convenience of witnesses before the defendant has filed any

pleadings, since until the allegations of the complaint are traversed there is no basis for the court to exercise its discretionary power to order change of venue.

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

APPEAL by plaintiff from *Mintz, J.*, 26 June 1967 Regular Civil Non-Jury Session of WAKE.

Plaintiff, a resident of Wake County, instituted this action against defendant, a resident of Carteret County, to recover damages for breach of a construction contract. In brief summary, the complaint alleges:

Defendant agreed to construct — according to plaintiff's plans — a beach house for him at Emerald Isle in Carteret County. Defendant's work did not conform to the plans; his construction was unsightly and unsafe. As a result, plaintiff had to engage another contractor to correct defendant's faulty work and finish the house. Plaintiff is entitled to recover damages in the amount of $1,924.00.

Before the time for answering expired, defendant filed a motion to remove the cause to Carteret County as a matter of right, for that the action involves "rights and interest" in real property located there.

When the motion came on to be heard before Judge Mintz, defendant introduced an affidavit from which it appeared, *inter alia*, that defendant had instituted an action in Carteret County to foreclose a laborer's lien in the amount of $1,361.20, which he had filed against the beach house. After considering the complaint and defendant's affidavit, Judge Mintz, "being of the opinion that this cause ought to be removed," in his discretion ordered a transfer to Carteret County. Plaintiff excepted and appealed.

John V. Hunter, III, for plaintiff appellant.

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

SHARP, J. The form of action alleged in the complaint determines whether a cause is local or transitory. *Blevens v. Lumber Co.*, 207 N.C. 144, 176 S.E. 262. Plaintiff's action is to recover monetary damages for the breach of a contract to construct a house. Its purpose is not to recover real property, not to determine an estate or interest in land, and not to recover for damages to realty. It is not, therefore, a local action within the meaning of G.S. 1-76(1), and defendant is not entitled to have the cause removed to Carteret County as a matter of right. *Casstevens v. Membership Corp.*, 254 N.C. 746, 120 S.E. 2d 94; *Lamb v. Staples*, 234 N.C. 166, 66 S.E. 2d 660; *White v. Rankin*, 206 N.C. 104, 173 S.E. 282; *Warren v. Herrington*, 171 N.C. 165, 88 S.E. 139. The test is this: If the judgment to which

plaintiff would be entitled upon the allegations of the complaint will affect the title to land, the action is local and must be tried in the county where the land lies unless defendant waives the proper venue; otherwise, the action is transitory and must be tried in the county where one or more of the parties reside at the commencement of the action. G.S. 1-82. *Penland v. Church,* 226 N.C. 171, 37 S.E. 2d 177; 1 McIntosh, North Carolina Practice and Procedure § 771 (2d Ed., 1956).

The cause which plaintiff has stated was properly brought in Wake, the county of his residence, and defendant cannot force its removal to Carteret County as a matter of right. The judge, aware of the rule, did not order the case removed as a matter of law but attempted to transfer it in his discretion. His Honor obviously concluded that the ends of justice and the convenience of witnesses would require that this action (begun in Wake County for the breach of a contract to build a house) and defendant's action to foreclose a laborer's lien on the same house (instituted in Carteret County as required by G.S. 1-76) be tried together. Nevertheless, in ordering the removal before defendant had filed his answer, the judge acted prematurely. "[U]ntil the allegations of the complaint are traversed, the occasion for the exercise of discretion will not arise upon the motion for removal for the convenience of witnesses and the promotion of justice." *Indemnity Co. v. Hood, Comr.,* 225 N.C. 361, 362, 34 S.E. 2d 204-05; *accord, Lowther v. Wilson,* 257 N.C. 484, 126 S.E. 2d 50. Furthermore, it is noted that defendant's motion to remove was made as a matter of right under G.S. 1-76 and G.S. 1-83(1). It was not addressed to the court's discretion under G.S. 1-83(2). If so advised, after he has answered the complaint, defendant may yet file a motion to remove the action to Carteret County for the promotion of the ends of justice and the convenience of witnesses. *Teer Co. v. Hitchcock Corp.,* 235 N.C. 741, 71 S.E. 2d 54.

Error and remanded.

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

HARRY RAY EMANUEL, BY HIS NEXT FRIEND, LESLIE EMANUEL, PLAINTIFF, v. SARAH CLEWIS, DEFENDANT.

(Filed 12 January, 1968.)

1. Automobiles § 62—

Evidence of a fourteen year old boy that defendant had invited him and other small children to ride in the bed of a truck, that defendant started

the truck before plaintiff could find a suitable place to sit down, and that within 100 to 150 feet from the starting point defendant reached a speed of from 18 to 20 miles an hour on a bumpy road frequently traveled by defendant, and that the truck struck a deep hole, causing plaintiff to be thrown over the side of the truck, with resultant head injuries, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence.

2. Automobiles § 46—

A fourteen year old boy of superior scholastic ability is competent to give his opinion as to the speed of a motor vehicle in which he is a passenger.

3. Evidence § 33—

Testimony of a witness that the plaintiff was an outstanding student is incompetent as hearsay where it appears that the witness had no personal knowledge of the plaintiff's scholastic record and rank in his class.

4. Trial § 37—

An exception on the ground that the court misstated the contentions of the appellant will not be sustained when the error is not called to the attention of the court in time to afford opportunity for correction.

5. Parent and Child § 4—

In an action to recover for injuries to a minor child, an instruction to the jury that the negligent injury of a minor gives rise to two separate causes of action, one in the child for pain and suffering and for loss of earning capacity after his minority, the other in the father for medical expenses and loss of earnings during minority, *is held* without error.

6. Damages § 16—

In a personal injury action to recover damages sustained by a fourteen year old plaintiff, an instruction to the effect that the jury is not to consider medical expenses and loss of earning capacity during minority in awarding damages to the plaintiff *is held* without error.

7. Appeal and Error § 31—

An exception to the entire charge of the court is a broadside exception and cannot be sustained.

APPEAL by defendant from *McKinnon, J.*, at the July 1967 Civil Session of ROBESON.

The plaintiff sues for personal injuries alleged to have been sustained by him when he fell from the bed of a pickup truck, owned and driven by the defendant, in which he was riding as a passenger. He alleges that his fall was proximately caused by the defendant's negligence in operating the truck upon a rough, unpaved private road without keeping a proper lookout, and at a speed greater than was reasonable under the prevailing conditions, so that she drove it into a hole in the road, thereby causing the plaintiff to be thrown from the bed of the truck to the road, where he landed on his head and sustained injuries. The defendant denies that she was negligent

in the operation of her truck and alleges that, if she was, the plaintiff was contributorily negligent in that he was standing in the bed of the truck when he could have sat therein in safety. The jury answered the issues of negligence and contributory negligence in favor of the plaintiff and awarded him $2,000 in damages. From a judgment upon the verdict the defendant appeals.

The plaintiff testified to the following effect:

On the day before his fourteenth birthday, he was one of a group of children walking on a private road toward their homes from a school bus stop. The defendant, who drove frequently over the road, overtook them driving her pickup truck, she having a passenger with her in the seat of the truck. She invited the children to ride in the truck bed and they all got on, the plaintiff being the last to do so. The other children sat down on the tail gate, taking up all the room on it. While the plaintiff was standing, looking for a seat, with his school books and baseball glove in his arms, the defendant set the truck in motion and drove approximately 100 to 150 feet, reaching a speed of 18 to 20 miles an hour. At that point the defendant's truck struck a deep hole in the road caused by a broken road tile. This threw the plaintiff over the side of the truck onto the road. He fell upon his head and sustained a concussion of the brain and scalp injuries, for which he was hospitalized. He continues to suffer headaches, which he did not have prior to this occurrence. He knew the road was bumpy. He did not ask the defendant to wait and let him find a place to sit down. He did not sit on the floor of the truck because it was dirty. The tail gate, where the other children were sitting with their feet hanging off, was clean. There was nowhere for the plaintiff to sit except on the dirty floor. The plaintiff was among the top ten students in his class at school, making grades of A and B.

The defendant's evidence was to the following effect:

All of the children had gotten on the truck before she put it again in motion. The plaintiff was sitting on the side railing. The defendant proceeded at a speed of between 10 and 15 miles an hour. After driving about 200 yards she glanced in the mirror and noticed one boy had fallen off the truck, none of the children having made any outcry. She went back, assisted the plaintiff to get back in the truck and carried him home, he stating that he had not been hurt and did not wish to go to a doctor. She did not run into the hole caused by the broken road tile but did run into a "little washout." She knew this was a bad road and had bumps in it. For that reason she was driving slowly, 10 to 15 miles an hour. She was talking to her passenger in the cab of the truck and did not see the plaintiff when he fell.

One of the other children, riding in the back of the truck, testi-

fied that when the plaintiff got on the truck he sat down at the side. After the defendant put the truck in motion, the plaintiff stood up. Another child told him to sit down. The plaintiff replied, "It takes a man to stand up on the back of a truck and it going." The truck then hit "a little bump" and the plaintiff fell out over the side. There was plenty of room for the plaintiff to sit down at the place where he was standing when he fell.

The defendant assigns as error the denial of her motion for judgment of nonsuit, certain rulings on the admission of evidence, and portions of the charge of the court to the jury.

Johnson, Hedgpeth, Biggs & Campbell for defendant appellant.
Musselwhite & Musselwhite for plaintiff appellee.

PER CURIAM. The motion for judgment as of nonsuit was properly denied. The evidence of the plaintiff, taken in the light most favorable to him, as it must be upon such a motion, is sufficient to support a finding that the defendant, having invited a group of small children to ride in the bed of her truck, started it before the plaintiff had an opportunity to find a suitable place to sit down and, on a road known by her to be bumpy, reached a speed of 18 miles an hour within 100 to 150 feet from the starting point, and, at that speed, drove into a deep hole causing the truck to jolt and throw the plaintiff out. This is sufficient to carry the case to the jury on the issue of her negligence. A nonsuit on the ground of contributory negligence can be granted only when the plaintiff's own evidence leads inescapably to the conclusion that he was guilty of such negligence. The defendant's evidence tending to show contributory negligence cannot be considered upon the motion for judgment of nonsuit. *Pruett v. Inman*, 252 N.C. 520, 114 S.E. 2d 360. The issues of negligence and contributory negligence were properly submitted to the jury, which answered them in the plaintiff's favor. It is not contended that there was any error in the instructions of the court to the jury concerning the principles of law by which it should answer these issues.

There was no error in permitting the plaintiff to testify as to the speed of the truck. He was standing in the truck bed and was clearly in a position to have an informed opinion as to its speed over the 100 to 150 feet which it traveled before he fell. A fourteen year old boy, shown to have a superior scholastic record, is clearly capable of judging the speed of a motor vehicle in which he is a passenger. See: *Murchison v. Powell*, 269 N.C. 656, 153 S.E. 2d 352; *Lookabill v. Regan*, 247 N.C. 199, 100 S.E. 2d 521; Strong, North Carolina Index 2d, Automobiles, § 46.

It was not error to strike the defendant's testimony that the plaintiff was "an outstanding student." This was a conclusion based upon hearsay, the defendant not purporting to have personal knowledge of the plaintiff's scholastic record or of his rank in his class. In any event, the defendant was not prejudiced by this ruling since the plaintiff, himself, testified that he was one of the top ten students in his class and his grades were A and B. Obviously, he was a better than average student.

We have considered the assignments of error relating to the charge to the jury. Three of these are concerned with the court's statement of the contentions of the parties. The record does not indicate that any of the alleged errors therein were called to the court's attention at the time so as to enable the court to state the contentions correctly. Consequently, these alleged errors are not ground for a new trial. *Rudd v. Stewart,* 255 N.C. 90, 120 S.E. 2d 601.

It was not error to instruct the jury that the negligent injury of a minor child gives rise to two separate causes of action, one in the child for pain and suffering and for loss of earning capacity after his twenty-first birthday, the other in the father for medical expenses and loss of earnings during minority. The jury was properly instructed that in awarding damages to the minor plaintiff it was not to consider such medical expenses or loss of earning capacity during minority. This was not an expression of opinion that the conduct of the defendant was such as to give rise to an action in the father for these losses, but was merely an elimination of these items from the calculation of the damages, if any, recoverable by the plaintiff in this action.

The exception to "the entire charge of the court" is a broadside exception and cannot be sustained. The remaining assignments of error are formal and are without merit.

No error.

STATE v. WILLIE LEE MOSES.

(Filed 12 January, 1968.)

1. Criminal Law § 91—

A motion for continuance is ordinarily addressed to the sound discretion of the trial judge, and his ruling thereon is not subject to review absent an abuse of discretion.

2. Same—

A motion for continuance on the ground that the defendant's cases were called for trial within a few minutes after return of the bills of indict-

ment, *held* properly denied where it appears that the indictments were based upon warrants issued by the recorder's court and that the defendant had at least one week's notice that the cases were calendared for trial and where no affidavit was filed, pursuant to G.S. 1-176, detailing facts asserted as a basis for the motion.

APPEAL by defendant from *Snepp, J.*, 7 August 1967 Schedule "C" Criminal Session of MECKLENBURG.

On Tuesday, 8 August 1967, the grand jury returned six indictments which charged respectively that, on 7 May 1967, defendant was guilty of two offenses of reckless driving, a violation of G.S. 20-140 (cases numbered 50-110 and 50-111); of driving upon the left side of the highway, a violation of G.S. 20-146 (case No. 50-112); of failing to stop upon the approach of a police vehicle giving an audible signal by siren and blue light, a violation of G.S. 20-157(a) (case No. 50-113); of operating a vehicle at a speed of 100 MPH in a 60 MPH zone, a violation of G.S. 20-141 (case No. 50-114); and of unlawfully and feloniously failing to stop his vehicle at the scene of an accident in which he was involved and which resulted in injury to Patricia Baucom Hudson, a violation of G.S. 20-166 (case No. 50-115).

The six cases were consolidated and called for trial on the same day the indictments were returned. Defendant, through his counsel, Mr. T. O. Stennett, moved for a continuance upon the sole ground that the cases were called for trial "within a few minutes" after the bills of indictment were returned. "We feel," said Mr. Stennett, "that we would be within our rights in asking for a continuance in the case." In opposing the motion to continue, the solicitor pointed out to the judge that the calendar for that session had been published one week in advance of the beginning of the term; that it listed each of the charges against defendant; and that Mr. Stennett had received a copy of it. The court denied defendant's request for a postponement, and the State offered evidence which tended to establish the following facts:

About 9:10 a.m. on 7 May 1967, Highway Patrolman D. W. Padgett observed defendant operating a 1962 Ford on Interstate Highway No. 85 at a speed of 70 MPH — 5 MPH in excess of the speed limit. When defendant turned from Interstate No. 85 onto N. C. No. 49, the patrolman followed him. After observing defendant run off the pavement onto the right shoulder, come back onto the hardsurface, and cross the centerline into the lane for opposing traffic, Padgett stopped him and charged him with reckless driving. The officer instructed defendant to follow the patrol car to the county police station so that he could post bond. Instead of following, defendant drove off in the opposite direction at a high rate of speed.

The patrolman gave chase with the blue light on the patrol car flashing and the siren sounding. Defendant ignored these signals to stop and attained a speed in excess of 100 MPH. As he went into a curve, defendant veered to his left of the centerline of the highway and struck an automobile operated by Mrs. Patricia Baucom Hudson which was proceeding in the opposite direction. The Hudson car turned over, and Mrs. Hudson was injured. After the impact, defendant's vehicle continued down the highway approximately 1,056 feet before it hit an oak tree, which stopped it. Defendant was thrown from the car. One of his legs and an arm were broken.

At the close of the State's evidence, the court allowed defendant's motion to nonsuit the felony charge in case No. 50-115 (hit and run). Defendant offered no evidence. In cases Nos. 50-110 and 50-111, the jury found defendant guilty of reckless driving; in cases Nos. 50-112 and 50-113, guilty as charged; in case No. 50-114, guilty of speeding in excess of 80 MPH. The court imposed sentences totaling three years, and defendant appealed. Upon his representations of indigency, the court appointed his trial counsel, Mr. Stennett, to perfect his appeal at the expense of Mecklenburg County.

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

T. O. Stennett for defendant.

PER CURIAM. Defendant's only assignment of error is that the court erred in overruling his "motion for a continuance in all cases called for trial." The judgment of nonsuit in case No. 50-115, the only felony charge, eliminated the exception to the failure of the court to continue that case. Defendant, while conceding that he had received notice a week prior to the beginning of the term that the five specific misdemeanors charged against him were calendared for trial on 8 August 1967, contends nevertheless "that a constitutional question was brought into play in the denial of the motion for a continuance."

Defendant makes no contention here — nor did he at the trial — that he was taken by surprise when the five indictments were returned against him. Such an assertion could not have been maintained for the indictments were based upon warrants issued by the Mecklenburg County Recorder's Court, where defendant had demanded a jury trial. This demand resulted in the transfer of the cases to the Superior Court, where trial could not have been had upon the warrants. *State v. King,* 270 N.C. 791, 154 S.E. 2d 906. It is also noted that defendant makes no claim here — nor did he assert in the lower court — that he and his counsel needed time to prepare

his defense or to procure witnesses in his behalf. When he made his oral motion for a continuance, defendant did not attempt to support it by affidavit as contemplated by G.S. 1-176. *State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520. Indeed, defendant has never suggested any reason whatever for the requested postponement of the trial of the five misdemeanor charges except that he should not have been ruled to trial on the same day the indictments were returned. In many instances this would undoubtedly be a valid contention for "the constitutional guaranty of the right of counsel requires that the accused and his counsel shall be afforded a reasonable time for the preparation of his defense." *State v. Gibson, supra* at 501, 50 S.E. 2d at 523. *Accord, State v. Phillip,* 261 N.C. 263, 134 S.E. 2d 386.

In this case, however, no facts appear which would except defendant's motion for a continuance from the general rule that a motion for a continuance is addressed to the sound discretion of the trial judge, whose ruling thereon is subject to review only in case of manifest abuse. 2 Strong, N. C. Index, 2d, Criminal Law § 91 (1967). Whether a defendant bases his appeal upon an abuse of judicial discretion, or a denial of his constitutional rights, to entitle him to a new trial because his motion to continue was not allowed, he must show both error and prejudice. *State v. Phillip, supra.* Defendant here has shown neither.

No error.

STATE v. WYLIE EUGENE BROWN.

(Filed 12 January, 1968.)

Criminal Law § 169—

The admission of testimony over objection is ordinarily harmless when testimony of the same import is theretofore or thereafter introduced without objection, or defendant elicits similar testimony on cross-examination.

APPEAL by defendant from *Bundy, J.,* August 7, 1967 Schedule "A" Criminal Session of MECKLENBURG.

The grand jury returned a true bill charging that defendant, "on the 5th day of July, A.D., 1967, about the hour of 4:30 A.M. in the night of the same day, with force and arms, at and in the county aforesaid, the dwelling house of one Loomis Oglesby, Jr., there situate, and then and there actually occupied by one Loomis Oglesby, Jr., and Mrs. Ida Mae Oglesby, Jr. feloniously and burglariously did break and enter, with intent, the goods and chattels of the said

Loomis Oglesby, Jr. in the said dwelling house then and there being, then and there feloniously and burglariously to steal, take and carry away $14.00 in lawful money of the United States, . . ."

Defendant was tried on said bill of indictment for a less degree of the same crime, namely, breaking and entering the dwelling house of Loomis Oglesby, Jr., with intent to commit the felony of larceny therein.

The State's evidence consisted of the testimony of Ida Mae Sanders, referred to hereafter as Miss Sanders, and of Loomis Oglesby, and of T. R. Smith, a police officer. Miss Sanders, referred to in her testimony and in the testimony of Oglesby, as Oglesby's "housekeeper," resided in Oglesby's rented dwelling at 426 East Hill Street in Charlotte, North Carolina.

According to Miss Sanders: On July 5, 1967, about 4:30 a.m., a man took out the screen, opened the window and through the window entered her private bedroom from the front porch; that he "woke (her) up trying to get on top of (her)"; that she hollered, beat on the wall and called Oglesby; that the man fled, going out through the window and taking with him "$13.00 tied up in a handkerchief lying on the headboard of (her) bed"; and that in his flight he left "his shirt, which he had taken off, in (her) room."

According to Oglesby: In response to Miss Sanders' call for help, he rushed from his private bedroom to the porch; that he saw the "boy" jump out of the window, and also saw him when he jumped "off the porch"; and that, when he would not stop in response to his command, "(he) took a shot at him," and thought he had hit him but had not done so.

Miss Sanders testified she was unable to identify the man who had entered and who fled from her private bedroom. Oglesby testified defendant was the man he saw jump out of the window and off the porch.

The testimony of Smith consists largely of what Oglesby had told him on July 6th and later on July 10th, the latter being the date on which Oglesby swore out the warrant for defendant. According to Smith, Oglesby referred to the bedroom occupied by Miss Sanders as "his wife's bedroom." Miss Sanders is referred to in the bill of indictment by the name of Mrs. Ida Mae Oglesby, Jr. Miss Sanders testified: "I hold myself out to the public as Miss Sanders."

Miss Sanders, on cross-examination, testified: "I don't know nothing about no warrant; Mr. Oglesby had took out the warrant; I didn't."

When Oglesby was first examined (he was later recalled), no reference was made during direct examination by the solicitor to any conversation Oglesby had with Mrs. Lula Mae Brown, mother of

defendant. However, during *the cross-examination* of Oglesby, testimony was elicited to the effect that Oglesby had conversed with Mrs. Brown; that he had exhibited to her the shirt left by the intruder in the bedroom of Miss Sanders; and that Mrs. Brown had identified this shirt as a shirt worn by defendant. Later, other testimony of Oglesby of like import was admitted without objection.

Evidence offered by defendant included his personal testimony and the testimony of his mother. Specifically, Mrs. Brown denied having identified the shirt exhibited to her by Oglesby as a shirt belonging to or worn by defendant. Defendant testified and offered evidence to the effect it was not his shirt and had not been worn by him. Defendant denied any connection with the alleged crime and testified and offered evidence to the effect he was elsewhere when the alleged crime was committed.

The jury found defendant "Guilty of the charge of Breaking and Entering with the intent to commit a felony therein." The court pronounced judgment imposing a prison sentence of seven years.

On account of the indigency of defendant, an order was entered providing that Mecklenburg County pay the costs of mimeographing the record and of defendant's brief incident to his appeal.

Attorney General Bruton, Deputy Attorney General Lewis and Staff Attorney Jacobs for the State.

William L. Pender for defendant appellant.

PER CURIAM. The court permitted Officer Smith to testify over defendant's objection that the shirt Oglesby had exhibited to him on July 10, 1967, and which had been offered in evidence as State's Exhibit No. 1, was the same shirt Oglesby told him "on the morning of the 10th that the mother of the defendant told him belonged to the defendant." Defendant assigns as error the overruling of his objection and the admission of this testimony.

Defendant contends this testimony of Smith was elicited in response to a *leading* question. In respect of this contention, we find neither error nor prejudice.

The testimony of Smith that Oglesby had told him *that Mrs. Brown had told Oglesby* that the shirt in evidence was a shirt owned or worn by defendant was incompetent. However, as set forth in our preliminary statement, evidence to this effect was first elicited during the cross-examination of Oglesby and was received in evidence then and thereafter without objection. Moreover, Smith had testified, without objection, prior to the question to which objection was made, that Oglesby told him that Mrs. Brown had identified the shirt as

"Wylie's shirt." Hence, the error in Smith's quoted testimony must be deemed harmless.

"The admission of testimony over objection is ordinarily harmless when testimony of the same import is theretofore or thereafter introduced without objection, or defendant elicits similar testimony on cross-examination, . . ." 3 Strong, N. C. Index 2d, Criminal Law § 169.

The critical issue of identity was for jury determination. An appraisal of the cold record suggests that such determination was fraught with difficulty. However, further factual investigation as to defendant's guilt is a matter within the sphere and competence of the Board of Paroles.

Each of defendant's remaining assignments of error has been considered. None discloses error of law deemed of such prejudicial nature as to justify a new trial or of such substance as to merit particular discussion.

No error.

STATE v. JAMES DICKENS ALIAS WOODROW.

(Filed 12 January, 1968.)

Burglary and Unlawful Breakings § 2—

G.S. 14-54, as amended, constitutes unlawful breaking or entering a building a felony when such breaking or entering is done with intent to commit a felony or other infamous crime therein and a misdemeanor in the absence of a felonious intent, and constitutes the misdemeanor a less degree of the offense.

APPEAL by defendant from *Fountain, J.*, August 21, 1967 Criminal Session of NASH.

Defendant was indicted at May-June 1967 Session in a bill charging that defendant, on March 10, 1967, "unlawfully, wilfully, feloniously and burglariously did break and enter the dwelling house of one Maxine Cherry at or about the hour of 1:00 o'clock A.M. in the nighttime of said day, while the dwelling house was then and there actually occupied by the said Maxine Cherry, with the felonious intent to take, steal and carry away the goods and chattels of Maxine Cherry there situate, . . ." At said session, Judge Morris, based on defendant's affidavit of indigency, appointed Wm. D. Etheridge, Esq., of the Nash County Bar, to represent defendant. Later, upon defendant's statement in open court that he had retained W. O. Rosser, Esq., of the Nash County Bar, to represent him, Mr. Etheridge was released from further obligations to defendant.

Prior to trial of defendant at August 21, 1967 Criminal Session, the solicitor announced in open court "that the State would not seek a verdict of 1st degree burglary but would ask for a verdict of Felonious B. & E." At trial, the only evidence was that offered by the State. The court submitted to the jury whether defendant was guilty of breaking or entering the dwelling house of Maxine Cherry with intent to commit larceny, or guilty of wrongful breaking or entering said dwelling house without the intent to commit larceny, or not guilty. The jury returned a verdict of "guilty of wrongful breaking and entering without the intent to commit a felony." The court pronounced judgment imposing a prison sentence of two years, this sentence "to begin at the expiration of the sentence imposed in case No. 5371-R from Nash County Recorder's Court for Larceny, said sentence being for 6 months." Defendant excepted and appealed.

By order of Judge Fountain, Mr. Rosser was appointed to continue to serve as counsel for defendant in connection with his appeal and Nash County was ordered to pay the necessary costs of mimeographing the record and defendant's brief incident to such appeal.

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

W. O. Rosser for defendant appellant.

PER CURIAM. There was direct evidence that defendant unlawfully entered the Cherry dwelling house; that he was in the kitchen when first observed by the aroused occupants; and that he made his exit by way of the kitchen window. Moreover, the circumstantial evidence, when considered in the light most favorable to the State, was sufficient to support a jury finding that the kitchen window had been closed and that defendant had raised the kitchen window and had entered the kitchen by way thereof.

Defendant's assignments of error, which relate to nonsuit and one excerpt from the charge, presuppose there was no evidence of an unlawful *breaking*. Although, in our view, the evidence was sufficient to support a finding that defendant made his entry pursuant to an unlawful *breaking*, attention is called to the fact that such evidence was not a prerequisite to conviction.

"G.S. 14-54, as amended, defines a felony and defines a misdemeanor. The unlawful breaking *or* entering of a building described in this statute is an essential element of both offenses. The distinction rests solely on whether the unlawful breaking *or* entering is done 'with intent to commit a felony or other infamous crime therein.' Hence, the misdemeanor must be considered 'a less degree of the same crime,' an included offense, within the meaning of G.S. 15-

170." (Our italics.) *State v. Jones,* 264 N.C. 134, 141 S.E. 2d 27. See *State v. Cloud,* 271 N.C. 591, 157 S.E. 2d 12, and cases cited.

Defendant was convicted of "a less degree of the same crime," a misdemeanor, after a trial conducted in accordance with approved legal principles.

No error.

STATE OF NORTH CAROLINA v. PEARL BELK.

(Filed 12 January, 1968.)

1. Criminal Law § 144—

The judgment of the court is *in fieri* during the term in which it is rendered and it may be modified, amended, or reversed at any time during the term.

2. Grand Jury § 1; Constitutional Law § 29—

While defendant, prior to pleading to the indictment, is ordinarily entitled to present evidence in support of a motion to quash on the ground that members of defendant's race were systematically excluded from the grand jury, the action of the trial court in declining to hear the evidence of defendant in this case *is held* without error when the court, after verdict, judgment and notice of appeal had been given, offered defendant an opportunity, which he declined, to present evidence during the term in support of the motion.

APPEAL by defendant from *Bailey, J.,* May-June 1967, Criminal Session, MECKLENBURG Superior Court.

The defendant was charged in a bill of indictment with illegal possession of a narcotic drug, to wit: marijuana, and in another count with the sale of marijuana to a minor child sixteen years of age. Before pleading to the bill of indictment, the defendant, a negro, through her counsel moved to quash it upon the grounds that negroes had been systematically excluded from the grand jury and that it was therefore illegally composed. The presiding judge denied the motion and would not allow the defendant to introduce evidence in support of the motion.

The defendant then entered a plea of not guilty, and upon trial before a jury a verdict of guilty on both counts was rendered. From a judgment of imprisonment the defendant appealed, assigning the action of the Court stated above as error.

Charles V. Bell, Attorney for defendant appellant.

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

PER CURIAM. From the record it appears that at the time the defendant's motion to quash the bill of indictment was made the judge was informed that the question had theretofor been tested and it had been found that the grand jury was legally composed. Apparently for that reason he declined to hear evidence in support of the motion; however, after verdict, judgment and appeal, he offered the defendant an opportunity to present evidence in support of her motion.

It is well recognized that the action of a court is *in fieri* during the term in which it is rendered and that it may be modified, amended, or reversed at any time during the term. *State v. Godwin,* 210 N.C. 447, 187 S.E. 560.

The opportunity to offer evidence in support of the defendant's motion was presented to the defendant later in the same week and in the same term of court, to-wit: Friday, June 9. At that time the defendant's counsel said he was not ready to present this evidence, although he had asserted that he was ready when the motion was made four days earlier; and when called upon to state what evidence he had, defendant's attorney said that he had none and that it would take him two or three weeks to get it. The Court then offered the defendant an opportunity to present her evidence at a later time, which was not accepted; but the Court set June 26 as the time for hearing evidence on the motion. The Solicitor for the State consented thereto. On June 26 the defendant again declined to present evidence upon her motion, contending that the Court had no authority to quash the bill of indictment after verdict, judgment and appeal at the same term and especially was without such authority at a later term. Upon questioning by the Judge, her attorney finally admitted that he had not talked with the witnesses he had proposed to use and did not know what they would say.

Upon evidence offered by the State, the Court found that no mark indicating race, creed or color was put on the juror's name slips, and it would have therefore been impossible to discriminate when the names were drawn for jury service, and further found as a fact that there were two negroes on the grand jury which had indicted the defendant.

While it is true that the defendant was entitled to present evidence in support of her motion to quash (*State v. Inman,* 260 N.C. 311, 132 S.E. 2d 613; *State v. Yoes,* 271 N.C. 616, 157 S.E. 2d 386) and that it should have been heard before the defendant was required to plead to the bill of indictment, the defendant was offered an opportunity to avoid any disadvantage when the presiding judge offered to hear her evidence later during the same term. There can be no doubt that the judge had the discretionary power to set the ver-

dict and judgment aside at that time and to quash the bill of indictment. However, the defendant, acting under the erroneous impression that since the appeal entries had been made the Court had lost authority in connection with the matter, declined the opportunity. The defendant's position would have been well taken if the term had already expired at that time. *Dellinger v. Clark,* 234 N.C. 419, 67 S.E. 2d 448.

The defendant's contention that the Court had no authority to continue the motion to be heard at a later date is not well founded under the facts in this case. First, because there was no way she could lose. The Court had already denied her motion, and he could only reverse himself and quash the indictment, which would have been to the advantage of the defendant. Also, the State, which alone could have been disadvantaged, made no objection to the June 26 hearing.

From the record it appears doubtful that the motion was originally made in good faith, and it is quite obvious that the defendant seeks to rely upon technicalities that have no merit.

No error.

STATE OF NORTH CAROLINA v. GARY TYSON HOWARD.

(Filed 12 January, 1968.)

1. Automobiles § 113—

In this prosecution for manslaughter arising from the operation of an automobile, evidence of the State to the effect that the defendant was intoxicated at the time of the collision, together with an inference of high speed arising from the physical facts, *held* sufficient to be submitted to the jury on the issue of defendant's culpable negligence.

2. Criminal Law § 82—

In a prosecution for homicide arising from the operation of an automobile, testimony of defendant's family physician that defendant was intoxicated at the time of the collision, *held* competent upon a finding by the court that the evidence was necessary to a proper administration of justice, G.S. 8-53, since such finding takes the evidence out of the privileged communications rule.

APPEAL by defendant from *Carr, J.,* September, 1967 Session, CHATHAM Superior Court.

The defendant, Gary Tyson Howard, was indicted for the crime of manslaughter. The State's evidence tended to show that Vander E. Farrell was killed in a motor vehicle accident on the public highway in Chatham County. On December 18, 1966, the deceased was a passenger in the rear seat of a 1956 Buick being driven by

Gary Tyson Howard. The vehicle struck the concrete abutment of a bridge across the highway, and broke in two pieces. The front half stopped 31 feet from the bridge. "The rear half was in the middle of the road between the two sides of the bridge. The tire marks began in the ditch on the right side of the road." There were tire pressure and skidmarks for 270 feet before the impact at the bridge. The tracks in the ditch indicate the car was sliding sideways. Vander E. Farrell was killed.

The investigating officer, highway patrolman Robert R. Russell, arrived at the scene of the accident at 4:40 a.m., shortly after it occurred. The body of Farrell "was lying two to three feet northwest of the bridge abutment." The officer arrested the defendant who was, in his opinion, under the influence of alcohol. The State called and examined Dr. K. M. Matthiesen, the defendant's family physician, who treated the defendant for the injuries he received in the accident. Dr. Matthiesen saw the defendant "on the early morning hours" before day on December 18, 1966. In the opinion of the witness, the defendant was under the influence of alcohol.

When the Solicitor examined Dr. Matthiesen, defense counsel objected without assigning any reason for the objection. The objection was overruled. Afterwards, when the Court ascertained the objection was based on the confidential relationship of doctor and patient, Judge Carr found the evidence of Dr. Matthiesen was necessary to meet the ends of justice and inserted the finding to that effect in the record.

The defendant did not offer evidence. Timely motions for directed verdict of not guilty were overruled. The jury found the defendant guilty of involuntary manslaughter. Judge Carr imposed a prison sentence of 3 to 5 years.

The defendant excepted and appealed.

T. W. Bruton, Attorney General; Harrison Lewis, Deputy Attorney General; William F. Briley, Trial Attorney, for the State.

Harry P. Horton for defendant appellant.

PER CURIAM. The State's evidence showing the defendant's intoxication and the inference of terrific speed arising from the physical facts make out a case of culpable negligence. *State v. Cope,* 204 N.C. 28, 167 S.E. 456. The motions for directed verdict were properly overruled.

The Court's finding, inserted in the record, that the evidence of the physician was necessary to a proper administration of justice, takes the physician's evidence out of the privileged communication

rule provided in G.S. 8-53. The time the finding is inserted in the record, under the facts here disclosed, is not deemed material.

No error.

STATE v. CHESTER BETHEA.

(Filed 12 January, 1968.)

1. Constitutional Law § 36—

Punishment within the maximum fixed by statute cannot be cruel or unusual in the constitutional sense.

2. Constitutional Law § 28—

The statute, G.S. 15-140.1, providing for waiver of indictment by defendants in noncapital felony cases contemplates that the prosecution shall be upon an information signed by the solicitor, and the failure of the solicitor to sign the statement of accusation to which defendant pled guilty renders the plea void.

3. Same—

The practice of the solicitor in attempting to use a warrant in lieu of an information as required by G.S. 15-140.1 is expressly disapproved by the Supreme Court.

4. Same—

Where the defendant pleads not guilty to a misdemeanor, the requirements for a waiver of indictment and for trial upon an information signed by the solicitor are the same as in noncapital felony cases. G.S. 15-140.

APPEAL by defendant from *Snepp, J.*, 7 August 1967 Schedule "C" Session of MECKLENBURG.

Defendant was arrested upon two warrants issued by the Recorder's Court of the City of Charlotte on 5 July 1967. Warrant No. 50-357 charged (1) that on 8 June 1967 defendant feloniously did break and enter a dwelling owned and occupied by Vance Huggins with the intent to steal personal property situated therein and (2) that as a result of defendant's felonious breaking and entering the dwelling of Vance Huggins he did feloniously steal and carry away therefrom certain specified personal property of the value of $220.00. Warrant No. 50-358 charged that on 3 June 1967 defendant did break and enter the dwelling house of Heathy Harris Walker with the felonious intent to steal the personal property of Heathy Harris Walker therein situated, a violation of G.S. 14-54. On 6 July 1967 defendant waived preliminary hearing on each charge, and the recorder bound him over to the Superior Court.

At the 7 August 1967 Session, defendant and his attorney, Mr.

T. O. Stennett, signed the following notation which was made on each of the two warrants:

"The foregoing information has been read and explained to me and I do hereby waive the finding of a bill of indictment by the Grand Jury upon the advice of my attorney and counsel. I have requested my counsel to sign the waiver, this the 10 day of August, 1967. /s/ Chester Bethea (Seal) Witness: /s/ T. O. Stennett."

After the execution of the foregoing waivers, defendant pleaded guilty as charged in Case No. 50-358; in Case No. 50-357, guilty of nonfelonious breaking and entering and nonfelonious larceny. In Case No. 50-358, his sentence was 3-5 years in the State's prison; in Case No. 50-357, one year in the common jail of Mecklenburg County "under the supervision of the Department of Correction. This sentence to run CONCURRENTLY with that imposed in #50-358."

From the sentences imposed, defendant appealed.

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

T. O. Stennett for defendant.

PER CURIAM. Defendant's only assignment of error is that the sentences prescribed constituted "excessive, cruel and unreasonable punishment." This assignment cannot be sustained. The sentences were below the statutory maximum for the offenses to which defendant pled guilty. They therefore cannot be cruel and unusual in the constitutional sense. *State v. Robinson,* 271 N.C. 448, 156 S.E. 2d 854. In Case No. 50-358, however, error appears upon the face of the record.

By written waiver, signed by a defendant and his counsel, the defendant may waive the finding of a bill of indictment in noncapital felony cases. In such cases, however, G.S. 15-140.1 requires that *"the prosecution shall be on an information signed by the solicitor."* (Italics ours.) The solicitor's signature does not appear upon the purported information. Instead of preparing an information as contemplated by the statute, the solicitor attempted to use the warrant as an information. This is a practice which we do not approve. In any event, the solicitor's failure to affix his signature to the statement of the accusation to which defendant pled guilty rendered the plea void. The solicitor may yet, however, try the defendant on a bill of indictment or upon a valid information.

Where the offense charged is a misdemeanor and defendant's plea is not guilty, the requirements for a waiver of indictment and trial upon an information signed by the solicitor are the same as in noncapital felony cases. G.S. 15-140. In Case No. 50-357, however,

defendant *pled guilty* to a misdemeanor. The sentence imposed in that case is sustained. Notwithstanding, whether the plea be guilty or not guilty, in all cases the better practice is the preparation of an information.

As to Case No. 50-357,
No error.
As to Case No. 50-358,
Judgment arrested.

STATE OF NORTH CAROLINA v. LUKE McCROWE.

(Filed 12 January, 1968.)

Criminal Law § 138—

Where there is a verdict or plea of guilty to more than one count in a warrant or bill of indictment and the court imposes a single judgment thereon, a consolidation of the counts for the purpose of judgment will be presumed, and the punishment may not exceed that permitted on the count carrying the greater punishment.

APPEAL by defendant, Luke McCrowe, from *Hobgood, J.*, May Criminal Session, 1967, ROBESON Superior Court.

On April 2, 1966 the defendant was charged in the Recorder's Court, St. Pauls, North Carolina, with having committed these criminal offenses:

(Unlawfully operating the above described vehicle (1960 Chevrolet, License No. DP 6657) on U. S. Highway 301:

1. Speeding 85 miles per hour in a 55 miles per hour zone.

7. Driving left of center not in overtaking and passing.

8. Illegal possession of beer, to wit, 6 gallons, contrary to the statutes made and provided, and against the peace and dignity of the State.

On April 6, 1966 the Recorder, after hearing, adjudged the defendant guilty on all counts as charged. The Recorder imposed a prison sentence of 90 days, suspended upon the payment of a fine of $75 and costs of $17.25, and ". . . defendant not to have in his possession or on his premises any intoxicants, including wine, whiskey or beer, for a period of 2 years . . ."

On October 21, 1966 defendant was apprehended for a traffic violation and having in his possession 40 pints of beer. Notice was

served on the defendant, and a bill of particulars was filed before the Recorder. After hearing, the Recorder found the defendant had violated the conditions upon which the prison sentence of 90 days was suspended, and activated the sentence. The defendant excepted and appealed to the Superior Court of Robeson County.

At the May Criminal Session, Judge Hobgood, after hearing and after full findings of fact with respect to the entry of the original sentence, the breach of the conditions of the suspension, affirmed the judgment of the Recorder.

The defendant appealed.

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

F. D. Hackett for defendant appellant.

PER CURIAM. The defendant contends: (1) the record does not disclose he was represented by counsel at his trial before the Recorder, and (2) that sentences on two of the counts does not permit a prison sentence of 90 days. However, the verdict of guilty on the count charging operating the Chevrolet at 85 m.p.h. in a 55 m.p.h. zone on U. S. Highway 301 will sustain the judgment.

In cases in which there is a verdict or plea of guilty to more than one count in a warrant or bill of indictment, and the Court imposes a single judgment (sentence, or fine, or both) a consolidation for the purpose of judgment will be presumed. The punishment may not exceed that permitted on the major count. Appointment of counsel was not required in this case.

No error.

STATE v. DELLON MAYNOR.

(Filed 12 January, 1968.)

Criminal Law § 102—

Wide latitude is allowed to counsel in the argument to the jury, including the use of illustrations and anecdotes, and the rulings of the trial court thereon will not be disturbed in the absence of gross abuse of discretion.

APPEAL by defendant from *Hobgood, J.*, April Criminal Session, 1967, ROBESON Superior Court.

The defendant was charged in a bill of indictment with the first degree murder of Fue Lowery on 6 December 1966. He was put on

trial for second degree murder and convicted of manslaughter.

The deceased was at the home of the defendant, a good deal of drinking took place, arguments ensued, and the defendant shot Lowery in the left chest with a shotgun. He died immediately.

The defendant claimed that the shooting was done in self-defense and in his own home. He offered evidence that he was a man of good character and that the deceased was violent and dangerous.

There was evidence which would have justified a verdict of guilty of murder in the second degree, but the defendant was convicted of the lesser charge of manslaughter.

The defendant brings forth no exceptions to the admission of evidence but assigns as error one statement in the charge of the Court which will be discussed in the opinion.

From a verdict of imprisonment the defendant appealed.

L. J. Britt & Son by L. J. Britt, and Robert Weinstein, Attorneys for defendant appellant.

T. W. Bruton, Attorney General, and James F. Bullock, Deputy Attorney General, for the State.

PER CURIAM. The defendant complains of the following remarks made by the assistant solicitor in his argument to the jury:

> "President Truman was coming down to North Carolina and was invited to stay in the Governor's mansion. Of course, the Secret Service checked out the representation of all people in the Governor's Mansion, and found out that all servants there were inmates of the North Carolina Prison System and had been convicted of some sort of criminal offense. The President asked the Governor about this, and the Governor said, 'I would never have put a thief in your house; would never have a person who breaks and enters in my presence; never have an embezzler in my house — but these people were all people of good character, committed crime, did it out of heat of blood and passion and will never commit those acts again.'"

The defendant objected and requested the Court to instruct the jury not to consider this and upon denial took exception.

We can see nothing wrong or prejudicial in this argument. Its effect is to say that even persons of good character sometimes in the heat of passion fight and take human life. That, of course, is true. The solicitor had the right to make the contention that notwithstanding the fact that the defendant was of good character, he could still be guilty of the offense charged, and to use the statement attributed to him in support of and illustrating his argument.

The use of illustrations and anecdotes in arguments to a jury are commonplace and to be expected. Wide latitude is given to counsel in argument. The judge hears the argument, knows the atmosphere of the trial and has the duty to keep the argument within proper bounds. His rulings will not be disturbed unless abuse of privilege is shown and the impropriety of counsel was gross and well calculated to prejudice a jury. *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424; *State v. Christopher,* 258 N.C. 249, 128 S.E. 2d 667.

The defendant further excepts to a portion of the charge relating to interested witnesses. While not in approved form, we are of the opinion that the error, if any, was not prejudicial.

The defendant's remaining assignment that the court erred in pronouncing judgment upon the verdict is formal and without merit.

No error.

STATE OF NORTH CAROLINA v. LEROY WATSON.

(Filed 12 January, 1968.)

Safecracking § 2; Indictment and Warrant § 17—

There is a fatal variance between pleading and proof where the indictment alleges the forcible opening of a safe of a named person, and the evidence is that the safe is owned solely by a corporation, and it was error to deny defendant's motion of nonsuit at the close of all the evidence.

APPEAL by defendant from *Carr, J.,* at the 7 August 1967 Criminal Session of ORANGE.

The defendant was tried upon an indictment, proper in form, charging that on 22 January 1967 the defendant "unlawfully, wilfully and feloniously did, by the use of tools, force open a safe of R. C. H. Harriss, used for storing chattels, money and other valuables." The jury found him guilty as charged in the indictment and he was sentenced to confinement in the State Prison for ten to twelve years.

The evidence for the State, if true, is sufficient to support the finding that on the date specified in the bill of indictment someone, with the use of tools, forced open the bottom drawer of a fireproof, metal file cabinet which was "owned by Harriss-Conners Chevrolet, Inc.," and located in the office of that company. Robert Cornell Harriss is the president and one of the principal stockholders of the corporation. The cabinet which was broken into was not owned by him "personally." In it the corporation kept money and documents,

the amount of money customarily kept in the cabinet being approximately $150. The cabinet was constructed so as "to make the same fireproof," its walls, constructed of sheet metal and plaster, being one and one-half inches thick and it having a "push type tumbler lock that locks at the top and locks all four drawers of the cabinet at the same time." At the time of the break in, there was about $145 in the cabinet, which was found to be missing upon the discovery of the break in.

Other evidence introduced by the State, which it is not now necessary to recount, tended to identify the defendant as the person who so forced open the drawer of the file cabinet.

Attorney General Bruton and Staff Attorney Vanore for the State.

Haywood, Denny & Miller by James H. Johnson, III, for defendant.

PER CURIAM. The defendant's motion for judgment as of nonsuit, made at the conclusion of the State's evidence and renewed at the conclusion of all the evidence, should have been granted. The indictment charged that the defendant forced open "a safe of R. C. H. Harriss." The State's evidence shows that the cabinet forced open on the occasion in question was the property of Harriss-Conners Chevrolet, Inc. This was a fatal variance between the offense charged in the indictment and the proof. *State v. Brown,* 263 N.C. 786, 140 S.E. 2d 413; *State v. Stinson,* 263 N.C. 283, 139 S.E. 2d 558. "It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. The allegation and proof must correspond." *State v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149. "In indictments for injuries to property it is necessary to lay the property truly, and a variance in that respect is fatal." *State v. Mason,* 35 N.C. 341.

Since the judgment below must be reversed because of the above mentioned variance between the indictment and the proof, it is unnecessary for us to consider, and we do not express any opinion upon, the defendant's further contention that the file cabinet shown to have been broken open was not a "safe" within the meaning of G.S. 14-89.1.

The solicitor may, if so advised, present another bill of indictment correctly alleging the ownership of the container which he contends was forced open in violation of the above statute.

Reversed.

STATE OF NORTH CAROLINA v. TALTON GALLIMORE, JR.

(Filed 16 January, 1968.)

1. Conspiracy § 3—

A criminal conspiracy is the unlawful concurrence of two or more persons in a scheme or agreement to do an unlawful act, or to do a lawful act in an unlawful way or by unlawful means, and the crime is complete when the agreement is made.

2. Conspiracy § 5—

During the existence of a conspiracy, the acts and declarations of each conspirator made in furtherance of the object of the conspiracy are admissible in evidence against all parties to the agreement.

3. Indictment and Warrant § 9—

An indictment must contain all essential elements of the crime charged so that the defendant may prepare his defense and be protected against a subsequent prosecution.

4. Conspiracy § 4—

An indictment for conspiracy need not name the co-conspirators, it being sufficient if it appears on the face of the indictment that there was another with whom defendant conspired, but the better practice would seem to require that the State disclose the name of other conspirators when their identity becomes known.

5. Indictment and Warrant § 13—

A disclosure by police officers to defendant's attorney of the evidence upon which the State would rely in a conspiracy prosecution, which evidence includes the names of the other conspirators, is the equivalent of a bill of particulars.

APPEAL by defendant from *Gwyn, J.*, June 26, 1967 Mixed Session DAVIDSON Superior Court.

The record discloses that four bills of indictment were returned by the Davidson County Grand Jury against the defendant, Talton Gallimore, Jr. The indictment in Case No. 13,205 charged "safe cracking". The indictment in Case No. 13,409 charged "conspiracy to safe crack". These bills of indictment are referred to but not set out in the record. Apparently the bills were returned at the January, 1967 Session.

The record also discloses that the defendant was given a preliminary hearing on January 20, 1967. His present counsel was then employed and represented him. The record discloses that on May 4, 1967 Judge Gwyn heard a motion for a bill of particulars and ordered that the State disclose certain information to Mr. Grimes, defendant's counsel. The Solicitor announced at the time that his purpose was to send a bill of indictment charging the defendant with the crime of conspiracy and the substantive offenses of (1) breaking and entering, and (2) the larceny of the safe and its contents

from the building owned and occupied by J. Don Kepley and wife, Evelyn M. Kepley, as co-partners doing business as Central Tire Company.

On May 4, 1967, the investigating officers, in compliance with Judge Gwyn's oral directive, gave the following information, which Attorney Grimes reduced to writing:

"Lt. Kimbrell started saying the information he was giving was given by the co-defendant Jimmy Shoureas to Assistant Chiefs Cook and Weisner; that Benny English, a co-defendant called on the telephone (Kimbrell and Cook did not know with whom English had his telephone conversation) to the effect that the safe at Central Tire Company was ready; that English would come to the motel and meet them — English came to the motel, asked Shoureas if his friend Riley, who had just arrived from New York, would like to go along. Shoureas went into Riley's room and when he came out English, Shoureas, and Riley all went in the defendant Gallimore's truck from the Longview Motel to Lexington.

Cook and Kimbrell did not know whether Gallimore was supposed to have been present during either English's conversation with Shoureas or Shoureas's with Riley in his room; however, Kimbrell did state that Shoureas stated: 'We all talked it over together.' He did not advise who constituted 'we all.'

Defendants Riley, Shoureas, and English drove to Lexington in Gallimore's truck, parked said truck about one block from Central Tire Co. (Kimbrell stated he had not been informed just where the truck was parked.) The defendant Riley remained in the truck and defendants Shoureas and English went to a window on the rear of the tire company. A pane of glass was taped in its entirety with masking tape to keep it from shattering and making a lot of noise and was broken out. Defendant Shoureas entered the same and raised the big door. English backed the truck into the door and the above named three defendants loaded the safe onto the truck. After the safe was loaded these three defendants returned to the Longview Motel. Defendant Shoureas stayed in the motel. Defendant Riley had stated that defendant Gallimore went with Riley and English to an old farm house which defendant Riley did not know where the farm house was. However, at a later time Riley took Assistant Chief Cook to the actual location of the farm house which is somewhere out from Denton, N. C.

Defendant Riley stated he stood at the road and watched and that the defendants English and Gallimore opened the safe in an old small outbuilding. The safe was opened with tools and

specific mention was made of an axe and crowbar. Gallimore got out all of the money from the safe and give *(sic)* to Riley to divide between himself and Shoureas some money. Upon division it turned out that he and Shoureas got $97.00 apiece. After this the safe was taken and thrown in a creek. Lt. Kimbrell and Asst. Chief Cook were further able to advise Attorney Grimes that the creek was in Randolph County, N. C. Cook stated he did not know whether or not the farm and outbuildings where the safe was open was in Davidson or Randolph but he would ascertain the location of the same. In response to a question by Attorney Grimes as to whether Attorney Grimes would be advised as to which county the buildings were in, Cook answered he would convey the information to 'his solicitor,' indicating Kivett.

Kimbrell further stated that Shoureas backed up Riley's story. Both defendants told the same story in front of defendant English but the defendant Gallimore was not present."

At the time of giving the foregoing information, the Solicitor informed Mr. Grimes that bills of indictment charging conspiracy and housebreaking and larceny would be submitted to the Grand Jury.

On June 26, 1967 the Grand Jury returned into Court the following bill of indictment in Case No. 13,410:

Case No. 13,410	SUPERIOR COURT
STATE OF NORTH CAROLINA	June 26th Mixed Term,
DAVIDSON COUNTY	A.D., 1967

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, that Talton Gallimore, Jr., and others late of the County of Davidson, on the 26th day of December, A.D., 1966, with force and arms, at and in the county aforesaid, unlawfully, wilfully, and feloniously combine, conspire, confederate and agree, each and every one with the other, to break and enter the storehouse, shop and building occupied by Don Kepley and wife, Evelyn M. Kepley, co-partners, trading and doing business as Central Tire Service, otherwise than burglariously, with the intent to commit a felony therein, to wit, larceny of personal property, namely, one safe, 2 pistols, 4 watches, stocks, credit cards, business records, several negotiable checks of the approximate value of $1500.00, and $1800.00 in good and lawful money of the United States, with a total value of Four Thousand Five Hundred and No/100 Dollars, and to steal, take and carry away said personal property, namely, one safe, 2 pistols, 4 watches, stocks, credit cards, business records, several negotiable checks

of the approximate value of $1500.00, and $1800.00 in good and lawful money of the United States, with a total value of Four Thousand Five Hundred and No/100 Dollars of the said Don Kepley and wife, Evelyn M. Kepley, co-partners, trading and doing business as Central Tire Service, against the form of the statute in such case made and provided and against the peace and dignity of the State."

At the same time the Grand Jury returned a bill of indictment in Case No. 13,411 charging the breaking and entering of the described building and the larceny of the safe and property described in Case No. 13,410.

Following motions for continuance, Judge Gwyn conducted a *voir dire* hearing. Mr. Grimes, defense counsel, admitted he had talked with Shoureas and Riley, upon whose testimony the State relied to convict the defendant of the charges contained in the two bills. Judge Gwyn found (1) the information furnished in lieu of bills of particulars fully apprised defense counsel of all material matters necessary for the preparations for trial, and (2) defense counsel had not shown cause for a continuance. The defendant again applied for a bill of particulars. When the Court denied the motion, the defendant challenged the validity of the indictment in No. 13,410 upon the ground the indictment charged the defendant conspired with others, not naming them. Judge Gwyn overruled all motions, whereupon the defendant entered pleas of not guilty.

The State's evidence tended to show the following: The defendant was employed by the Longview Motel in Lexington. On or about December 24, 1966 he met Ronald Riley and Jimmy Shoureas, two young boys hitchhiking south from New York, and employed them to work at the Longview Motel. Two days later, December 26, the defendant told Shoureas that one Benny English had called and that they were going to go that night and get a safe, and arranged for Shoureas and Riley to assist. At 12:30, Shoureas, English and Riley took the defendant's pickup truck and drove to Central Tire Company, owned by Kepley and wife. They broke into the building and opened a large door from the inside, backed the truck into the service area and loaded Kepley's safe on the truck. These three then drove to the Longview Motel where they were met by the defendant. Shoureas remained at the motel while Riley and the defendant left in defendant's car, followed by English in the truck. The two vehicles were driven to a spot in the country where tools were secured and then proceeded to a deserted farm house where the defendant and English, by the use of chisel, crowbar and hammer, opened the safe. The breaking took about two hours. Talton Gallimore, Jr. took

all the contents of the safe, except $97.00 for Riley and an equal amount for Shoureas.

There was evidence tending to show that at least one of the checks contained in the safe was endorsed and deposited as a credit to Gallimore's account in a certain High Point finance company. The manager of the finance company testified that Gallimore came to his office and wanted to redeem the check, saying it was no good. He delivered the check, in January, 1967, to police officers in Lexington. The defendant objected to the introduction of this check, which was identified and admitted in evidence as State's Exhibit No. 5.

The jury returned verdicts of guilty of conspiracy as charged in No. 13,410 and of the substantive offenses of breaking and entering and larceny as charged in No. 13,411. From judgments of imprisonment of 7 to 10 years in each case, to run consecutively, the defendant appealed.

T. W. Bruton, Attorney General; James F. Bullock, Deputy Attorney General, for the State.

Barnes and Grimes by Jerry B. Grimes for defendant appellant.

HIGGINS, J. The first question of law presented by the appeal is the sufficiency of the bill of indictment in No. 13,410 to charge the crime of conspiracy. The objection is that at least one other conspirator, in addition to the defendant, should be named in the bill because of the nature of the crime. "A conspiracy is the unlawful concurrence of two or more persons in a wicked scheme — the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way by unlawful means. (Citing many cases.)" *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334; *State v. McCullough,* 244 N.C. 11, 92 S.E. 2d 389. A conspiracy to commit a felony is a felony. *State v. Brewer,* 258 N.C. 533, 129 S.E. 2d 262; *State v. Abernethy,* 220 N.C. 226, 17 S.E. 2d 25. The crime is complete when the agreement is made. *State v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686; *State v. Whiteside,* 204 N.C. 710, 169 S.E. 2d 711; *State v. Knotts,* 168 N.C. 173, 83 S.E. 972. Many jurisdictions follow the rule that one overt act must be committed before the conspiracy becomes criminal. Our rule does not require an overt act.

After a conspiracy is formed, and before it has terminated, that is, while it is a "going concern", the acts and declarations of each conspirator made in furtherance of the object of the conspiracy are admissible in evidence against all parties to the agreement, regardless of whether they are present or whether they had actual knowledge of the acts or declarations. *State v. Gibson,* 233 N.C. 691, 65

S.E. 2d 508; *State v. Smith,* 221 N.C. 400, 20 S.E. 2d 360; *State v. Jackson,* 82 N.C. 565. However, admissions made after the conspiracy has terminated are admissible only against the party who made them. Obviously, one person may not conspire with himself. *State v. Raper,* 204 N.C. 503, 168 S.E. 2d 831; *State v. Tom,* 13 N.C. 569. The objection to the validity of the charge in No. 13,410 is directed to the failure of the bill to name any conspirator except the defendant Gallimore. The bill charges he conspired with others.

The record discloses that the State had information from Jimmy Shoureas and Ronald Riley that they and one Benny English had conspired with the defendant Gallimore to break and enter the described building and to steal the safe and its contents. At the time the bill was drawn, the Solicitor was in a position to disclose in the bill the names of these three persons with whom the defendant had conspired. The decision of this and other courts are not altogether in agreement on the question whether an indictment for conspiracy must give the name or names of other conspirators, if known, or whether it is sufficient to charge the defendant (by name) and add "another or others", known or unknown. The general rule is an indictment should contain all essential elements of the crime charged to the end the defendant may prepare his defense and be protected against another procesution on the same charge. *State v. Barnes,* 253 N.C. 711, 117 S.E. 2d 849. In *State v. Van Pelt,* 136 N.C. 633, 49 S.E. 177, Judge Connor used this language:

> "We, however, fully approve the language of Shaw, C.J. in *Com. v. Hunt,* 45 Mass. 111. 'From this view of the law respecting conspiracy we think it an offense which especially demands the application of that wise and humane rule of the common law that an indictment shall state with as much certainty as the nature of the case will admit the facts which constitute the crime intended to be charged. This is required to enable the defendant to meet the charge and prepare for his defense, and, in case of an acquittal or conviction, to show by the record the identity of the charge, so that he may not be indicted a second time for the same offense.' "

Subsequent to the decision in *Van Pelt,* this Court, in *State v. Lewis,* 142 N.C. 626, 55 S.E. 600, held that an indictment was good which charged that Zeke Lewis *and others* conspired to break and enter the Anson County jail for the purpose of lynching one John V. Johnson, a prisoner being held therein. The Court cited as authority for holding the count sufficient: Revisal § 3250 (now G.S. 15-148); *State v. Capps,* 71 N.C. 93, and *State v. Hill,* 79 N.C. 656.

In *Capps,* the defendant was indicted for the larceny of ten kegs of gun powder, the property of W. W. Grier *and another.* The evidence showed the property belonged to Grier *and Alexander,* a partnership. The Court held the indictment valid on the ground that Grier was one of the owners and the act referred to (Now G.S. 15-148) provided: ". . . Any indictment wherein it shall be necessary to state the ownership of any property . . . which shall belong to or be in the possession of more than one person . . . whether partners in trade, joint tenants or tenants in common, it shall be sufficient to name one of such persons and state such property belonged to the person so named and another or others as the case may be." The Court sustained the indictment on the authority of the statute.

In *State v. Hill, supra,* the defendant was indicted in a two count bill. The first count charged malicious injury to a cow belonging to Lee Samuel. The count was held defective because it failed to allege the cow was injured by reason of malice toward the owner. The second count charged that the defendant did unlawfully and on purpose maim and injure livestock, the property of Lee Samuel *and others,* whose names were unknown. The livestock mentioned as the subject of the injury was alleged to be the property of Lee Samuel *and others* while the testimony showed the ox (beaten and injured) belonged to Lee Samuel *alone.* "This is a fatal variance not cured by the provisions of Bat. Rev. Ch. 33, Sec. 65." (Now G.S. 15-148).

Neither in *Capps* nor in *Hill* was there a charge of conspiracy. In each case the property involved was described in the bill as belonging to a person *and another or others.* These cases are poor, if any, authority for the Court's holding the indictment against Lewis for having conspired with *others* was a valid charge. The Superior Court held the charge bad. Clark, C.J. wrote the opinion, holding the indictment valid. Connor, J. concurred ". . . with much hesitation. I do not concur in some of the reasons which are given to sustain it. . . ." Brown, J. wrote a dissenting opinion.

Notwithstanding the insecure foundation upon which the opinion in *Lewis* rests, this Court, in two unanimous decisions, has followed *Lewis* by holding that "co-conspirators may be named in the bill or alleged to be unknown." *State v. Davenport, supra* and *State v. Abernathy, supra.* The holding in *Lewis* is cited as authority in 15 C.J.S. 1060 and 11 Am. Jur. 562.

In view of the foregoing background, we hold the conspiracy indictment in No. 13,410 meets the test of validity under the authorities cited. Judge Gwyn did not commit error in holding the indictment valid. However, we think the better practice is to name the con-

spirators in the bill if their identity is known. If unknown at the time the bill is submitted to the Grand Jury, the Solicitor should disclose their identity when ascertained and in time for counsel to complete his trial preparations. If the State fails to disclose the names of co-conspirators, the Court, on motion, should order them disclosed. We are advertent to the holding that a bill of particulars will not supply a fatal defect in a bill of indictment (*State v. Thornton,* 251 N.C. 658), but the defendant should know the identity of co-conspirators to the end that he may be prepared to defend himself against any statements they may have made or against any acts they may have committed while the conspiracy was active.

In this case the defendant was given a preliminary hearing five months before the trial. His present counsel represented him at that hearing. One month and 20 days before the actual trial, the officers, at the direction of Judge Gwyn, and in the presence of the Solicitor, made a full disclosure of the evidence upon which the State relied and which disclosed that Shoureas, Riley and English were participants in the conspiracy and in the commission of the substantive offenses charged in No. 13,411. This disclosure, for the purposes of trial preparations, was the equivalent of a bill of particulars. In view of the conspiracy, it was not necessary to show the defendant was present when the Kepley building was broken into, and the safe and its contents stolen in order to convict him of the substantive offenses charged in No. 13,411. *State v. Burgess,* 245 N.C. 304, 96 S.E. 2d 54; *State v. Birchfield,* 235 N.C. 410, 70 S.E. 2d 5.

Judge Gwyn did not commit error in denying the motion for continuance and in submitting the charges to the jury. The other objections involve the admission or exclusion of evidence. Examination of these objections fails to disclose error. The defendant did not offer evidence and does not except to the Court's charge.

No error.

STATE OF NORTH CAROLINA v. EDWARD W. DAWSON.

(Filed 2 February, 1968.)

1. Property § 4—

Evidence of the State tending to show that the padlocked door of a home had been pried open, that the letters KKK had been sprayed with paint both on the inside and outside of the house, that the defendant and three friends were seen riding in a truck in the immediate neighborhood

on the night of the defacing, and that a can of spray paint found in the truck was similar in composition to the paint discovered on the walls of the house, *held* insufficient to be submitted to the jury on the issue of defendant's guilt of violating G.S. 14-144, since the circumstantial evidence raises no more than a suspicion that defendant defaced the dwelling.

2. Same—

The indictment in this case *held* sufficient to charge the offense of unlawfully and wilfully defacing a house in violation of G.S. 14-144.

3. Same—

Evidence of the State tending to show that three or four shots were fired into a home by the occupants of a truck, that 60 feet from the dwelling were found empty casings for a rifle and pistol, and that a test conducted by a ballistics expert revealed that the casings had been fired from guns found in defendant's truck, *held* sufficient to be submitted to the jury on the issue of defendant's guilt of the offense of wilfully injuring a house.

4. Criminal Law § 9—

When two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty.

5. Criminal Law § 158—

Where the charge of the court is not included in the case on appeal, it will be presumed that the judge correctly instructed the jury with respect to the law and the evidence.

6. Constitutional Law § 17—

The purpose of the constitutional guaranty of the right to bear arms is to secure a well regulated militia, but the individual has the right, subject to reasonable regulation by the Legislature, to possess a weapon in order to exercise his common law right of self-defense.

7. Same; Unlawful Assembly—

The constitutional guaranty of the right to bear arms, N. C. Constitution, Art. I, § 24, does not abrogate the common law offense of going armed with unusual weapons to the terror of the people.

8. Unlawful Assembly—

An indictment alleging that the defendant armed himself with unusual and dangerous weapons for the unlawful purpose of terrorizing the people of the county and that, thus armed, the defendant went about the public highways of the county in a manner to cause terror to the people, *held* sufficient to charge the common law offense.

9. Same—

The evidence in this case *held* sufficient to be submitted to the jury on the issue of defendant's guilt of the offense of going armed with unusual and dangerous weapons to the terror of the people.

LAKE, J., concurring in part and dissenting in part.

HIGGINS, J., joins in concurring and dissenting opinion.

APPEAL by defendant from *McKinnon, J.*, February 1967 Session of ALAMANCE.

STATE *v.* DAWSON.

Defendant Edward W. Dawson, together with Robert H. Coleman, Hugh Vaughn, Jr., and James G. Buck, was tried upon five counts contained in four bills of indictment, which are summarized below:

Bill No. 47 charges that defendant and the three other persons named above, on 24 November 1966, did unlawfully assault Ernest Farrington with a deadly weapon, a pistol.

Bill No. 48 charges (1) that defendant and the aforesaid three other persons, without intent to commit a felony, on 24 November 1966, did break and enter the dwelling of Lawrence Williamson, in which his personal property was kept, and (2) that on the same day they did unlawfully, wilfully, and maliciously damage and deface the dwelling house of Lawrence Williamson by painting the letters KKK thereon.

Bill No. 49 charges that defendant and the three other persons heretofore named, on 24 November 1966, did unlawfully, wilfully and maliciously injure the dwelling house of Sarah Foust by firing bullets into the windows and walls and by painting on it the letters KKK.

Bill No. 50 charges that defendant and the aforesaid three persons, on 24 November 1966, "did unlawfully & wilfully arm themselves with unusual and dangerous weapons, to wit: Pistols and Rifles and, for the wicked and mischievous purpose of terrifying and alarming the citizens of Alamance County, did ride or go about the public highways of Alamance County without lawful excuse armed with said weapons in a manner as would cause a terror and annoyance and danger to the citizens of said County. . . ."

Appellant, defendant Dawson, through his present counsel, moved to quash each of the bills of indictment. The motions were overruled, and defendant entered a plea of not guilty to each charge. The cases were consolidated for trial. At the conclusion of the State's evidence, defendant also rested and moved for a judgment of nonsuit. The motion was denied. In case No. 47, the jury was unable to reach a verdict, and a mistrial was declared. In each of the other cases, the verdict was "guilty as charged."

The following prison sentences were imposed: In case No. 48, both counts consolidated for judgment, 12 months, prison sentence suspended for 5 years upon the usual conditions; case No. 49, 18 months; case No. 50, 18 months to run concurrently with the sentence imposed in case No. 49.

From the judgments entered, defendant Dawson appealed.

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

Lester V. Chalmers, Jr., for defendant.

SHARP, J. Defendant's assignments of error raise only two questions: (1) Does each of the indictments charge a crime, and (2) will the State's evidence withstand the motions for nonsuit? The charge of the court is not in the record, and no exceptions to the admission of evidence were brought forward. Since the judge declared a mistrial in case No. 47 because the jury was unable to agree upon a verdict, the sufficiency of the evidence to sustain the charge in that case is not before us. The indictment itself sufficiently charges an assault with a deadly weapon. The four cases having been consolidated for trial, and none of the testimony restricted to a particular case, evidence pertinent to any case may be considered with reference to it.

The State's evidence tends to show the following facts: Ernest Farrington operates the E & R Grocery, a small store on N. C. Highway No. 54 about 4 miles east of Graham. Between 9:00 and 10:00 p.m. on 24 November 1966, the lights were on both inside and outside the store. The light was also burning on the porch of the Farrington residence across the road from the store. In the front of the grocery were two big windows and a picture window. Farrington was alone in the store when a bullet came through the wall about a foot below the right window and struck a television two feet from where he was standing.

At the time the shot was fired, Farrington's 16-year-old daughter Ernestine and her date, Earl Torrain, were standing in the front yard of the Farrington home. They heard a motor vehicle approach and slow down as if to stop. A noise, which they thought to be a shot, caused them to turn around. They saw a light green or blue, late-model truck speed away toward Graham. It was equipped with metal rods or pipes resembling a rack extending from the end of the bed forward over the cab. Mr. Farrington came out of the store and told Ernestine to tell her mother that somebody had shot into the store and to call the sheriff. He himself, however, immediately crossed the road and called Sheriff Stockard, who arrived in about fifteen minutes.

At about 9:57 p.m., Deputy Sheriff Hargrove, who was driving on Interstate 85, was notified of the shooting by radio from the sheriff's office. He turned off onto N. C. Highway No. 54 about five miles from the E & R Grocery. Two miles out of Graham, he met a truck fitting the description he had received over the radio. He turned around and followed the truck to Pine Street where he stopped it. Defendant Dawson was driving; "four subjects were in the truck" — defendant, Vaughn, Coleman, and Buck. When Hargrove opened the door to the cab he saw a 30-caliber carbine in the floorboard on the right-hand side. On the dashboard were four pistols: a 25-caliber automatic, a 38-caliber pistol, a 22 revolver, and a 22-target pistol.

Defendant Dawson said that the target pistol was his and that the carbine belonged to Buck. Coleman claimed the 38-caliber pistol. The men unloaded the weapons and turned them over to Hargrove at the time.

At 10:10 p.m., Sheriff Stockard went to Pine Street where the deputy had the truck stopped and then proceeded to the E & R Grocery where he talked to Farrington, his daughter, and Torrain. While there, he removed a projectile from the television. He then took Miss Farrington to Graham where she viewed the truck which Deputy Sheriff Hargrove had stopped on Pine Street. It was light green. She said that, in her opinion, it was the truck from which the shot had been fired into the store. A photograph of the truck was introduced in evidence as State's Exhibit 4, and both Miss Farrington and Torrain testified that it represented the truck with its rack of pipes or rails, which they described in their testimony.

After talking to Ernestine Farrington on the night of 24 November 1966, Sheriff Stockard warned defendant of his constitutional rights and asked him if he wished to make any statement. Defendant said that he did not, and he made none. The next day, the sheriff searched the truck and found in it two pressurized cans of paint. One was on the floorboard of the cab and the other in a toolbox in the rear of the truck.

About 9:30 p.m. on 24 November 1966, Nellie Mae Foust was at home in the trailer which she occupied with her three small children on Covington Road, a dead-end street off of Highway No. 54. That night she observed two cars and a truck, which was either blue and white or green, go by her trailer and stop in front of the Sarah Foust house next door. The next house beyond Mrs. Sarah Foust's belongs to Lawrence Williamson. Next to it is a trailer, and the last house at the end of the road belongs to Elmina Wood. None of the dwellings below Nellie Mae Foust's trailer was occupied on the night of 24 November 1966. When the two cars and truck stopped in front of Sarah Foust's house, the lights on the vehicles were turned off and, later on, she "heard them shooting." Three or four shots were fired at the Sarah Foust home.

When the vehicles came out, the truck pulled off to the right as it went by Nellie Mae Foust's trailer. It did not stop, but a shot was fired at the trailer. The next day, she found a hole in her refrigerator and called Sheriff Stockard. He came and discovered that a bullet had entered the trailer about two feet to the left of the front door and struck the refrigerator.

Sheriff Stockard also examined the Lawrence Williamson home, six to seven hundred yards down the road from the Foust trailer.

He found that the letters KKK had been sprayed on the side of the house with white paint. The padlock on the back door had been pried off, and the letters KKK had also been sprayed on a picture hanging on the wall. A sample of the paint used was sent to the laboratory of the State Bureau of Investigation, but its report showed only that the paint used was similar to that found in the truck.

On the right-hand side of the door to the residence of Mrs. Sarah Foust, the sheriff found that the letters KKK had also been sprayed in white paint. To the left of the door, he found approximately five bullet holes. Sixty feet from the front of this house, he found three empty casings for a 30-caliber carbine and an empty casing for a 25-caliber pistol. These casings (State's Exhibit 3), he sent to the SBI in a sealed envelope. He also removed two projectiles from the rafters in the ceiling. John Boyd, a ballistics specialist in charge of the firearms section of the SBI Criminal Laboratory, test-fired bullets from the 30-caliber carbine and the 25-caliber pistol taken from the truck which defendant was driving on the night of 24 November 1966. He then compared the cartridges which he had fired with the casings contained in State's Exhibit 3. In his opinion, these casings had been fired from the carbine and the 25-caliber pistol found in defendant's truck.

The first count in the indictment in case No. 48 sufficiently charges the misdemeanor of nonfelonious breaking and entering the dwelling house of Lawrence Williamson, which contained personal property (a violation of G.S. 14-54). 2 Strong, N. C. Index 2d, Burglary and Unlawful Breakings § 2 (1967). The second count likewise adequately charges a violation of G.S. 14-144, that is, that defendant *et al.* did unlawfully and wilfully deface the home of Lawrence Williamson by painting the letters KKK thereon. We are constrained to hold, however, that the evidence is not sufficient to establish the violations alleged. It was sufficient to show that the padlock on the back door of the Williamson house had been broken and the house entered, and that somebody had sprayed paint both on the inside and outside of the house. It does not, however, disclose when these acts were committed or by whom. The finger of suspicion points to defendant and his three associates on the night of 24 November 1966, but the evidence does not satisfy the test for circumstantial evidence which was laid down in *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431. See also *State v. Bogan,* 266 N.C. 99, 145 S.E. 2d 374. The motion of nonsuit in case No. 48 should have been allowed.

Bill No. 49 also charges a violation of G.S. 14-144. It specifically alleges the ownership and location of the house alleged to have been unlawfully and wilfully damaged (1) by firing bullets into the win-

dows and walls and (2) by painting the letters KKK on the dwelling house. The indictment clearly alleges all the constituent elements of the crime of unlawfully and wilfully injuring a house. It is, therefore, sufficient. 2 Strong, N. C. Index, Indictment and Warrant § 9 (1959).

The evidence pertaining to case No. 49, when considered in the light most favorable to the State — as we are required to consider it in dealing with the motion for nonsuit — is sufficient to establish the following facts: The three empty casings from a 30-caliber carbine and the one from a 25-caliber pistol, which were found 60 feet from the Sarah Foust home, were fired from the carbine and pistol which law-enforcement officers took from defendant's truck about 10:00 p.m. on 24 November 1966. This truck was light green. The truck which Nellie Mae Foust saw go by her trailer on a dead-end road, and from which shots were fired at the Sarah Foust house, was either light green or blue and white. Shots were also fired at the Nellie Mae Foust trailer from this truck as it went out.

There is no evidence as to which one of the occupants of the truck fired the shots but when two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty. *State v. Peeden*, 253 N.C. 562, 117 S.E. 2d 398. It is a permissible inference that the four men, who were riding the roads of Alamance County on the night of 24 November 1966 in the cab of a truck containing a carbine and four pistols, were motivated by a common purpose and engaged in a joint enterprise. Evidence that defendant was criminally responsible for the firing of bullets into the Sarah Foust home on the night of 24 November 1966 was sufficient to sustain his conviction in case No. 49 even though — as in case No. 48 — the evidence was not sufficient to establish his participation in the painting of the letters KKK on the house. Under the law, proof of defacement by either bullets or paint would be sufficient to sustain a conviction under G.S. 14-144. The charge is not included in the case on appeal, but it is presumed that the judge correctly instructed the jury. 3 Strong, N. C. Index 2d, Criminal Law § 158 (1967). The motion of nonsuit in case No. 49 was properly overruled.

The purpose of bill No. 50 is to charge the common-law misdemeanor known as going armed with unusual and dangerous weapons to the terror of the people. This offense was incorporated in the statute of 2 Edw. III, ch. 3, which provided that any one who appears before the King's justices or other ministers with force and arms, or brings force "in affray of the peace," or goes armed by night or day in any fair, market, or elsewhere in such a manner as

to terrify the King's subjects, is guilty of a misdemeanor. 3 Burdick, Law of Crime § 741 (1946). In the report of Sir John Knight's Case, 87 Eng. Rep. 75, "An information was exhibited against him by the Attorney General, upon the statute of 2 Edw. 3, c. 3. . . . The information sets forth, that the defendant did walk about the streets armed with guns, and that he went into the church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King's subjects, *contra formam statuti*. . . . The Chief Justice said, that the meaning of the statute of 2 Edw. 3, c. 3, was to punish people who go armed to terrify the King's subjects. It is likewise a great offence at the *common law*, as if the King were not able or willing to protect his subjects; and therefore this Act is but an affirmance of that law; and it having appointed a penalty, this Court can inflict no other punishment than what is therein directed." *Id.* at 75-76.

This Court adopted the views expressed in Sir John's Case when, in 1843, it decided the case of *State v. Huntley*, 25 N.C. 418. In that case, the defendant was tried upon a bill of indictment which charged that, on 1 September 1843, he armed himself with pistols, guns, knives, and other dangerous and unusual weapons and went forth and openly exhibited himself, both in the daytime and in the night, to the good citizens of Anson County, and in the highway did publicly declare a purpose and intent to beat, wound, kill, and murder one James H. Ratcliff and other good citizens of the State; that by this conduct of Robert S. Huntley, "divers good citizens of the State were terrified, and the peace of the State endangered, to the evil example of all others in like cases offending, to the terror of the people, and against the peace and dignity of the State."

From the evidence, it appeared "that the defendant (Huntley) was seen by several witnesses, and on divers occasions, riding upon the public highway, and upon the premises of James H. Ratcliff . . . armed with a double-barreled gun," and that, on some of those occasions, he was heard to make threats against Ratcliff's life. The defendant's motion for a directed verdict of not guilty was overruled. The jury found him guilty and he appealed from the sentence imposed, contending that the offense of going armed with unusual and dangerous weapons to the terror of the people was created by the statute of Northampton, 2 Edw. III, ch. 3, and that this statute was not in force in this State. In disposing of this contention, Gaston, J., said:

". . . We have been accustomed to believe, that the statute referred to did not *create* this offense, but provided only special penalties and modes of proceeding for its more effectual suppression, and

of the correctness of this belief we can see no reason to doubt. All the elementary writers, who give us any information on the subject, concur in this representation, nor is there to be found in them, as far as we are aware of, a dictum or intimation to the contrary. Blackstone states that 'the offense of riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is *particularly* prohibited by the statute of Northampton, 2 Edward III, ch. 3, upon pain of forfeiture of the arms, and imprisonment during the King's pleasure.' 4 Bl. Com. 149. Hawkins, treating of offenses against the public peace under the head of 'Affrays,' pointedly remarks, 'but granting that no *bare words* in judgment of law carry in them *so much terror as to amount to an affray,* yet it seems certain that in some cases there may be an affray, where there is no actual violence, as where a man arms himself with dangerous and unusual weapons in such a manner as will naturally cause a terror to the people, *which is said to have been always an offense at common law* and *strictly* prohibited by many statutes.' Hawk. P. C., B. 1, ch. 28, sec. 1. . . . [I]t is difficult to imagine any (acts) which more unequivocally deserve to be so considered than the acts charged upon this defendant. They attack directly that public order and sense of security, which it is one of the first objects of the common law, and ought to be of the law of all regulated societies to preserve inviolate — and they lead almost necessarily to actual violence. Nor can it for a moment be supposed that such acts are less mischievous here or less the proper subjects of legal reprehension, than they were in the country of our ancestors. The bill of rights in this State secures to every man, indeed, the right to 'bear arms for the defense of the State.' While it secures to him a *right* of which he cannot be deprived, it holds forth the *duty* in execution of which that right is to be exercised. If he employs those arms, which he ought to wield for the safety and protection of his country, to the annoyance and terror and danger of its citizens, he deserves but the severer condemnation for the abuse of the high privilege with which he has been invested.

"* * *

"It has been remarked that a double-barrel gun, or any other gun, cannot in this country come under the description of 'unusual weapons,' for there is scarcely a man in the community who does not own and occasionally use a gun of some sort. But we do not feel the force of this criticism. A gun is an 'unusual weapon,' wherewith to be armed and clad. No man amongst us carries it about with him, as one of his everyday accoutrements — as a part of his dress — and never, we trust, will the day come when any deadly weapon

will be worn or wielded in our peace-loving and law-abiding State, as an appendage of manly equipment. But although a gun is an 'unusual weapon,' it is to be remembered that the carrying of a gun, *per se,* constitutes no offense. For any lawful purpose — either of business or amusement — the citizen is at perfect liberty to carry his gun. It is the wicked purpose, and the mischievous result, which essentially constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm a peaceful people." *Id.* at 420-23.

A different conclusion from that in *State v. Huntley* was reached in *Simpson v. The State of Tennessee,* 5 Yerg. (Tenn.) 356 (1833) wherein it was said that it was no offense at all at common law for a man to go armed in public places with dangerous and unusual weapons when there was no attempt to use them, even though it was alleged to have been done to the terror of the people. In commenting upon the Tennessee case, Clark and Marshall, in their treatise on the Law of Crimes § 428 (5th Ed. 1952), say: "In North Carolina the contrary was held, and this decision (*State v. Huntley, supra*) seems to be supported both by general principles and by authority." *Accord,* 2 Brill, Cyclopedia, Criminal Law § 987 (1923); 3 Wharton's Criminal Law § 1869 (11th Ed., Kerr, 1912).

State v. Huntley is still the law of North Carolina. During the past 124 years it has never been criticized. In *State v. Lanier,* 71 N.C. 288, Settle, J., said: "The elementary writers say that the offense of going armed with dangerous or unusual weapons is a crime against the public peace by terrifying the good people of the land, and this Court has declared the same to be the common law in *State v. Huntley,* 25 N.C. 418." *Id.* at 288-89. In *State v. Roten,* 86 N.C. 701, 704, it is written that although the legislature has not forbidden the open wearing of arms, "[i]f the privilege of so wearing arms should be abused, the public is protected by the common law." As authority for this last statement, Ashe, J., the author of the opinion, cited and quoted from *State v. Huntley, supra.* In *State v. Griffin,* 125 N.C. 692, 34 S.E. 513, Clark, J. (later C.J.), cited *State v. Huntley* as authority for his statement that "An affray may be committed by 'going armed with unusual and dangerous weapons, to the terror of the people.'" In *State v. Cole,* 249 N.C. 733, 107 S.E. 2d 732, the defendants were convicted of inciting a riot. The judge instructed the jury that the constitutional guaranty of a citizen's rights to bear arms and assemble peaceably for the purpose of registering their grievances "does not give any individual or any body of individuals, the right to bear arms for unlawful purposes in any respect anywhere." Upon appeal, the defendants assigned this instruction as

error. It was, however, approved upon the authority of *State v. Huntley, supra.*

At the time *State v. Huntley* was decided, the constitutional provision with reference to the right of the people to bear arms was contained in section 17 of the Bill of Rights, which was a part of our Constitution of 1776. It read as follows: "That the people have a right to bear arms for the defence of the state; and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power."

In 1868, the above provision was replaced by the first sentence of Art. I § 24 of the present Constitution: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to, and governed by, the civil power." To the foregoing, the Constitutional Convention of 1875 added a second sentence: "Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the Legislature from enacting penal statutes against said practice."

Defendant in this case makes no contention that Art. I § 24 of our present Constitution abolished the common-law crime of carrying weapons to the terror of the people or that it protects him from Indictment No. 50. Notwithstanding, we now consider whether this revision in the Constitution changed the common law as it existed in this State in 1843.

It is obvious that the second amendment to the Federal Constitution — "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed" — furnished the wording for the first part of the N. C. Constitution, Art. I § 24. Historical data and the reports of the deliberations and discussions which resulted in the wording of the second amendment and similar provisions in the constitutions of the original states lead to the conclusion that the purpose of these declarations (that a well regulated militia is necessary to the security of a free state) was to insure the existence of a state militia as an alternative to a standing army. Such armies were regarded as " 'peculiarly obnoxious in any free government.' " *State v. Kerner,* 181 N.C. 574, 576, 107 S.E. 222, 224. The framers of our constitutions were dedicated to the principle that the military should be kept under the control of civil power. For a full discussion of the history, and a collection of the decisions relating to the right to bear arms in

the United States, see Fuller and Gotting, *The Second Amendment: A Second Look*, 61 Nw. U. L. Rev. 46 (1966).

Militia is defined as "[t]he body of citizens in a state, enrolled for discipline as a military force, but not engaged in actual service except in emergencies, as distinguished from regular troops or a standing army," Black's Law Dictionary, 4th Ed. 1951 N. C. Constitution, Art. 12; G.S. 127-1 *et seq.;* see *Worth v. Commissioners,* 118 N.C. 112, 24 S.E. 778.

At the time constitutional provisions guaranteeing to the people the right to bear arms were formulated, the weapons of the militia were largely the private arms of the individual members; so the right of the people to keep and bear arms was the right to maintain an effective militia. If a citizen could be disarmed, he could not function as a militiaman in the organized militia. Today, of course, the State militia (of which the National Guard is the backbone) is armed by the State government and privately owned weapons do not contribute to its effectiveness. While the purpose of the constitutional guaranty of the right to bear arms was to secure a well regulated militia and not an individual's right to have a weapon in order to exercise his common-law right of self-defense, this latter right was assumed. *Hill v. State of Georgia,* 53 Ga. 472. In any event, the guaranty made the militiaman's arms available to him for that purpose. North Carolina decisions have interpreted our Constitution as guaranteeing the right to bear arms to the people in a collective sense — similar to the concept of a militia — and also to individuals. *Accord, Nunn v. State of Georgia,* 1 Ga. 243 (1846). These decisions have, however, consistently pointed out that the right of individuals to bear arms is not absolute, but is subject to regulation.

In *State v. Kerner,* 181 N.C. 574, 107 S.E. 222 (1921), it was held that a public-local law which prohibited one from carrying a pistol off his premises in Forsyth County without a permit (even though the pistol was not concealed) was unconstitutional. In the opinion, however, Clark, C.J., was careful to point out that an individual's constitutional right to bear arms was subject to reasonable regulation. He said: "It would also be a reasonable regulation, and not an infringement of the right to bear arms, to prohibit the carrying of deadly weapons when under the influence of intoxicating drink, or to a church, polling place, or public assembly, or in a manner calculated to inspire terror, which was forbidden at common law. These from a practical standpoint are mere regulations, and would not infringe upon the object of the constitutional guarantee, which is to preserve to the people the right to acquire and retain a practical knowledge of the use of fire-arms." *Id.* at 578, 107 S.E. at 225.

In a concurring opinion, Allen, J., and Stacy, J. (later C.J.), pointed out that to require a person to secure a permit before taking his gun off his premises — particularly in an emergency — was an unreasonable regulation. They said: "The right to bear arms, which is protected and safeguarded by the Federal and State constitutions, is subject to the authority of the General Assembly, in the exercise of the police power, to regulate, but the regulation must be reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety." *Id.* at 579, 107 S.E. at 226.

In *State v. Speller,* 86 N.C. 697, 700 (1882), Ruffin, J., posed this question: "But without any constitutional provision whatever on the subject, can it be doubted that the Legislature might by law *regulate* this right to bear arms — as they do all other rights whether inherent or otherwise — and require it to be exercised in a manner conducive to the peace and safety of the public?" Justice Ruffin thought the question answered itself.

In *State v. Reams,* 121 N.C. 556, 557, 27 S.E. 1004, 1005 (1897), this Court held that a pistol which was partly exposed to the public view was not a concealed weapon. Faircloth, C.J., began the opinion as follows: "The Constitution, Art. I, sec. 24, says that 'The right of the public to keep and bear arms shall not be infringed. . . . Nothing herein contained shall justify the practice of carrying concealed weapons or prevent the Legislature from enacting penal statutes against said practice.' The Legislature may then regulate the right to bear arms in a manner conducive to the public peace (*S. v. Speller,* 86 N.C. 697), which it has done in section 1005 of the Code."

North Carolina has not been alone in the view that a citizen's right to carry arms is subject to reasonable regulation. In 1896, in *Commonwealth v. Murphy,* 166 Mass. 171, 44 N.E. 138, the Supreme Judicial Court of Massachusetts was able to say, "[I]t has been almost universally held that the Legislature may regulate and limit the mode of carrying arms." *Id.* at 171, 44 N.E. at 138. In that case, the court held that a statute which forbade unauthorized bodies of men to parade with firearms did not contravene the provision of the Massachusetts Constitution which declared: "The people have a right to keep and bear arms for the common defense." The defendant Murphy, and ten or twelve other men, carrying ordinary breech-loading Springfield rifles, paraded in violation of statute. Their conviction was upheld even though their rifles had been altered so that they would not fire. The court said: "The right to keep and bear arms for the common defense does not include the right to associate together as a military organization, or to drill and parade with arms in cities and towns, unless authorized so to do by law. This is a

matter affecting the public security, quiet, and good order, and it is within the police powers of the legislature to regulate the bearing of arms, so as to forbid such unauthorized drills and parades." *Id.* at 171, 44 N.E. at 138.

Insofar as they affect an individual's right to carry arms, we perceive no difference in the constitutional provision of 1776 and our present constitution. The 1875 addendum stating that the legislature may enact penal statutes against carrying concealed weapons was undoubtedly "a matter of superabundant caution, inserted to prevent a doubt, and that, unexpressed, it would result from the undefined police powers, inherent in all governments, and as essential to their existence as any of the muniments of the bill of rights." *Haile v. State,* 38 Ark. 564, 567 (1882). It may have been that the specific reference to concealed weapons was directed at members of the militia who had thus abused their right to bear arms. In any event, it is inconceivable that the Constitutional Convention, which expressed its disapproval of the practice of carrying concealed weapons, intended to legalize acts which had previously been criminal. As the Supreme Court of Georgia said in *Hill v. State of Georgia,* 53 Ga. 472, 477, a case in which it held constitutional a statute prohibiting the carrying of weapons in a court of justice: "The preservation of the public peace, and the protection of the people against violence, are constitutional duties of the legislature, and the guarantee of the right to keep and bear arms is to be understood and construed in connection and in harmony, with these constitutional duties."

The right of a citizen to keep and bear arms is not at issue in this case. The question is whether he has a right to bear arms to the terror of the people. Our decisions make it quite clear that any statute, or construction of a common-law rule, which would amount to a destruction of the right to bear arms would be unconstitutional. But, as the Supreme Court of Alabama declared in *State v. Reid,* 1 Ala. 612, 617, "[A] law which is intended merely to promote personal security, and to put down lawless aggression and violence, and to that end inhibits the wearing of certain weapons, in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others, does not come in collision with the constitution." Alabama's Constitution provided that "Every citizen has a right to bear arms, in defence of himself and the State."

The 1875 addendum to Art. I § 24 does not license self-appointed vigilantes, extremist groups, hoodlums, or any persons whomsoever to arm themselves for the purpose of intimidating the people and

then — so long as they flaunt those weapons — to roam with impunity to the terror of the people. The right to keep and bear arms no more gives an individual the right to arm himself in order to prowl the highways or other public places to the terror of the people than the constitutional guaranty of free speech gives him the right to yell "fire" in a crowded theater.

Because our citizens are customarily law abiding, prosecutions for the common-law crime of going armed to the terror of the people have been infrequent. Notwithstanding, it is a wise and salutory law. In this day of social upheaval one can perceive only dimly the tragic consequences to the people if either night riders or daytime demonstrators, fanatically convinced of the righteousness of their cause, could legally arm themselves, mass, go abroad, and display their weapons for the purpose of imposing their will upon the people by terror. Such weapons — unconcealed and "ready to be used on every outbreak of ungovernable passion" — would endanger the whole community. *Haile v. State, supra* at 566. The wisdom of the common law, which made it a crime to go armed to the terror of the people, inures to our benefit today.

The indictment in case No. 50, although not as detailed and specific as the charge in *State v. Huntley, supra,* is nevertheless sufficient. *Sir John's* Case, *supra.* See also 3 Wharton's Criminal Law § 1870 (11th Ed. Kerr 1912). It charges all the essential elements of the crime, that is, that defendant (1) armed himself with unusual and dangerous weapons, to wit, pistols and rifles (2) for the unlawful purpose of terrorizing the people of Alamance County, and, (3) thus armed, he went about the public highways of the county (4) in a manner to cause terror to the people. While it would have been proper (as in *Huntley, supra*) to enumerate acts or threats of violence committed by defendant while thus going armed, such specific averments are not required. Evidence of such acts, of course, was admissible as tending to prove the commission of the offense charged.

The State's evidence was sufficient to show that defendant and three others collected an arsenal of dangerous weapons, a carbine and four pistols; that, thus armed, they rode the public highways of Alamance County in the nighttime; that, on different streets, they fired bullets into the store of Ernest Farrington and the homes of Nellie Mae Foust and Sarah Foust. As Gaston, J., said of Huntley's conduct in 1843, it is difficult to imagine facts which "more unequivocally" constitute the common-law misdemeanor of going armed to the terror of the people. Defendant's motion of nonsuit in case No. 50 was properly overruled.

The decision is this:
As to case No. 48
Reversed.
As to cases Nos. 49 and 50,
No error.

LAKE, J., concurring in part and dissenting in part.

I concur in the decisions reached in the majority opinion with reference to Bill No. 48 and with reference to Bill No. 49, and with the views expressed therein concerning those two cases.

I dissent from the decision with reference to Bill No. 50. It is my view that the motion to quash that indictment should have been granted for the reason that the indictment does not state a criminal offense under the present law of this State.

The sufficiency of an indictment to withstand a motion to quash turns upon the facts alleged therein and not upon what the evidence shows. The indictment in Case No. 50 is not strengthened by what is alleged and proved in Cases No. 48 and 49. Upon the motion to quash, it must be considered as if there were no Case No. 48 and no Case No. 49. Upon that motion we look solely to the indictment in Case No. 50 and we assume that every fact alleged therein is true and that no other fact whatever is known about this defendant. *State v. Cole,* 202 N.C. 592, 163 S.E. 594; *State v. Whedbee,* 152 N.C. 770, 67 S.E. 60; *State v. Eason,* 70 N.C. 88; 27 Am. Jur., Indictments and Informations, § 54.

The facts alleged in the indictment in Case No. 50 are these:

> The defendant and three others "did unlawfully, & wilfully arm themselves with unusual and dangerous weapons, to wit: Pistols and Rifles and, for the wicked and mischievous purpose of terrifying and alarming the citizens of Alamance County, did ride or go about the public highways of Alamance County without lawful excuse armed with said weapons in a manner as would cause terror and annoyance and danger to the citizens of said county."

The majority construes this to allege that the defendant, armed as described, went upon the public highways in a manner to cause terror to the people. I construe the allegation to mean that he went upon the public highways armed in a manner to cause terror to the people. The difference is not a play upon words. The indictment must charge the elements of the offense "lucidly." *State v. Banks,* 263 N.C. 784, 140 S.E. 2d 318. Where it leaves doubt as to what acts are charged, the accusation should be strictly construed. 27 Am. Jur., Indictments and Informations, §§ 54, 57. In my view of the law of this

State, it is quite material whether the defendant is charged with some act while bearing arms upon the highway or with the mere bearing of arms upon the highway. A substantial basis for doubt as to whether the indictment charges an element of a criminal offense should be resolved in favor of the defendant. As the majority opinion notes, this indictment does not allege any act or threat of violence committed by the defendant while going armed upon the highway. Neither does it allege that any person was terrified.

In *State v. Huntley,* 25 N.C. 418, which is cited by the majority and which is the foundation upon which the conclusion of the majority opinion rests, the indictment charged that the armed defendant went upon the highway and, exhibiting himself thereon to the citizens of the county, "did openly and publicly declare a purpose and intent" to murder a named individual and others "by which said arming, exposure, exhibition, and declarations," citizens of the State were terrified and the peace of the State endangered. That is a substantial distinction between the present case and *State v. Huntley.* If these acts of the defendant there were not the basis upon which that case was decided, it is my view that *State v. Huntley* does not correctly represent the present law of this State, even if it did so represent the law of this State in 1843.

The majority opinion correctly states that the opinion in *State v. Huntley* has never been criticised during the 124 years since it was rendered by the great Court composed of Ruffin, C.J., and Gaston and Daniel, JJ. It is possible that this is true because of the fact that, so far as the reports of this Court's decisions show, it has never been applied from that day to this. It is true that there are a few scattered instances in which this Court has cited that case as a correct statement of the common law. I have been able to find only these: *State v. Cole,* 249 N.C. 733, 107 S.E. 2d 732; *State v. Griffin,* 125 N.C. 692, 34 S.E. 513; *State v. Roten,* 86 N.C. 701; *State v. Lanier,* 71 N.C. 288. In none of these was the offense charged that dealt with in *State v. Huntley.* To these might be added *State v. Kerner,* 181 N.C. 574, 107 S.E. 222, in which Clark, C.J., in an opinion concurred in only by one other member of the Court, though the entire Court joined in the result, refers to the common law crime of carrying deadly weapons in a manner calculated to inspire terror. There, too, another offense was charged. *State v. Huntley* cites no instance in which anyone was ever, prior to that date, charged with this offense in North Carolina. No American decision is cited as recognizing the existence of such an offense in this country.

That case, decided by this Court when composed of judges equalled by few and surpassed by none in wisdom or in knowledge of the

common law, establishes that in 1843 the common law of North Carolina made it a criminal offense for one armed with "unusual and dangerous weapons" to go upon the public highway and there, by threats of murder, cause terror to the people. Notwithstanding the eminent authority of the Court which so declared the common law of this State in 1843, I question the correctness of a decision which now sends a man to prison on no basis save that it was so declared in the time of Plantagenet absolutism, the dust gathered upon that declaration having been disturbed but once in all the history of this State.

There is, however, a much better reason for refusing to affirm this defendant's conviction on the ground of *State v. Huntley, supra.* That is, the fact that the present Constitution of this State contains a different provision as to the right of the people of North Carolina to bear arms from that which the Constitution contained in 1843 At that time the Constitution in effect was the one adopted 18 December 1776. In section 44, that original Constitution of North Carolina incorporated into itself the Declaration of Rights adopted the previous day. Section 17 of the Declaration of Rights of 1776 declared "that the people have a right to bear arms *for the defense of the State* * * *." (Emphasis added.) That provision was quoted by Gaston, J., in *State v. Huntley* and he emphasized in his opinion the fact that the Constitution then so limited this right.

In 1868, our Constitution was rewritten and the language of the Second Amendment to the United States Constitution was substituted for that of the original Constitution relied upon in *State v. Huntley.* That language is, "A well regulated militia being necessary to the security of a free state, the right of the people *to keep and bear arms* shall not be infringed * * *." (Emphasis added.) Seven years later, in the Convention of 1875, this sentence was added: "Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the Legislature from enacting penal statutes against said practice." It appears indisputable that the Convention of 1875 regarded the then established right of the people to keep and bear arms as absolute, so much so that the Legislature could not even forbid the carrying of a concealed weapon without the express authority being granted to it in the Constitution by amendment.

It is true that in *State v. Speller,* 86 N.C. 697, Ruffin, J., not the Chief Justice of 1843, said in a dictum that the Legislature might by law "regulate this right to bear arms," and the same view is expressed by Allen and Stacy, JJ., in *State v. Kerner, supra,* in which case, as above noted, there was no opinion receiving the approval of the majority of the Court. I am unable to understand how a right can be regulated without being infringed. The language of the present

Constitution appears to be plain and unequivocal. It does not say that the right to bear arms cannot be infringed except for the promotion of peace and good order in the community. It says the right shall not be infringed. It is immaterial whether that is wise or unwise. That is what the Constitution says. The better view on this point seems to be that stated by Clark, C.J., in *State v. Kerner, supra,* as follows:

> "The Constitution of this State, sec. 24, Art. I, which is entitled, 'Declaration of Rights,' provides: 'The right of the people to keep and bear arms shall not be infringed,' adding, 'Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the Legislature from enacting penal statutes against said practice.' This exception indicates the extent to which the right of the people to bear arms can be restricted; that is, the Legislature can prohibit the carrying of concealed weapons, but no further."

If the Legislature of North Carolina today cannot make conduct a criminal offense, it cannot be punished in this State by reason of the fact that Edward II declared it to be so. It was the very fact that the right to bear arms had been infringed in England, and that this is a step frequently taken by a despotic government, which caused the adoption of the provision in the North Carolina Declaration of Rights of 1776 and the insertion in the Federal Bill of Rights of the Second Amendment. When our distinguished predecessors of 1843 determined that the language used in our State Constitution did not forbid the imprisonment of a man for conduct which Edward III had declared a criminal offense, the people of this State wrote into our Constitution the more inclusive language of the Second Amendment to the Constitution of the United States. Thus, *State v. Huntley, supra,* unless distinguishable from the present case as above suggested, has not been overruled by this Court. It has been overruled by the only authority which is higher than this Court in matters of North Carolina law — the people of North Carolina.

A further quotation from the opinion of Clark, C.J., in *State v. Kerner,* in which opinion Hoke, J., later C.J., concurred, is not inappropriate to the present times:

> "The former [the right to keep and bear arms] is a sacred right, based upon the experience of the ages in order that the people may be accustomed to bear arms and ready to use them for the protection of their liberties or their country when occasion serves. The provision against carrying them concealed was to prevent assassinations or advantages taken by the law-

less, *i.e.*, against the abuse of the privilege. * * *

"In our own State, in 1870, when Kirk's militia was turned loose and the writ of *habeas corpus* was suspended, it would have been fatal if our people had been deprived of the right to bear arms, and had been unable to oppose an effective front to the usurpation.

"The maintenance of the right to bear arms is a most essential one to every free people, and should not be whittled down by technical constructions. It should be construed to include all such 'arms' as were in common use, and borne by the people when this provision was adopted. * * * The intention was to embrace 'the arms,' an acquaintance with whose use was necessary for their protection against the usurpation of illegal power — such as rifles, muskets, shotguns, swords, and pistols.

* * *

"The usual method when a country is overborne by force is to 'disarm' the people. It is to prevent the above and similar exercises of arbitrary power that the people in creating this Government 'of the people, by the people, and for the people,' reserved to themselves the right to 'bear arms' that accustomed to their use they might be ready to meet illegal force with legal force by adequate and just defense of their persons, their property, and their liberties, whenever necessary. We should be slow, indeed, to construe such guarantee into a mere academic expression which has become obsolete."

When *State v. Huntley* was decided in 1843, it had never been supposed that the Second Amendment to the United States Constitution placed any limit upon the power of the State Government to declare conduct criminal. See Clark, C.J., in *State v. Kerner, supra.* There was then no Fourteenth Amendment. The Supreme Court of the United States has now held that the Fourteenth Amendment makes applicable to state governments all of those provisions of the first ten amendments which are essential to the preservation of liberty. See, *Palko v. Connecticut,* 302 U.S. 319, 326, 58 S. Ct. 149, 82 L. Ed. 288. Whether that Court will so regard the Second Amendment, I am unable to predict. In any event, the same language now in our own State Constitution does forbid the imposition of criminal penalties upon the bearing of arms which are not concealed.

By no means does it follow that one, while bearing arms, may use them as he sees fit. The right to bear arms obviously confers no right to shoot into the dwelling of another. Thus, the conviction of the defendant in Case No. 49 should be affirmed and I concur in the

majority's decision so to do. Likewise, the State has unquestioned power to punish for an assault with a deadly weapon more severely than for a simple assault, G.S. 14-33, and to impose for armed robbery a sentence more severe than that imposed for common law robbery. G.S. 14-87. To stand in a public highway brandishing a pistol while threatening to murder, as was done in *State v. Huntley,* may be punished by the State. To incite to riot is punishable. *State v. Cole,* 249 N.C. 733, 107 S.E. 2d 732. To refer to the case of Sir John Knight, cited in the majority opinion, if some modern counterpart of Sir John invades a church in this State while Divine services are in progress, waving a gun and terrifying the congregation, as Sir John is said to have done in England, he may be punished for disturbing public worship if not for an assault with a deadly weapon. It is not necessary to dust off Edward III's statute of Northampton, 2 Edward III, ch. 3, in order to protect the people of this State from the misuse of firearms or other weapons. However, the mere carrying of weapons upon the public highway, without some act other than the carrying of them, cannot be made a crime under the Constitution of this State, even though the sight of the weapons frightens some person or persons; nor is it sufficient to make the bearing of weapons a criminal offense that the bearer intended to frighten someone thereby. So long as a man does only that which the Constitution declares he has an uninfringeable right to do, he cannot be convicted and punished whatever his motive or purpose for doing it may be and whatever the effect of it may be upon other people. Until some act, other than the mere carrying of the weapon is done, the Constitution of the State protects the bearer of the weapon from punishment by the State.

In the present indictment in Case No. 50, as I interpret it, the defendant is charged only with carrying weapons on the highway, not with any other act. For this reason the indictment does not state a criminal offense and the motion to quash should have been allowed.

HIGGINS, J., authorizes me to say he concurs in the views here expressed and joins in this opinion.

STATE v. DENNIS McDANIEL.

(Filed 2 February, 1968.)

1. Homicide § 15—

In order for a declaration to constitute a dying declaration the declarant must, at the time of the making of the statement, have full apprehension of his danger of imminent and inevitable death, and a mere showing that the declarant was at the point of death and in great agony is insufficient.

2. Criminal Law §§ 75, 76—

The admission, over objection, of inculpatory statements made by defendant to police officers without a hearing of evidence by the trial court to determine the voluntariness of the statements, and the admission, over objection, of a knife identified by the accused, while in the custody of police officers and without being advised of his rights, as the knife with which he stabbed the deceased, while ordinarily reversible error, *is held* not to warrant a new trial in this case, since the defendant testified in his own behalf that he intentionally stabbed the deceased with the knife.

3. Criminal Law § 169—

The admission of evidence over objection is ordinarily rendered harmless when the defendant thereafter testifies to evidence of the same import.

4. Same; Criminal Law § 76—

The rule that a conviction based upon an incompetent confession cannot be saved by sufficient evidence *aliunde* the confession does not apply when the defendant testifies in his own behalf to the same facts stated in such confession.

5. Criminal Law § 85—

Where defendant takes the stand in his own behalf and introduces the details of his criminal record, including a conviction for assault, as substantive evidence of his innocence, the solicitor is entitled to cross-examine the defendant as to the nature of the weapon used by defendant in the prior assault.

BOBBITT AND SHARP, JJ., concur in result.

APPEAL by defendant from *Bailey, J.*, at the January 1967 Criminal Session of COLUMBUS.

Upon an indictment, proper in form, the defendant was tried for the murder of Chester Leggett and was found guilty of murder in the second degree. He was sentenced to imprisonment in the State Prison for 20 to 30 years. The only assignments of error relate to the denial of his motion for a directed verdict of not guilty and to the admission of evidence over his objection.

Evidence introduced by the State, without objection, is to the following effect:

On Sunday, 4 September 1966, the defendant and Leggett had an altercation which began in a parked automobile in which they,

two women and another man were sitting in front of the home of a mutual friend. Leggett and his woman companion, whom the defendant had also dated on occasion, got out of the car, the defendant remaining therein. Leggett called back to the defendant and told the defendant that if he had anything to "settle" to come on down the road and settle it with him. Thereupon, the defendant got out of the car with a knife in his hand and went down the road toward Leggett. They began to tussle. Leggett grabbed the defendant's wrist and they fell to the ground. He could not take the knife from the defendant and got up and told the defendant to "go on," and that "he didn't want to mess with him." Leggett started down the road and the defendant ran up behind him. Leggett picked up a stone and they began to tussle again. The defendant still had the knife. Leggett dropped the stone. They resumed the struggle and again fell to the ground. When they got up, Leggett was backing away down the road and the defendant was walking toward him with the knife. Leggett then picked up a piece of plank about three feet long and two inches wide. Swinging this in front of him, he continued to back away from the defendant until he (Leggett) backed into a wire fence. Leggett did not hit the defendant with the piece of plank. Witnesses saw the defendant go up to Leggett and saw his right arm go up and down three times. Leggett fell against the fence and then began to run down the road. Leggett and the defendant were 38 and 65 years of age, respectively, Leggett being substantially taller and heavier.

The foregoing fight occurred at approximately 3 p.m. About 4:15 p.m., in response to a call, Assistant Police Chief Heye went to the scene and found Leggett lying on the ground about one block from where the fight occurred. Leggett's shirt was full of blood and he appeared to be in agony. The officer observed three stab wounds or cuts, one in the middle of the chest. After a brief conversation with Leggett, the officer carried him to the hospital where, upon arrival, he was pronounced dead by the examining physician. At the trial it was stipulated that the cause of Leggett's death was a stab wound in the center of his chest.

Over objection, Officer Heye was permitted to testify that when he found Leggett he asked him three times who had cut him and, on the third time, Leggett replied, "Mr. Dennis" (the defendant).

Through a series of questions, interspersed with objections and motions to strike, all of which were overruled, the State introduced the testimony of Officer Heye to the following effect:

After Leggett had been pronounced dead on arrival at the hospital, Officer Heye, by radio, instructed Officer Fipps to pick up the defendant and take him to the police station in Chadbourn, which

Officer Fipps did. Upon arrival at the police station from the hospital, Officer Heye found the defendant there and transported him to the jail in Whiteville, where the coroner was waiting, the coroner having gone to the hospital before Officer Heye left it. During the ride from the police station in Chadbourn to the jail in Whiteville, Officer Heye did not interrogate the defendant, but the defendant "persisted" in telling Officer Heye what had happened, so the officer "just let him go ahead and talk." The defendant told Officer Heye that he had cut Leggett with a knife and meant to do it, intending to put a stop to Leggett's "picking and staying in behind him all the time." Upon arrival at the jail in Whiteville, Officer Heye asked the defendant where he had left his knife. The defendant replied that he had left it on a table between the sink and the refrigerator in the house of Joe Collins, in front of which house the fight began. Officer Heye then instructed Officer Fipps to go to the Collins residence and get the knife, which Officer Fipps did, finding it on the table in the location so described by the defendant.

Officer Fipps, over objection, testified that he found a knife, as described to him by Officer Heye in the latter's instructions, in the place so specified. Over objection, the knife was introduced in evidence. It was a small paring knife with a wooden handle, approximately six inches long. It was then in the same condition as when offered in evidence. Officer Fipps also testified that earlier, pursuant to his original instructions by radio from Officer Heye, he had gone to the scene of the fight and found the defendant in the road. He and two other officers, who were with him, asked the defendant to ride with them down to the police station, telling him they wanted to talk with him. He got in the police car and accompanied these officers to the police station in Chadbourn, where he was when Officer Heye arrived from the hospital. There was no evidence of any statement by the defendant to these officers or by them to him.

There was no evidence that Officer Heye, or any other officer, at any time advised the defendant of his constitutional rights to remain silent and to have an attorney or of any other constitutional right. No examination of any officer was conducted in the absence of the jury with reference to the voluntary or involuntary nature of statements by the defendant. The court made no findings of fact with reference thereto, merely overruling, without comment, objections by the defendant to questions propounded to the officers with reference to the above statements and to the finding of the knife.

Following the above testimony by the police officers, counsel for the defendant cross examined each of the officers. Upon cross examination, Officer Heye testified that he had "a very brief conversation" with the defendant at the Chadbourn police station and that the de-

fendant began to tell him what had happened. Thereupon, Officer Heye told the defendant that they had to go over to Whiteville and the coroner was waiting for them at the jail. On the way to the jail the defendant "volunteered to tell him what happened." The defendant was nervous and wanted to talk about what had taken place and Officer Heye "let him go ahead and talk." During the course of that conversation, the defendant told Officer Heye that he and Leggett had had a fight, and also told him that he (the defendant) had "stabbed him" (Leggett). During this conversation on the way to Whiteville, the defendant told Officer Heye where he could find the knife.

On cross examination, Officer Fipps testified that, pursuant to instructions from Officer Heye, he went to the scene of the fight, which was in front of the Joe Collins residence and, finding the defendant there, requested him to go to the police station because the officers "wanted to talk to him." He did not place the defendant under arrest at any time or inform him why the officers wanted to talk to him. He had no other conversation with the defendant whatever. The defendant did not object to being taken to the jail in Whiteville by Officer Heye. He made no inquiry as to why he was being taken to Whiteville.

The defendant testified in his own behalf. The substance of his testimony on direct examination was:

Leggett, who was much younger and much larger than the defendant, without provocation, jumped on the defendant as they were walking together down the road from where they had gotten out of the automobile, began choking and beating the defendant and "had him down." Thereupon, the defendant, being scared that Leggett would kill him, as he said he was going to do, stabbed Leggett. Leggett then got up and the defendant put his knife back in his pocket. Thereupon, Leggett got a rock and tried to hit the defendant with it. The defendant backed off. Leggett dropped the rock and picked up the piece of plank. The defendant then pulled his knife out of his pocket again to keep Leggett from hurting him. Leggett was trying to hit him with the piece of plank. After Leggett dropped the plank and ran, the defendant saw Leggett no more. He went to the police station with Officer Fipps. Upon being asked when he found out that he was under arrest, the defendant replied that he "never found out." He went to the Whiteville jail with Officer Heye. On the way Officer Heye asked him where the knife was and the defendant told him where to find it on the table in Joe Collins' house. He had previously been arrested and convicted for public drunkenness five or six times, and in 1963 he had been given a suspended sentence for "assault with a deadly weapon." He did not have his knife in his hand when he

got out of the automobile and walked down the road toward Leggett before the start of the fight.

On cross examination the defendant testified:

He and Leggett were not quarreling over Leggett's woman companion. They had had no quarrel at all prior to Leggett's "jumping on him" as they walked together down the road. While Leggett had the defendant down on the ground, with one hand on his neck and hitting him with the other, the defendant reached in his pocket, got the knife and stabbed Leggett. He then put his knife back in his pocket and did not take it out again until Leggett picked up the piece of plank and started swinging it. Then Leggett backed up against the fence, dropped the piece of plank and ran. He does not know where he stabbed Leggett or how many times. He did not stab Leggett while the latter was backed up against the fence, but while Leggett had him down on the ground. On the way to Whiteville he told Officer Heye that he had stabbed Leggett and where the officer could find the knife.

Also on cross examination the defendant identified the knife in evidence as the one he "stabbed Chester Leggett with," and, over objection, in response to a question by the solicitor, he testified that his former suspended sentence for "assault with a deadly weapon" was for his use of "a pocket knife."

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

John A. Dwyer for defendant appellant.

LAKE, J. It was stipulated in the course of the trial below that Chester Leggett is dead and that the cause of his death was a stab wound in the chest. The defendant, himself, testified that in the course of a fight he intentionally stabbed Leggett with a knife, identifying the knife. The evidence of the State is that Leggett was found dying in the vicinity of that fight, approximately one hour after it occurred. The State also introduced evidence tending to show that the defendant was the aggressor in the fight and that he stabbed Leggett while the latter was backed up against a fence in an effort to retreat from the fight. There was no error in the denial of the defendant's motion for a directed verdict of not guilty on the charge of second degree murder. The defendant's testimony that he stabbed Leggett in self defense presented a question for the jury which did not accept his version of the occurrence.

It was error to permit Officer Heye, over objection by the defendant, to testify that the deceased told him the defendant had cut

him. This was obviously hearsay. The defendant was not present when the statement was made. It does not qualify as a dying declaration for the reason that there is insufficient evidence to show that Leggett then had "full apprehension of his danger" of imminent and inevitable death. *State v. Dunlap,* 268 N.C. 301, 150 S.E. 2d 436; *State v. Brown,* 263 N.C. 327, 139 S.E. 2d 609; *State v. Bright,* 215 N.C. 537, 2 S.E. 2d 541; Stansbury, North Carolina Evidence, 2d Ed., § 146. While such apprehension on the part of the deceased may be shown by circumstances, *State v. Watkins,* 159 N.C. 480, 75 S.E. 22; 26 Am. Jur., Homicide, § 421, it is not shown by mere proof that the deceased was actually at the point of death and in great agony, which is all that is shown upon this point in this record.

There was also error in allowing the State, over objection, to introduce in evidence statements made to Officer Heye by the defendant, and the knife, which was found by the officers as the result of such statements. The admission of the statements was error, not because the record shows affirmatively that they were incompetent under the *Miranda* Rule, but because the procedure required by our own rule for determining their competency was not followed. The admission of the knife was error both because of the *Miranda* Rule and because of our own rule.

In *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, the Supreme Court of the United States established the following rule which, being an interpretation by that Court of the Fifth and Fourteenth Amendments to the Constitution of the United States, is binding upon us:

> "To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree

to answer questions or make a statement. *But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.*" (Emphasis added.)

Obviously, the defendant was in custody, within the meaning of the *Miranda* decision, when, in response to a question by Officer Heye, he told Officer Heye where to find the knife which was introduced in evidence as the State's Exhibit No. 1. There is no suggestion whatever in the record that, prior to this interrogation and response, the defendant was warned of his constitutional rights. It follows that the knife itself and the testimony of the officers that they found it in the place designated by the defendant were not admissible in evidence against him when offered by the State. *State v. Mitchell,* 270 N.C. 753, 155 S.E. 2d 96.

In due time, the defendant objected to testimony by Officer Heye concerning statements made by the defendant to him enroute from the police station in Chadbourn to the jail in Whiteville. Without conducting any examination concerning the voluntary or involuntary nature of the statements, without sending the jury from the courtroom and without making any finding of fact upon which a conclusion as to the voluntary or involuntary nature of the statements could be based, the court overruled the objection and permitted the officer to testify that the defendant said that he had intentionally cut the deceased with a knife.

In *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1, we said:

"When the State proposes to offer in evidence the defendant's confession or admission, and the defendant objects, the proper procedure is for the trial judge to excuse the jury and, in its absence, hear the evidence, both that of the State and that of the defendant, upon the question of the voluntariness of the statement. In the light of such evidence and of his observation of the demeanor of the witnesses, the judge must resolve the question of whether the defendant, if he made the statement, made it voluntarily and with understanding. [Citations omitted.] The trial judge should make findings of fact with reference to this question and incorporate those findings in the record."

We again stated this rule in *State v. Ross,* 269 N.C. 739, 153 S.E. 2d 469. To the same effect is *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344, where a new trial was granted because the trial judge had not made findings of fact with reference to whether a confession introduced in evidence over the defendant's objection was voluntary.

Nothing else appearing, these errors in the admission of evidence

would require a new trial. However, the defendant elected to testify in his own behalf and his testimony was such as to cure the errors above noted by rendering them harmless. The evidence of the State so erroneously admitted was for the sole purpose of proving that the defendant intentionally cut or stabbed the deceased with the knife introduced in evidence. The defendant, himself, testified that he did intentionally stab the deceased, that he did so with that knife, which he subsequently placed on the table in the residence of Joe Collins, and that he later told Officer Heye where to find the knife.

In *State v. Adams,* 245 N.C. 344, 95 S.E. 2d 902, Denny, J., later C.J., speaking for the Court, said:

> "Exceptions by the defendant to evidence of a State's witness will not be sustained where the defendant or his witness testifies, without objection, to substantially the same facts. *State v. Matheson,* 225 N.C. 109, 33 S.E. 2d 590.
>
> "Likewise, the admission of evidence as to facts which the defendant admitted in his own testimony, cannot be held prejudicial. *State v. Merritt,* 231 N.C. 59, 55 S.E. 2d 804."

The rule so stated is well established in this and other jurisdictions. *State v. Dunlap, supra; State v. Conner,* 244 N.C. 109; 92 S.E. 2d 668; *State v. Minton,* 234 N.C. 716, 68 S.E. 2d 844; 31 A.L.R. 2d 682; *State v. Hudson,* 218 N.C. 219, 10 S.E. 2d 730; *State v. Bright, supra; State v. Cade,* 215 N.C. 393, 2 S.E. 2d 7; Strong, N. C. Index 2d, Criminal Law, § 169; 5 Am. Jur. 2d, Appeal and Error, § 806; 5A C.J.S., Appeal and Error, §§ 1731 and 1732.

The admission of the testimony of Officer Heye as to the statement by the deceased, identifying the defendant as the person who had cut him, the admission of the testimony of Officer Heye concerning the admissions by the defendant and the defendant's directions as to where the knife was to be found, and the admission of the knife, itself, in evidence do not, therefore, entitle the defendant to a new trial under the rule heretofore established by the decisions of this Court.

We are not inadvertent to the Court's footnote 33 to the opinion in the *Miranda* case, *supra.* That footnote is to the effect that when a conviction is based in part upon a confession, admitted in evidence over the defendant's objection and inadmissible because obtained by police officers in violation of the *Miranda* rule, the conviction and resulting judgment are not saved by the fact that the record contains other evidence which is competent and ample, without consideration of the confession, to support the conviction. Obviously, a confession does not cease to be prejudicial and its improper admission does not

fall into the category of harmless error merely because it is not the only evidence of guilt. For example, the presence in the record of testimony of an alleged eye-witness, or of evidence of other circumstances, from which guilt could be inferred, would usually be less convincing than the defendant's own confession, and so would not convert the improper admission of such confession into harmless error. The defendant's own direct testimony upon the witness stand, in response to questions put to him by his own counsel, is a different matter. When he takes the witness stand and testifies to the same facts as those contained in the State's evidence to which he objects, it is his own testimony, not the extra-judicial statement improperly allowed in evidence, which establishes those facts and the extra-judicial statement becomes inconsequential. Having now testified to the same facts under oath, he cannot be heard to say he has been prejudiced by the erroneous admission of evidence to the identical effect.

Nor have we overlooked *Fahy v. Connecticut,* 375 U.S. 85, 84 S. Ct. 229, 11 L. Ed. 2d 171. There the Court reversed a conviction on the charge of injuring a public building by painting a swastika upon a synagogue. The ground of reversal was that a paint brush obtained by an unconstitutional search and seizure was admitted in evidence over objection. The Supreme Court of Errors and Appeals of Connecticut sustained the conviction and resulting judgment on the ground that the admission of the brush into evidence, while error, was harmless error. The United States Supreme Court reversed for the reason that, in its view, the inadmissible evidence was, in fact, prejudicial, Justices Harlan, Clark, Stewart and White dissenting. The Chief Justice, speaking for the majority of the Court, said:

> "On the facts of this case, it is not now necessary for us to decide whether the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to the normal rules of 'harmless error' under the federal standard of what constitutes harmless error. Compare *Ker v. California,* 374 U.S. 23, 10 L. ed. 2d 726, 83 S. Ct. 1623. We find that the erroneous admission of this unconstitutionally obtained evidence at this petitioner's trial was prejudicial; therefore, the error was not harmless and the conviction must be reversed. * * * Obviously, the tangible evidence of the paint and brush was itself incriminating. * * * It can be inferred from this [a quoted finding by the trial judge] that the admission of the illegally seized evidence made Lindwall's [a police officer] testimony far more damaging than it would otherwise have been."

Mr. Justice Harlan, speaking for the minority of four justices, said:

> "This [his discussion of the state court's reasoning] brings me to the question which the Court does not reach: Was it constitutionally permissible for Connecticut to apply its harmless-error rule to have this conviction from the otherwise vitiating effect of the admission of the unconstitutionally seized evidence? I see no reason why not."

In the majority opinion it is noted that, after the admission of the paint brush and a confession (this being before the *Miranda* decision) into evidence, the defendants took the stand, as witnesses in their own behalf, and "admitted their acts," and tried unsuccessfully to establish that the nature of these acts was not within the prohibition of the state statute under which they were charged. The majority noted this as further indication of the prejudicial nature of the improperly admitted paint brush. However, the majority opinion also states that under the Connecticut practice the defendants "were not allowed to pursue the illegal search and seizure inquiry at the trial" and "[t]hus petitioner was unable to claim at trial that the illegally seized evidence induced his admissions and confession." This distinguishes that case from the one now before us. The law of North Carolina, as declared in innumerable decisions of this Court, afforded this defendant the right to stand upon his objection to the admission of the knife and his statements to Officer Heye. He was not compelled to testify as he did. Indeed, he does not contend upon this appeal that he was brought to his decision so to do by the admission of this evidence. Apart therefrom, he may have concluded the other evidence offered by the State, as summarized in our statement of facts, made it advisable for him to testify as he did. We are not required to speculate as to this and, in the absence even of a contention by the defendant to that effect in his brief and oral argument before us, to assume that he took the stand and testified that he stabbed the deceased with this knife under the compulsion of the evidence improperly admitted. His testimony was designed to win an acquittal on the ground of self defense.

In the absence of any decision by the Supreme Court of the United States to the effect that erroneous admission of an unconstitutionally obtained statement by a defendant, and of a weapon found as the result of such statement, may not be cured by the defendant's subsequently testifying in his own behalf to the same facts and identifying in his testimony the State's exhibit as the weapon used by him,

we adhere to our well established rule that such testimony by the defendant makes the trial court's error a harmless one.

On direct examination the defendant testified, in response to questions by his counsel, that he had been arrested and convicted for public drunkenness five of six times and that he recalled being given a suspended sentence on the charge of assault with a deadly weapon, these being the only offenses of which he had been convicted in his 66 years. A defendant charged with a criminal offense may offer evidence of his own good character as substantive evidence tending to show that he did not commit the offense with which he is charged. *State v. Guss,* 254 N.C. 349, 118 S.E. 2d 906; *State v. Reddick,* 222 N.C. 520, 23 S.E. 2d 909. Thus, the defendant was entitled to show, as he did, that in his 66 years he had been convicted only of the offenses named by him in the hope that the jury would infer therefrom that a person with such character as would be indicated from such record would not commit the offense with which he is now charged.

It is equally well settled that ordinarily the State may not introduce evidence of prior like offenses, this not being competent evidence to show the defendant's guilt of the offense now charged. *State v. Gammons,* 258 N.C. 522, 128 S.E. 2d 860; Stansbury, North Carolina Evidence, 2d Ed., § 91. However, when the defendant takes the stand as a witness in his own behalf, he is subject to impeachment just as is any other witness. For that purpose, the solicitor may cross examine him with reference to other offenses for which he has been convicted. *State v. Troutman,* 249 N.C. 395, 106 S.E. 2d 569; *State v. Howie,* 213 N.C. 782, 197 S.E. 611; Strong, N. C. Index 2d, Criminal Law, §§ 84 and 85. This is especially true where, as here, the defendant has testified on direct examination as to his past criminal record as substantive evidence of his innocence and has referred to the identical offense, to which the solicitor's cross examination is directed, as evidence from which the jury should infer his innocence of the present charge. The defendant, having sought thus to have the jury infer from his past record that he is not a man who would commit an offense such as charged in the present indictment, the solicitor is entitled to cross examine him concerning the record so put in evidence by the defendant. Under the circumstances of this case, there was no error in permitting the solicitor, on cross examination, to ask the defendant as to the nature of the weapon used by him (a knife) in the former offense of assault with a deadly weapon, to which the defendant himself had testified.

We have carefully examined the defendant's other assignments of error and find nothing therein which would merit a new trial of this action.

No error.

BOBBITT and SHARP, JJ., concur in result.

JOHN B. EXUM, JR., ADMINISTRATOR OF THE ESTATE OF HERMAN JOSEPH McDONALD v. WILLIAM FRANKLIN BOYLES, SR.

(Filed 2 February, 1968.)

1. Automobiles § 8—

A motorist upon the highway owes a duty to all other persons using the highway, including its shoulders, to maintain a lookout in the direction in which he is traveling.

2. Negligence § 10—

Where a defendant under a duty to maintain a proper lookout could have discovered the plaintiff's helpless peril in time to avoid injuring him by the exercise of due care, defendant is liable under the doctrine of last clear chance if he fails to take such action to avoid the injury.

3. Same—

The statement in former decisions to the effect that the "original negligence" of a defendant cannot serve as a basis for recovery under the last clear chance doctrine since this negligence is barred by the plaintiff's contributory negligence is expressly disapproved by the Supreme Court.

4. Automobiles § 10—

Evidence that intestate undertook to change the left rear tire of his automobile while it was parked on the right shoulder of a highway some 10 inches from the pavement, that his body projected over the edge of the pavement as he worked on the tire, and that defendant, traveling in intestate's lane of traffic, observed intestate's disabled vehicle with its taillights on, but that defendant did not put his lights on high beam, nor steer toward the center line, nor reduce his speed, *is held* sufficient to take the case to the jury on the issue of last clear chance, and the granting of nonsuit was error.

5. Negligence § 10—

The last clear chance doctrine must be pleaded by the plaintiff in order to be available as a basis for recovery, and the burden of proof on this issue is on him.

6. Judgments § 33—

An entry of a judgment of voluntary nonsuit is not *res judicata* in a subsequent action on the same cause of action.

7. Limitation of Actions § 12; Death § 4—

An action for wrongful death instituted within one year after entry of a judgment of voluntary nonsuit in a former action and nearly five years after the accident and death of the intestate is not barred by the statute of limitations when plaintiff does not allege a cause of action different from the former action.

8. Pleadings § 2—

A cause of action consists of the facts alleged in the complaint.

9. Limitation of Actions § 12; Pleadings § 25—

Where the complaint alleged negligence by defendant and that it was a proximate cause of intestate's death, an amendment which alleges facts raising the last clear chance doctrine does not amount to a statement of a new cause of action, and therefore the action is not barred when the complaint is filed within the time limited, even though the amendment is filed thereafter.

10. Negligence § 10—

A plaintiff ordinarily pleads the doctrine of last clear chance in reply to the answer alleging contributory negligence.

11. Pleadings § 2—

Plaintiff is not required in his complaint to anticipate a defense and undertake to avoid it.

12. Automobiles § 10—

In an action for wrongful death arising out of an automobile accident, an instruction that plaintiff's intestate would be guilty of contributory negligence if the jury should find that he failed to set out flares or lanterns to the front and rear of his disabled automobile *held* error, since the provisions of G.S. 20-161 requiring such warning devices apply only to disabled trucks or trailers.

PARKER, C.J. and HIGGINS, J., concur in result.

APPEAL by plaintiff from *Cowper, J.*, at the January 1967 Civil Session of NASH.

This is an action for wrongful death of Herman McDonald and for his pain and suffering. At the conclusion of the plaintiff's evidence the motion of the defendant for judgment of nonsuit as to the action for pain and suffering was allowed and from this ruling the plaintiff does not appeal.

The complaint alleges that while McDonald was in the act of changing a tire on his station wagon, which was stopped upon the shoulder of U.S. Highway 301, Bypass, near Rocky Mount, the defendant operated his automobile in a negligent manner so that it struck McDonald and inflicted injuries which caused his death. Among the specifications of negligence alleged in the complaint are failure to keep a proper lookout, driving at a speed greater than was

reasonable under the circumstances, and failure to sound the horn, apply brakes, turn to the left or otherwise take steps to avoid striking McDonald when the defendant knew, or in the exercise of reasonable care should have known, that he was trapped and helpless and would be struck unless the defendant took action to avoid striking him.

The answer denies any negligence by the defendant and pleads contributory negligence by McDonald in that he stopped his vehicle so near to the pavement that his body protruded over the pavement while he was engaged in changing the tire. The answer also pleads in bar the entry in a former action of a judgment of voluntary nonsuit and the running of the Statute of Limitations.

The plaintiff filed a reply alleging that, notwithstanding any contributory negligence of his intestate, the defendant had the last clear chance to avoid the accident.

The trial judge refused to submit to the jury the issue as to the last clear chance, which was tendered in due time by the plaintiff. The jury answered the issues of negligence and contributory negligence in the affirmative. From judgment entered in favor of the defendant upon this verdict, the plaintiff appeals.

It is alleged in the complaint that the accident occurred on 3 July 1960, shortly after 8 p.m., that it was then "almost dark," that the defendant's headlights were burning and that the defendant failed to see McDonald prior to striking him. The answer alleges that at the time of the accident, "it was dark," admits that the headlights were burning on the defendant's automobile and admits that the defendant did not see McDonald until "an instant before the impact," at which time it was too late to avoid striking him. The answer also admits that the defendant did not sound the horn. It is further alleged in the complaint and admitted in the answer that at the point of this accident the highway was straight and level for half a mile in each direction and visibility was unrestricted.

The plaintiff's evidence shows that McDonald died 3 July 1960, he instituted an action against the defendant for wrongful death 4 December 1961, and a judgment of voluntary nonsuit was entered therein 6 May 1964. The present action was instituted 25 March 1965, the plaintiff having paid the costs in the former action. It is stipulated that the plaintiff is the duly qualified and acting administrator of McDonald's estate.

As to the merits, the plaintiff's evidence is to the following effect:

McDonald, his wife and their four small children were traveling northward on U.S. Highway 301 upon the bypass around the city of Rocky Mount. The left rear tire of their station wagon became flat. It was then dusk and the headlights and taillights of the station

wagon were on. McDonald stopped the station wagon on the shoulder of the road upon a fill approaching a bridge over a creek. After observing the flat tire, he moved the station wagon so that it finally stopped with the left rear bumper ten inches off the pavement, the frame of the car extending a bit closer to the pavement. The pavement was 24 feet wide, divided into one northbound and one southbound lane. The shoulder was level and in good condition for approximately 12 feet from the pavement and then went down to swampy woodland bordering the creek. The station wagon was a few inches more than six feet in width.

McDonald jacked up the left rear wheel and changed the tire, having virtually completed the task at the time he was struck. It was then dark. The wheel was still jacked up and throughout the process, the headlights, taillights and the interior dome light of the station wagon were on. Its doors were shut. Mrs. McDonald and the children remained in the station wagon. McDonald was dressed in a white T-shirt and gray trousers. During the changing of the tire, a few other vehicles had passed in each direction.

The defendant's automobile was also northbound. The children in the station wagon observed his automobile approaching when it was approximately 300 feet away. His headlights were on. He was in the northbound lane of traffic. He struck the deceased with force sufficient to knock him 40 to 50 feet and to inflict injuries resulting in instant unconsciousness and in death shortly thereafter. The impact broke the right front headlight and damaged the right front fender of the defendant's car. The door of the station wagon was dented, apparently from being struck by McDonald's body. The vehicles did not come in contact. The defendant did not blow his horn or apply his brakes prior to the impact. His statement to the investigating patrolman at the scene of the accident was that he was driving 55 miles per hour and did not see the deceased prior to striking him. The speed limit at that point was 60 miles per hour.

The investigating patrolman did not find any flares, smudge pots, flashlights or other devices beside, or to the rear of, the station wagon. The occupants of the station wagon testified that McDonald had a flashlight in his hand. Immediately prior to the impact, he was squatting down, tightening the lug bolts, his knees bent and his back straight. At the time of the impact, a northbound truck was following the defendant and there was some southbound traffic approaching but at a considerable distance.

The adverse examination of the defendant, offered in evidence by the plaintiff, was to the following effect:

He was en route to his home following his evening meal at a

restaurant in Rocky Mount. He had had nothing intoxicating to drink. He first noticed the station wagon when he was approximately 200 yards from it. It was on the shoulder very close to the pavement. Its taillights were on. He did not see McDonald until he struck him. He did not apply his brakes and did not turn toward the marked center line of the highway away from the station wagon. At the time of the impact, he was driving between 50 and 55 miles per hour and he continued approximately 250 feet before bringing his automobile to a stop. He was looking straight ahead prior to the impact. He was not blinded by the lights of the vehicles approaching in the southbound lane.

The defendant testified in his own behalf to the following effect: He was northbound and observed the taillights burning on the station wagon, which was parked "real close to the pavement." He did not see any activity around the station wagon or detect that its occupants were "having any trouble." Just as he reached the back of the station wagon, McDonald raised up and the defendant struck him. The defendant's headlights were "on low beam." He did not turn out so as to leave more room between his automobile and the station wagon and did not reduce his speed.

The plaintiff assigns as error the failure of the court to submit the issue of the last clear chance and to instruct the jury thereon, and certain portions of the court's charge upon the issue of contributory negligence, including the following:

> "With respect to this second issue, if Mr. Boyles, the defendant, has satisfied you by the greater weight of the evidence that on the occasion in question Herman Joseph McDonald failed to use due care under all the circumstances while working in darkness on a busy highway and thus exposing himself unreasonably to danger, or in failing to keep a proper lookout for approaching traffic, *or failure to warn approaching motorists of his presence by placing lights or flares,* or that he failed to get out of the way of the defendant's vehicle, and that such conduct in one or more respects constituted negligence, and if the defendant has further satisfied you by the greater weight of the evidence that such negligence on the part of Mr. McDonald concurred and cooperated with the negligence of the defendant as a proximate cause or one of the proximate causes of his death, you would answer the second issue YES." (Emphasis added.)

Spruill, Trotter & Lane by DeWitt C. McCotter for plaintiff appellant.

Valentine & Valentine; Battle, Winslow, Scott & Wiley for defendant appellee.

LAKE, J. There is ample evidence to support the finding of the jury that the defendant was negligent and his negligence was a proximate cause of the death of the plaintiff's intestate. The evidence, if true, shows that the defendant saw the station wagon 200 yards before he reached it. It was parked on the shoulder close to the edge of the pavement upon a fill approaching a bridge, the defendant being familiar with the road. The taillights, headlights and the interior dome light of the station wagon were burning. One approaching a motor vehicle, so parked after dark in such a location, should foresee the probability of a dismounted passenger in its immediate vicinity. The evidence, if true, shows that the defendant was not blinded by the lights of oncoming vehicles and his view of the station wagon, the highway and the narrow space between the two was unobstructed for at least 200 yards. McDonald, wearing a white shirt, was squatting beside the rear wheel, his body projecting over the edge of the pavement. The defendant's headlights were burning. There was no oncoming traffic close enough to make it hazardous for the defendant to veer to his left and pass the station wagon so as to leave a space of several feet between his car and the station wagon. Without reducing his speed or veering to his left to the slightest degree, he passed so close to the parked station wagon that he struck McDonald, whom he did not see until virtually the instant of impact. This is not the care which a reasonable man would use in passing a parked vehicle under like circumstances.

There is also ample evidence in the record to support the finding of the jury that the plaintiff's intestate was negligent and that his negligence was a proximate cause of his injury and death. The evidence, if true, shows that he undertook to change the left rear tire of his vehicle while it was parked so close to the edge of the pavement that there was not room for his body between the vehicle and the edge of the pavement, thus projecting his body over a portion of the paved surface of the highway, although the shoulder of the road, which was level and in good condition, was wide enough to permit him, with safety to his vehicle and its occupants, to move it substantially further to his right and thus provide ample room for him to work upon the tire in safety. He continued to work in this position of danger though he saw, or in the exercise of reasonable vigilance could have seen, the defendant's automobile approaching close to the edge of the pavement, over a distance of 200 yards. This is not the care which a reasonable man would exercise for his own safety

under like circumstances. Unless there was error in the refusal of the court to submit the issue of the last clear chance, or there was error in the instructions of the court to which the plaintiff excepts, the judgment should be affirmed.

Upon the evidence in this record the jury could properly have found that the defendant's automobile, traveling at its admitted speed of approximately 55 miles per hour, about 80 feet per second, reached the point at such distance from McDonald that the latter did not have sufficient time to avoid the collision by fleeing around either end of his vehicle before the arrival of the defendant's automobile at the point of impact, and yet the defendant had ample time, by a mere flick of the wrist, to guide his car to his left so as to avoid striking him. The evidence, if true, would also indicate that the defendant did not actually see McDonald in his position of peril until it was too late so to avoid the catastrophe, but that, had he maintained a lookout in the direction of his travel, the defendant could have observed the perilous position of McDonald in time so to avoid striking him. The question for us to determine is whether, under these circumstances, the doctrine of the last clear chance would impose liability upon the defendant notwithstanding the prior contributory negligence of McDonald. We conclude that it would and, therefore, the evidence was such as to require the submission of that issue to the jury for its determination of whether these facts did or did not exist in this instance.

The doctrine of the last clear chance originated in the case of *Davies v. Mann,* 10 M. & W. 547, 152 Eng. Rep. 588, the "Fettered Ass Case." There, the plaintiff fettered the forefeet of his animal and turned it out upon the highway to graze. Thereafter, the defendant's horses and wagon came at an excessive speed down a hill and ran over and killed the fettered animal which was unable to get out of the way. The defendant's driver was "some little distance behind the horses." The court sustained a verdict and judgment for the plaintiff on the ground that, even if the plaintiff's animal was unlawfully upon the highway, the defendant "might, by proper care, have avoided injuring the animal, and did not." The basis of the decision was that the defendant's negligence, under such circumstances, was the proximate cause of the damage to the plaintiff's property.

Thus, in *Davies v. Mann,* the plaintiff's negligence, or wrongful act, had placed his property in a position of danger of injury by a passing vehicle. Subsequently, when it was no longer possible for the plaintiff (or his animal) to avoid the peril, the defendant negligently permitted his vehicle to proceed along the highway in a dangerous

manner and to strike the plaintiff's animal. There is nothing in the report of the case to indicate that the defendant's driver actually saw the plaintiff's animal before it was struck. It thus appears that the plaintiff was allowed to recover on the ground that, had the defendant's driver been where he should have been and maintained the lookout he should have maintained, he would have seen the plaintiff's animal in time to avoid the collision.

In *Gunter v. Wicker,* 85 N.C. 310, which appears to have been the first case applying the last clear chance doctrine in North Carolina, Smith, C.J., observed that "there is great difficulty in extracting from the numerous adjudications of the courts any clear and distinct principle or formula determining when the cooperating agency of the plaintiff so directly contributes to the result as to deprive him of remedy against the other party to whose negligence the injury is attributable." The passage of time has not removed this difficulty. In Prosser, Law of Torts, 3d Ed., § 65, it is said of the doctrine of the last clear chance:

> "No very satisfactory reason for the rule ever has been suggested. * * * The application of the doctrine has been attended with much confusion. * * * It is quite literally true that there are as many variant forms and applications of this doctrine as there are jurisdictions which apply it. * * * In such a general area of confusion and disagreement, only very general statements can be offered, and reference must of necessity be made to the law of each particular state."

In the Restatement of the Law, Torts, Negligence, § 479, under the caption "DEFENDANT'S LAST CLEAR CHANCE," appears the following statement:

> "A plaintiff who has negligently subjected himself to a risk of harm from the defendant's *subsequent* negligence may recover for harm caused thereby if, *immediately preceding the harm,*
>
> (a) *the plaintiff is unable to avoid it* by the exercise of reasonable vigilance and care, *and*
>
> (b) the defendant
>
> (i) *knows* of the plaintiff's situation *and realizes* the helpless peril involved therein; or
>
> (ii) *knows* of the plaintiff's situation *and has reason to realize* the peril involved therein; or
>
> (iii) *would have discovered* the plaintiff's situation and thus had reason to realize the plaintiff's helpless

peril *had he exercised the vigilance which it was his duty to the plaintiff to exercise,* and

(c) *thereafter is negligent* in failing to utilize with reasonable care and competence *his then existing ability* to avoid harming the plaintiff." (Emphasis added.)

Section 480 of the Restatement, under the caption "LAST CLEAR CHANCE; NEGLIGENTLY INATTENTIVE PLAINTIFF," states:

"A plaintiff who, by the exercise of reasonable vigilance could have observed the danger created by the defendant's negligence in time to have avoided harm therefrom, may recover if, but only if, the defendant

(a) *knew* of the plaintiff's situation, *and*

(b) *realized or had reason to realize* that the plaintiff was inattentive and therefore unlikely to discover his peril in time to avoid the harm, *and*

(c) *thereafter is negligent* in failing to utilize with reasonable care and competence *his then existing ability* to avoid harming the plaintiff." (Emphasis added.)

It will be readily observed that the doctrine of the last clear chance is not a single rule, but is a series of different rules applicable to differing factual situations. Much of the apparent confusion in the decisions applying this doctrine stems from the failure to observe that the respective cases involve different factual situations and, therefore, call into play different rules comprising parts of the doctrine.

It must be admitted that there are in our own decisions with reference to the last clear chance doctrine expressions which seem inconsistent, but much of the resulting confusion disappears when these expressions are considered in the light of the facts of the cases where used. Thus, in *Ingram v. Smoky Mountain Stages, Inc.,* 225 N.C. 444, 35 S.E. 2d 337, the doctrine is referred to as the "doctrine of discovered peril," and it is said, "Peril and the discovery of such peril in time to avoid injury constitutes the backlog of the doctrine." Yet, in the same opinion, it is noted that the doctrine applies so as to impose liability upon a negligent defendant if "by the exercise of reasonable care defendant might have discovered the perilous position of the party injured or killed and have avoided the injury, but failed to do so."

It will be noted that the Restatement, § 479, *supra,* states that the doctrine imposes liability upon the defendant who did not ac-

tually know of the plaintiff's situation if, but only if, the defendant owed a duty to the plaintiff to maintain a lookout and would have discovered his situation had such a lookout been maintained. For the present it is sufficient to note that a motorist upon the highway does owe a duty to all other persons using the highway, including its shoulders, to maintain a lookout in the direction in which the motorist is traveling. *Black v. Milling Co.*, 257 N.C. 730, 127 S.E. 2d 515; *Smith v. Rawlins*, 253 N.C. 67, 116 S.E. 2d 184; *Carr v. Lee*, 249 N.C. 712, 107 S.E. 2d 544. Whatever may be the application of the doctrine of the last clear chance when the defendant owes no duty to the plaintiff to keep a lookout and has no actual knowledge of the plaintiff's helpless peril, it is well established in this State that where the defendant does owe the plaintiff the duty of maintaining a lookout and, had he done so, could have discovered the plaintiff's helpless peril in time to avoid injuring him by then exercising reasonable care, the doctrine of the last clear chance does impose liability if the defendant failed to take such action to avoid the injury. *Wanner v. Alsup*, 265 N.C. 308, 144 S.E. 2d 18; *Wade v. Sausage Co.*, 239 N.C. 524, 80 S.E. 2d 150. This is in accord with the decision in *Davies v. Mann, supra*, and with the majority view in other American jurisdictions. See: Prosser, Law of Torts, 3d Ed., § 65; Harper, Torts, § 138; 38 Am. Jur., Negligence, § 223; Bohlen, "The Rule in *British Columbia Railway Company v. Loach*," 66 U. of Pa. L. Rev. 73.

In several of our former decisions the statement appears that the "original negligence" of a defendant cannot be relied upon to bring into play the last clear chance doctrine since this "original negligence" is cancelled or nullified by the plaintiff's contributory negligence. See: *Mathis v. Marlow*, 261 N.C. 636, 135 S.E. 2d 633; *Barnes v. Horney*, 247 N.C. 495, 101 S.E. 2d 315; *Ingram v. Smoky Mountain Stages, Inc., supra*. We think this is an inaccurate statement and we no longer approve it, although the decisions in those cases were correct applications of the doctrine. In each of those cases, it is clear that what the court held was that to bring into play the doctrine of the last clear chance, there must be proof that after the plaintiff had, by his own negligence, gotten into a position of helpless peril (or into a position of peril to which he was inadvertent), the defendant discovered the plaintiff's helpless peril (or inadvertence), or, being under a duty to do so, should have, and, thereafter, the defendant, having the means and the time to avoid the injury, negligently failed to do so. The only negligence of the defendant may have occurred after he discovered the perilous position of the plaintiff. Such "original negligence" of the defendant is sufficient to bring

the doctrine of the last clear chance into play if the other elements of that doctrine are proved. Thus, in *Wanner v. Alsup, supra,* and in *Wade v. Sausage Co., supra,* the defendants were not shown to have been negligent in the operation of their vehicles except in their respective failures to turn aside from their straight lines of travel in order to avoid striking the respective plaintiffs, one a pedestrian crossing the street, the other a man lying in the highway. Likewise, the doctrine may render liable a driver whose only, *i.e.,* "original" negligence was a failure to apply his brakes and stop his vehicle before striking a plaintiff whom he saw lying in the street.

Applying these principles to the present record, the defendant owed the plaintiff's intestate, and all other persons using the highway, the duty to maintain a lookout in the direction of the defendant's travel. Assuming the evidence to be true, had the defendant maintained such a lookout, he could have observed McDonald, stooping down beside the station wagon in the act of changing the tire, at a time when it should have been apparent to the defendant that McDonald could not save himself, but at which time the defendant could have avoided striking McDonald by merely turning slightly to his left. This is sufficient to bring the doctrine of the last clear chance into operation. It was a question for the jury whether these were or were not the facts of the case. The issue of the last clear chance should have been submitted to the jury with proper instructions thereon. The failure of the court to do so requires that the case be sent back for a new trial.

It is true that to invoke the doctrine of the last clear chance the plaintiff must plead it and the burden of proof is upon him. *Collas v. Regan,* 240 N.C. 472, 82 S.E. 2d 215; *Wagoner v. R. R.,* 238 N.C. 162, 77 S.E. 2d 701; *Bailey v. R. R.* and *King v. R. R.,* 223 N.C. 244, 25 S.E. 2d 833. The facts giving rise to the doctrine were sufficiently pleaded in the present action both in the complaint and in the plaintiff's reply.

The defendant's plea of *res judicata* by reason of the entry of a judgment of voluntary nonsuit in the former action cannot be sustained. *Gibbs v. Light Co.,* 265 N.C. 459, 144 S.E. 2d 393. It is immaterial that this judgment was entered on the motion of the plaintiff after an intimation by the then presiding judge that he would grant the defendant's motion for judgment of involuntary nonsuit if the parties did not reach a settlement of the matter.

Likewise, the contention that the present action is barred by failure to institute it within the time allowed by the statute cannot be sustained. The present action was instituted within one year after the entry of the judgment of voluntary nonsuit in the former

action, the plaintiff having paid the costs in the former action before instituting the present one. This the plaintiff had the right to do, notwithstanding the fact that the present action was instituted nearly five years after the accident and the death of his intestate, unless he now alleges a different cause of action from that alleged in the former suit. *Hall v. Carroll and Moore v. Carroll,* 253 N.C. 220, 116 S.E. 2d 459. The defendant contends that the plaintiff now pleads a different cause of action from that alleged in his pleadings in the former suit for the reason that in the former action he did not plead the doctrine of the last clear chance.

In the former action, the plaintiff alleged substantially the same acts of negligence by the defendant as those alleged by him in the present complaint. He there alleged, as in the present action, the facts which, if established by the evidence, make applicable the doctrine of the last clear chance. While the plaintiff must plead the facts making the doctrine applicable in order to rely upon it, it is not required that he plead the doctrine by its generally accepted name. "A cause of action consists of *the facts* alleged in the complaint." *Stamey v. Membership Corp.,* 249 N.C. 90, 105 S.E. 2d 282.

The defendant contends, however, that in the former action the doctrine was not pleaded except by way of an amendment to the complaint originally filed therein, which amendment was not filed until after the time allowed by the statute for the institution of such action had expired. It is true that an amendment to a pleading will not be deemed to relate back to the filing of the original pleading where the effect of the amendment is to state a new cause of action, or, by supplying an essential fact previously omitted, to state a cause of action where the original complaint stated none. *Stamey v. Membership Corp., supra.* An examination of the original complaint filed in the former action discloses, however, that it did allege a cause of action. It also alleged facts sufficient to make the doctrine of the last clear chance applicable. Furthermore, the doctrine of the last clear chance is regarded in this jurisdiction as but an application of the doctrine of proximate cause. *McMillan v. Horne,* 259 N.C. 159, 130 S.E. 2d 52; *Construction Co. v. R. R.,* 185 N.C. 43, 116 S.E. 3. The plaintiff having originally alleged negligence by the defendant and that such negligence was the proximate cause of the death of his intestate, his subsequent pleading, whether by way of amendment to the complaint or by way of reply to the answer, alleging the operative facts bringing into play the doctrine of the last clear chance, without change in the specifications of negligence, is not the allegation of a new cause of action. The original complaint in the former action, the amended complaint therein, the complaint in the present action

and the reply filed in it all relate to the same cause of action. Therefore, the plaintiff having brought the present action within one year from the entry of the judgment of voluntary nonsuit in the former action, and the former action having been instituted within the time allowed therefor by the statute, the plaintiff's right to maintain the present action is not barred by the statute of limitations.

Normally, a plaintiff pleads the doctrine of the last clear chance in a reply to the answer alleging contributory negligence. The plaintiff should not in his complaint anticipate a defense and undertake to avoid it. *Green v. Tile Co.*, 263 N.C. 503, 139 S.E. 2d 538; *Scott v. Jordan*, 235 N.C. 244, 69 S.E. 2d 557. However, the purpose of a complaint "is to give the opposing party notice of the facts on which plaintiff relies to establish liability." *Green v. Tile Co., supra.* It would be exceedingly technical to hold that, though the complaint in the former action alleged facts giving rise to the doctrine of the last clear chance, the plaintiff may not receive the benefit of the doctrine in the present action, where it is properly pleaded, merely because in the first suit those facts were alleged in the complaint rather than in a reply. Consequently, we hold that in the present action the plaintiff's pleadings are sufficient to raise the doctrine.

There is a further error in the instructions of the court upon the issue of contributory negligence which is sufficient in itself to require a new trial. G.S. 20-161 requires the driver of a "truck, trailer or a semi-trailer" disabled upon the highway after sundown to place red flares or lanterns to the front and rear of the disabled vehicle. This statute does not apply to the driver of a disabled passenger vehicle. *Rowe v. Murphy*, 250 N.C. 627, 109 S.E. 2d 474. The court's instruction on the issue of contributory negligence, set forth in the foregoing statement of the facts, would permit the jury to answer that issue in the affirmative if it found that the plaintiff's intestate failed to display such signals. While there was ample evidence to support the finding of contributory negligence in other respects, we cannot assume that the jury's answer to that issue was not brought about by this inadvertence in the charge.

New trial.

PARKER, C.J. and HIGGINS, J., concur in result.

MRS. OLIVIA SMITH ROOT, HUBERT STOCKARD AND WIFE, MARGARET VASS STOCKARD, AND ANNIE SMEDES VASS, PLAINTIFFS, v. ALLSTATE INSURANCE COMPANY, DEFENDANT.

(Filed 2 February, 1968.)

1. Quasi-Contracts § 1—

A quasi-contractual obligation is one created by law for reasons of justice and it rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another.

2. Contracts § 12—

When the language of a contract is clear and unambiguous, the court must interpret it as written.

3. Boundaries § 1—

The rule that a specific description of land controls over a more general description in the same conveyance does not apply when the specific description is insufficient or ambiguous.

4. Contracts § 12—

An ambiguity in a written contract is to be construed against the party who prepared the instrument.

5. Contracts § 26; Evidence § 32—

The mutual agreement of the parties is the contract, and evidence of the unexpressed intent of one party in entering into the agreement is properly excluded.

6. Same—

Where the words of a contract are susceptible of more than one interpretation or where a latent ambiguity arises, evidence of prior negotiations of the parties to the written agreement may be competent for the purpose of throwing light on the intent of the parties.

7. Easements § 3; Landlord and Tenant § 5—

In an action by a lessor of an office building to recover rent for the lessee's use of a basement as office space, the crucial contention of the parties was whether the basement was included in the premises demised in the lease. The furnace, hot water heater, air conditioning and other utilities were located in the basement; the lease provided that the lessor would be responsible for the furnishing of the utilities. *Held:* The evidence is insufficient to show that the lessee acquired an easement in the basement by implication.

8. Landlord and Tenant §§ 5, 16— Ambiguity in lease as to the property demised is for the jury.

The lease agreement described the premises demised to the lessee as a building "erected at 747 Hillsboro St., comprising an area of 1772 square feet, for use as offices." The lessee contended that the lease conveyed all of the space in the building at that address, including a basement converted by lessee for office use. The lessor contended that the specific language of the lease conveyed only 1772 square feet of floor space, which

embraced the ground floor only. *Held:* The terms of the lease being ambiguous as to the property demised, it is for the jury to say what the parties meant, and the granting of lessee's motion of nonsuit in lessor's action to recover rent for the basement is error.

BOBBITT and SHARP, JJ., dissent.

APPEAL by plaintiffs from *Braswell, J.,* Second June 1967 Regular Civil Session of WAKE.

Civil action to recover rent on *quantum meruit* for use of basement in building owned by plaintiffs.

Plaintiffs (hereinafter referred to as lessors) entered into a lease agreement with defendant (hereinafter referred to as lessee) on 4 May 1960 whereby they leased property owned by them and described in the lease as follows:

> "A lot about 37 feet wide, fronting on Hillsboro Street, with a depth of about 200 feet on which a building approximately 27 feet 8 inches by 65 feet will be erected at 747 Hillsboro St., Raleigh, North Carolina, comprising an area of 1772 square feet, for use as offices. . . ."

The premises were leased for a period of five years commencing September 1, 1960 and expiring 1 September 1965, "at an annual rental at the rate of $3.50 per square foot, or a term rental of $31,010, payable in monthly installments of $516.83. . . ."

At the time of the execution of this lease the building to be used by defendant lessee had not been erected, and the building to be erected was to be constructed according to plans and specifications which lessors had prepared and which were approved by lessee, the same being included in the record on appeal. Other pertinent portions of the written lease, plans and specifications are:

Plans and Specifications: (1) They were entitled "An office building for Allstate Insurance Company, Hillsboro Street, Raleigh, N. C., Aldert Root, owner, (2) a large sign on top of the proposed building as follows: "ALLSTATE," (3) The time clock to operate electrical sign on the building was to be installed in the basement area, (4) the plans provided no access to the basement exclusive of access to the first or main floor office space, (5) furnace, hot water heater, and similar utilities were to be located in the basement area, (6) there was to be 393 square feet of space in the basement area exclusive of the utilities to be housed therein.

Lease:

(1) QUIET POSSESSION

2. So long as lessee performs its obligations, lessor covenants to it quiet and peaceful possession of the *leased space,* and the

right to use the same for general office purposes free of interference from noise.

(2) LESSEE'S OBLIGATIONS

3. Lessee agrees as follows:

(a) . . .

(b) To use the premises in a quiet and orderly fashion without disturbance to *other tenants* in the building; . . .

(3) MAINTENANCE AND REPAIR

13. Subject only to Lessee's liability to repair damage caused by the negligence or willful act of its agents, employees or occupants, Lessor shall maintain and keep in repair *the building and leased premises.* . . .

(4) PARKING FACILITIES

15. Lessee, its employees and visitors, shall have the right, *in common with other tenants in the building,* to use such parking facilities as may adjoin or be available to the *building.*

A renewal lease dated August 1, 1965 was executed by lessors to lessee for an additional period of five years. This lease contained substantially the same provisions as the original agreement, except the renewal lease described the premises as follows:

"747 Hillsboro Street, Raleigh, North Carolina, comprising an area of 1772 square feet, for use as offices, . . ."

It was stipulated that lessors' sole witness, Aldert S. Root, Jr., was the lessors' agent who handled all transactions relating to the lease between lessors and lessee. Mr. Root testified for lessors substantially as follows: That lessee had occupied the premises at 747 Hillsboro Street since November 1960. He identified the leases affecting the property and stated that they were prepared by lessee on a printed form. The lease stated that lessors would provide, among other things, heat, water, air conditioning, and electricity. In June or July 1966, Root went into the basement of the building and noticed that a partition had been built in the basement and that two desks, chairs, dictating equipment, additional lighting fixtures, shelving and office supplies had been placed in the basement. He thereafter wrote Mr. Jessup, an employee of lessee, demanding payment for use of the basement area. Lessee refused to pay for the use of this area. Suit was instituted by lessors to recover rent for the basement area, and was heard at a regular session of Wake County Superior Court. At the close of lessors' evidence lessee moved for judgment as of involuntary nonsuit, which motion was allowed. Plaintiffs appealed.

Dupree, Weaver, Horton, Cockman & Alvis for defendant.
Maupin, Taylor & Ellis and Thomas P. McNamara for plaintiffs.

BRANCH, J. The ultimate question presented by this appeal is whether the basement of the building located at 747 Hillsboro Street, Raleigh, N. C., was included in the premises demised in the written lease from plaintiffs to defendant.

Lessors' position is that lessee has no right to use the basement under the lease, and they admit that all of the rents required by the terms of the lease have been paid. The action is therefore based on an implied or quasi-contract.

"A quasi-contractual obligation is one that is created by the law for reasons of justice, without any expression of assent and sometimes even against a clear expression of dissent," *Cox v. Shaw*, 263 N.C. 361, 139 S.E. 2d 676, and "generally quasi or constructive contracts rest on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another, and on the principle that whatsoever it is certain that a man ought to do, the law supposes him to have promised to do. The obligation to do justice rests on all persons, and if one obtains money or property of others without authority, the law, independently of express contracts, will compel restitution of compensation." 17 C.J.S., Contracts, § 6, pp. 570, 571.

It is apparent that if the basement area is demised by the written lease, lessors' cause of action is without merit.

It is the position of lessee that the cause of action is ill-founded because of the well-recognized principle that an express contract precludes an implied contract with reference to the same subject matter. *Concrete Co. v. Lumber Co.*, 256 N.C. 709, 124 S.E. 2d 905. This contention is untenable, since the very basis of this controversy is whether the precise subject matter, that is, the basement, is included in the express contract.

It is a well-recognized principle of construction that when the language of a contract is clear and unambiguous, the court must interpret the contract as written, *Parks v. Oil Co.*, 255 N.C. 498, 121 S.E. 2d 850, and "The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Sell v. Hotchkiss*, 264 N.C. 185, 141 S.E. 2d 259.

In determining whether the basement area was demised by the lease, we first seek to determine the intention of the parties as shown by the whole written instrument. Lessee contends that the language of the lease clearly and without ambiguity conveys all of the space

in the building located at 747 Hillsboro Street, Raleigh, N. C., emphasizing that the language "comprising 1772 square feet" was simply a formula to determine the amount of rent for the entire building and premises. In support of this contention, lessee cites the case of *Miller v. Johnston,* 173 N.C. 62, 91 S.E. 593, where it is stated: "'"Include" is defined as 'to confine within, to hold, to attain, to shut up"; and synonyms are "contain," "inclose", "comprise," . . .'"

In the case of *Hoskins Mfg. Co. v. General Electric Co.,* D.C. Ill, 212 F. 422, a case involving patent law, the court compared the words "comprise" and "consist" and held that the latter is a more specific term, in that it means "to stand together," "to be composed of," or "made up of," while the former means "comprehend," "include," "contain," and "embrace." It is of interest to note that the terms recited in *Miller v. Johnston, supra,* to wit, "to confine within" and "to shut up" are not considered in this decision.

However, in the case of *Steigerwald v. Winans,* 17 Md. 62, the court construed a statute which provided that on an appeal from an order denying an injunction the clerk shall forthwith transmit the original papers, *comprising* the bill of petition, exhibits, and the court's order of refusal, to the Court of Appeals for determination. The court held that the word "comprising" should be construed "as determining *what are the original papers, which only are to be transmitted.* . . ." The Court noted that the word "comprising" does not under all circumstances imply inclusion of only the things enumerated. (Emphasis ours).

Upon substituting the dictionary definitions and synonyms adopted in *Miller v. Johnston, supra,* in lieu of the word "comprise" and upon a consideration of pertinent decisions, we can interpret the word "comprise" to be either a word of restriction or a word of enlargement.

Lessors, conversely, contend that the language of the lease is restrictive and specific and that it demised only 1772 square feet of floor space, which was identified by their witness as being located on the first floor of the building.

It is generally recognized in this jurisdiction that the law ordinarily prefers the specific to the general, and where there is a specific description of land, other words in the conveyance intended to describe generally the same lands, do not vary or enlarge the specific description. *Lee v. McDonald,* 230 N.C. 517, 53 S.E. 2d 845; *Von Herff v. Richardson,* 192 N.C. 595, 135 S.E. 533.

This rule is not controlling in the instant case because the rationale of the rule is that the law prefers that which is more certain to that which is less certain. Here, neither the general description, that is, "the premises located at 747 Hillsboro Street, Raleigh, N. C.,"

nor the description "comprising 1772 square feet" identifies or makes clearly specific the property demised.

"If the words employed are capable of more than one meaning, the meaning to be given is that which it is apparent the parties intended them to have." *King v. Davis,* 190 N.C. 737, 130 S.E. 707.

An examination of the entire written lease discloses many indicia of conflicting intent. Examples are: The term "leased building," indicating that the entire building was to be leased; the legend appearing on the plans and specifications, "An office building for Allstate Insurance Company, Hillsboro Street, Raleigh, N. C. Aldert Root, owner," indicating that the entire office building was to be used exclusively by lessee; the only access to the basement area of the building, without passing through the office space, is through an outside rear door which opens onto a stair landing which gives immediate access to the first floor office space, and, through a door, to steps leading to the basement. This indicates that the basement area was not planned for rental to any person other than lessee. On the other hand, terms of the lease indicating that demise of less than the entire building was contemplated by the parties to the lease are: "other tenants," "leased space," "leased premises," rather than the word "building"; use of the phrase "building and leased premises" without indication that the words are interchangeable.

The written lease was prepared by lessee, and in considering the contentions of the parties we are cognizant of the well-recognized rule that an ambiguity in a written contract is to be construed against the party who prepared the instrument. *Trust Co. v. Medford,* 258 N.C. 146, 128 S.E. 2d 141; *Jones v. Realty Co.,* 226 N.C. 303, 37 S.E. 2d 906.

At best, the written lease and the exhibits attached thereto leave it uncertain whether the parties intended for the lease to include the basement of the building. We are thus brought to lessors' assignment of error that the trial court erred in sustaining lessee's objection to questions asked of the witness Aldert Root as to whether or not it was his intention to include the basement in the lease and as to what took place at the negotiations between the witness and lessee's representative when the lease was negotiated in 1960. The judge properly refused to admit the evidence of the witness' unexpressed intention.

In the case of *Howell v. Smith,* 258 N.C. 150, 128 S.E. 2d 144, it is stated:

> "'A contract, express or implied, executed or executory, results from the concurrence of minds of two or more persons, and its legal consequences are not dependent upon the impressions

or understandings of one alone of the parties to it. It is not what either thinks, but what both agree.' *Prince v. McRae,* 84 N.C. 674; *Overall Co. v. Holmes,* 186 N.C. 428, 119 S.E. 817, and cases cited; *Jackson v. Bobbitt,* 253 N.C. 670, 677, 117 S.E. 2d 806.

"'. . . The undisclosed intention is immaterial in the absence of mistake, fraud, and the like, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. . . .'. . . the test of the true interpretation of an offer or acceptance is not what the party making it thought it meant or intended it to mean, but what a reasonable person in the position of the parties would have thought it meant." Williston on Contracts, Third Edition, Vol. 1, § 94.'"

However, there is merit in appellants' exception concerning the judge's refusal to admit evidence concerning negotiations between the witness and defendant's representative. In this connection, the record discloses the following:

"Q. You did have some negotiations with a man by the name of Connor from Allstate, did you not?

A. Yes, sir.

Q. What took place at these negotiations?

Objection by Mr. Dupree, sustained. EXCEPTION No. 3.

(If allowed to answer, plaintiffs' witness, Aldert Root, would have testified as follows:

A. Allstate came to us and wanted to rent, roughly, 1800 square feet. They came to us through a man named Connor. I was negotiating for our side. Connor wanted a first-floor building only, nothing but a first-floor building, and he explained this on the grounds that he was operating a drive-in claim service, and they couldn't do business on any floor but the first floor, and that he wanted a storage space in the building on the first floor, and that he wanted that provided and he wanted a rough drawing to proceed from at the outset. So a rough drawing was provided to him and he approved that and subsequently we retained an architect who provided more detailed drawings, the ones which are on trial here, and these were also approved by Allstate; and as I have already testified, the total square footage area involved here on the first floor, that which they had verbally stated they would take, came to always at the 'the around or about,' never exact because the architect hadn't completed his drawings prior to that. Anyway, the total amount came to 1857 square feet. Then Allstate said 'we don't need the base-

ment.' 'We don't need the landing.' 'We're not gonna pay rent on that which we can't use and we can't use the landing because it is not usable office space to us on the first floor; neither are the stairs down to the basement; hence we're going to subtract them from the 1857 feet.' And which they did, and when you multiply that area together, comprising — let me see, consisting of the stairway, we come to eighty-five feet, and that subtracted from the 1857 leaves a total area of 1772 feet, which is all that Allstate would agree to pay for since they weren't using the rest of it. Does that answer your question?"

The general rule is that when a written instrument is introduced into evidence, its terms may not be contradicted by parol or extrinsic evidence, and it is presumed that all prior negotiations are merged into the written instrument. *Fox v. Southern Appliances,* 264 N.C. 267, 141 S.E. 2d 522; *Barger v. Krimminger,* 262 N.C. 596, 138 S.E. 2d 207.

A modification of the above stated rule is found in the case of *Knitting Mills v. Guaranty Co.,* 137 N.C. 565, 50 S.E. 304, where it is stated:

". . . The legal effect of a final instrument which defines and declares the intentions and rights of the parties cannot be modified or corrected by proof of any preliminary negotiations or agreement, nor is it permissible to show how the parties understood the transaction in order to explain or qualify what is in the final writing, in the absence of an allegation of fraud or mistake or *unless the terms of the instrument itself are ambiguous and require explanation. Meekins v. Newberry,* 101 N.C. 17; *Bank v. McElwee,* 104 N.C. 305; *Taylor v. Hunt,* 118 N.C. 168; *Moffitt v. Maness,* 102 N.C. 457 . . ." (Emphasis ours).

See also *Patton v. Lumber Co.,* 179 N.C. 103, 101 S.E. 613.

In 30 Am. Jur. 2d, § 1069, we find the following:

"Whenever the terms of a written contract or other instrument are susceptible of more than one interpretation, or an ambiguity arises, or the intent and object of the instrument cannot be ascertained from the language employed therein, parol or extrinsic evidence may be introduced to show what was in the minds of the parties at the time of making the contract or executing the instrument, and to determine the object for or on which it was designed to operate."

30 Am. Jur. 2d, § 1071, states, in part:

"If previous negotiations between the parties make it manifest in what sense the terms of an ambiguous contract are used, such negotiations may be resorted to as furnishing the best definition to be applied in ascertaining the intention of the parties. . . ."

"However, while previous transactions may be very properly taken into consideration to ascertain the subject matter of a contract and the sense in which the parties may have used particular terms, they cannot be received to alter or modify the plain language which the parties have used. . . ."

This jurisdiction has recognized that the office of a description is to furnish means of identifying the property to be conveyed by the instrument, and where the language is patently ambiguous, parol evidence is not admissible to aid the description. To the contrary, where a latent ambiguity occurs, that is, when the words of the instrument are plain and intelligible but leave it uncertain as to what property is embraced in the conveyance and presents a question of identification of the property, parol evidence is admissible to fit the description to the property sought to be conveyed. Such parol evidence cannot be used to enlarge the scope of the descriptive word. *Self Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889; *Redd v. Taylor,* 270 N.C. 14, 153 S.E. 2d 761.

". . . Every valid contract must contain a description of the subject-matter; but it is not necessary it should be so described as to admit of no doubt what it is, for the identity of the actual thing and the thing described may be shown by extrinsic evidence. . . ." *Green v. Harshaw,* 187 N.C. 213, 121 S.E. 456.

Although the words of the instrument are plain and intelligible, it is uncertain whether the basement of the area of the building was demised by the written lease. This constitutes a latent ambiguity which permits the introduction of parol evidence to aid in determining what property the parties intended to include in the instrument.

The admission of evidence of prior negotiations in the instant case does not contradict or vary the terms of the instrument but tends to show the intent of the parties as to whether the entire area was to be included in the lease or whether the space was to be leased on a square-foot basis. Therefore, the trial court erred in sustaining lessee's objection to that part of the testimony as to prior negotiations which tended to show intent of the parties.

Lessee further contends that even if the lease did not authorize the use of the basement, the judge correctly allowed its motion for

nonsuit, since it had an easement in the basement by implication.

In the case of *Manufacturing Co. v. Gable,* 246 N.C. 1, 97 S.E. 2d 672, the owner of a three-story building leased the second and third floors to the plaintiff and leased the first floor to other tenants. The lease prorated the cost of fuel and maintenance of the heating plant two-thirds to plaintiff and one-third to the other tenants. The Court held that the heating plant was an appurtenance included in the property leased, and stated:

> "'. . . It is a settled principle of the law of property that a conveyance of land, in the absence of anything in the deed indicating a contrary intention, carries with it everything properly appurtenant to, that is, essential or reasonably necessary to the full beneficial use and enjoyment of the property conveyed, and this principle is equally applicable to a lease of premises. In leases, as in deeds, "appurtenance" has a technical signification, and is employed for the purpose of including any easements or servitudes used or enjoyed with the demised premises. . . . Parol evidence is admissible to show the meaning of the term "appurtenances."'"

See also *State v. Foster,* 196 N.C. 431, 146 S.E. 69.

Lessee cites in support of this contention the case of *Maiatico v. Stevens,* 125 A. 2d 275. This was an action by lessor to recover possession of two basement rooms which were not covered by lease of premises. Holding that the evidence sustained the finding that there was in contemplation of the parties when the lease was executed that lessee would continue to use the rooms for storage, etc., the Court stated:

> ". . . To pass by implication as an easement incidental to a leased portion of a building, the privileges which are exercised in portions not leased must be reasonably necessary and not merely convenient to a tenant's beneficial use and enjoyment of his leasehold. Or, it must be clear from all the surrounding circumstances that this was the use intended by the parties to the lease. . . ."

It is noted that in the Maiatico case the lease provided that tenant must keep clean "such portions of the building . . . as may be used incident to the operation of said restaurant. . . ." Further, there was parol evidence showing knowledge by lessor, when the lease was executed, that lessee had the use and enjoyment of the basement under a previous lease.

These cases are factually distinguishable from the instant case, in which the lease, plans and specifications reveal that lessors were

responsible for the heating, air conditioning and other utilities (all of which were located in the basement) for the office space, and that storage space was provided on the first floor. In the instant case there is no conclusive showing that the use of the basement was essential or reasonably necessary for the full and beneficial use of the property demised. Thus no easement passes by implication.

In the case of *Williams v. Insurance Co.*, 209 N.C. 765, 185 S.E. 21, defendant issued a policy against fire loss on premises described as the "one-story brick building . . . while occupied by tenants as stores . . . number 107 on the North side of East Church Street, Block No. ....., Rose Hill, N. C." The property consisted of one building, divided into three stores or compartments. Each of the stores was damaged by fire. Defendant contended that the policy covered only one store. The Court held that the policy was ambiguous as to property covered thereby, and stated:

> ". . . If contract is ambiguous, effect is for jury. *Montgomery v. Ring,* 186 N.C. 403; *Porter & Peck v. West. Const. Co.,* 195 N.C. 328. If writing leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent to show and make certain what was the real agreement, which is for the jury. . . ."

It is stated in *Hite v. Aydlett,* 192 N.C. 166, 134 S.E. 419:

> " 'It is a well-established general rule that if the parties reduce their entire contract or agreement to writing, whether under seal or not, the court will not hear parol evidence to vary or change it, unless for fraud, mistake or the like; but if it appear that the entire agreement was not reduced to writing, or if the writing itself leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent, not to contradict, but to show and make certain what was the real agreement between the parties; and in such a case what was meant, is for the jury, under proper instructions from the court.' Davis, J., in *Cumming v. Barber,* 99 N.C. 332."

Applying the rules of law set out above to the facts of instant case, we hold that the trial judge erroneously allowed defendant's motion for nonsuit. The case should be submitted to the jury under proper instructions.

Reversed.

BOBBITT and SHARP, JJ., dissent.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION v. TWO WAY RADIO SERVICE, INC., APPLICANT.

(Filed 2 February, 1968.)

1. Utilities Commission § 9—

The findings of fact of the Utilities Commission are conclusive upon the reviewing court if supported by competent, material and substantial evidence.

2. Same—

The Superior Court may, in proper cases, remand the cause to the Utilities Commission for additional findings upon a question of fact to which the Commission made no finding, or the Court may reverse or remand where a finding is not supported by competent or material evidence, but the court cannot reverse the Commission for failure to find facts which the reviewing court believes it should have found.

3. Utilities Commission § 7—

The Utilities Commission has no statutory authority to compel a telephone company to interconnect its system of line telephones with the system of a mobile radio service.

4. Same—

A certificate of public convenience and necessity authorizing its holder to render telephone service grants to the holder the right to adopt new methods of telephonic communications, including a mobile radio telephone service.

5. Same; Evidence § 3—

Courts may take judicial notice that telephone companies habitually transmit conversations by electrical impulses without the use of wires.

6. Same— Application for duplicate service should be denied if utility already serving area is willing and able to provide the service.

Where a public utility has a certificate of convenience and necessity for telephone service in a certain area and is ready and able to provide such area a mobile radio service, the Utilities Commission should deny an application for a certificate of public convenience and necessity to an applicant who proposes to render substantially the same mobile radio service in the area, and the fact that the applicant proposes to offer an electronic personal paging service as an auxiliary to its mobile radio service is not a sufficient difference to justify the issuance of the certificate when it appears that the Commission can compel the established utility to install such a service when the public convenience so requires.

7. Same—

Neither a telephone answering nor a message relaying service is a public utility within the purview of G.S. 62-3(23) and cannot therefore be determinative upon the question of whether an applicant's proposed telephone service is substantially the same as that of the existing franchise holder.

APPEAL by the North Carolina Utilities Commission and by Concord Telephone Company from *Johnston, J.*, at the January 1967 Civil Session of STANLY.

Two Way Radio Service, Inc., hereinafter called the applicant, applied to the North Carolina Utilities Commission, hereinafter called the Commission, for the issuance to it of a certificate of public convenience and necessity permitting it to operate "as a common carrier in intrastate communications providing a mobile radio service, with interconnection with existing telephone service," its service area to be within a radius of 40 miles of its proposed base station in or near the city of Albemarle. Concord Telephone Company, hereinafter called the protestant, intervened in opposition on the ground that it holds a certificate of public convenience and necessity under which it renders telephone service in the area and is authorized to render a service similar to that sought to be rendered by the applicant. The protestant alleged that it is ready and willing to provide "adequate mobile radio service in the Albemarle area in connection with its telephone service." The protestant also denied the right of the applicant to an interconnection with the lines of the protestant. Two Way Radio of Carolina, Inc., also intervened in opposition to the grant of the application but took no part in the appeal from the Commission to the superior court or in the appeal to this Court.

The Commission conducted a hearing and, thereupon, entered its order denying the application, setting forth in its order its findings of fact and its conclusions of law. The applicant appealed to the superior court, which entered judgment reversing the order of the Commission and remanding the matter to it with direction to grant the certificate "as applied for." From that judgment the Commission and the protestant appeal to this Court.

The applicant offered evidence before the Commission tending to show the following, with reference to the nature of its proposed operation:

> At its base station it will erect a radio antenna 165 feet in height. This will transmit and receive signals to and from an area within a radius of 40 miles. Subscribers to its service will have one or more of the following: A portable unit, a mobile unit installed in a vehicle, a dispatch unit installed in the subscriber's office, or a personal paging unit.
>
> The personal paging unit, designed for carrying in the subscriber's pocket, does not enable him to transmit or receive a message but, upon a signal from the antenna at the applicant's base station, it buzzes and thereby notifies the bearer that someone wants to talk to him on his mobile unit. Its purpose, thus, is to enable the subscriber, having a mobile unit in his vehicle, to leave the vehicle and still be advised when he has an incoming call. To take the call, he must return to his mobile unit and communicate with the applicant's operator.

All of the subscribers' transmitting units transmit to the applicant's base station where the incoming signal is received and re-transmitted to the person with whom the subscriber desires to communicate. Thus, an occupant of a vehicle at the perimeter of the applicant's service area can communicate with one on the other end of its diameter, about 80 miles away. A dispatch unit enables the subscriber's office to communicate, via the applicant's antenna, with any mobile unit in any vehicle of that subscriber's fleet, and vice versa, so long as the vehicle remains within the service area. Apparently, the dispatch unit may also thus communicate with and receive communications from that subscriber's portable units not installed in vehicles. The dispatch unit can talk to mobile, or portable, units of that subscriber only. Communication may also be had, in like manner, between one mobile unit and another or between a mobile and a portable unit. All such transmitting units can also communicate with the applicant's operator, or answering service, at its base station. Every message transmitted goes from the speaking unit to the antenna at the applicant's base station and thence to the receiving unit.

At the base station, the applicant will operate 24 hour answering and delayed relay service. Thus, a subscriber, unable to reach immediately the person with whom he wishes to communicate, can leave a message which the applicant's operator will transmit when the operator can get through to the other party.

This answering or message relaying service is not a mechanically necessary element of the "mobile radio service," but is an addition thereto providing an added convenience. They are two separate services which "dovetail into each other." Likewise, the applicant did not originally contemplate an interconnection with the telephone company's system and, if permitted, the applicant will operate its proposed service whether or not interconnection is granted. Through use of the answering service available at the base station a subscriber, upon returning to his mobile unit, can call the base station and receive messages, including numbers for calls which he is to return and which have accumulated in his absence from his mobile unit.

Other witnesses for the applicant were businessmen in the Albemarle area who testified that they need and would use the proposed service, with or without interconnection with the lines of the protestant, and that no such service is now available to them.

The protestant introduced evidence to the following effect as to its present and contemplated operations:

It holds a certificate of public convenience and necessity authorizing it to render "telephone service" in the area which includes that here in question. Its corporate charter empowers it to operate "a general telephone business" in such area and to acquire and use "such plants and exchanges equipped with necessary or desirable poles, wires, switchboards, dial equipment, and all other equipment, appliances, apparatus and things necessary or desirable in connection with carrying on a general telephone business," and "to operate all kinds of machinery and appliances, and generally to perform all acts which may be deemed necessary or expedient for the proper and successful prosecution of the objects and purposes for which the corporation is created."

It now operates telephone service in the area in question, having approximately 45,000 telephones in service in all of its exchanges. It has applied for and received from the Federal Communications Commission a permit for the construction of facilities for the rendition of "mobile telephone service in the Albemarle area." It has near Albemarle a 300 foot tower now used by it for microwave facilities. This it proposes to use as a base station for its "mobile telephone service." It has equipment on order for use in that service. It proposes to put the service into effect in the Albemarle area "as soon as it can be done."

This proposed service is known as the "Improved Mobile Telephone Service." It is a two way dial service. The subscriber thereto, while in his vehicle equipped with such telephone, can dial any number he desires and can receive a call from anyone dialing his mobile number. His service through this unit will be essentially the same as that of any other telephone subscriber. Only one subscriber on the same communications channel can use it at the same time. If a communications channel allotted by the Federal Communications Commission becomes filled, the holder of such permit can apply to that commission for the allotment of another channel for that area.

The protestant now has in operation a "microwave method of transmitting messages." It has personnel trained and licensed by the Federal Communications Commission to operate such system. It proposes to make this mobile service available in the area 24 hours a day.

In its proposed "mobile telephone service," the protestant does not contemplate the operation by it of any answering ser-

vice or message relay service. It does not propose to operate any "personal paging" units such as are proposed by the applicant.

Upon the foregoing evidence the Commission made findings of fact, of which the following are material to this appeal:

"1. Common carrier two-way mobile radio service with a base at Albemarle is not now being provided the public.

* * *

"3. Certain farmers, ambulance services, vending services, florists, contractors, realtors, doctors, and other businesses or professions need and would use mobile radio service with a base point at Albemarle whether or not such service was interconnected with land-line telephone service.

* * *

"5. Concord Telephone Company has heretofore been granted a certificate of public convenience and necessity by the North Carolina Utilities Commission to engage in the general telephone business and is actively engaged in the provision of general telephone service in the City of Albemarle and adjacent areas involved in the application. Concord Telephone Company is not presently offering mobile telephone service at Albemarle in Stanly County. The Company proposes to offer mobile telephone service (known as 'IMTS — Improved Mobile Telephone Service') with base point at Albemarle. It already owns a 300 foot microwave tower at Albemarle, has the necessary equipment on order, and has a construction permit granted by the Federal Communications Commission. Concord Telephone Company is otherwise financially able and willing to provide 'Improved Mobile Telephone Service' in the Albemarle and Stanly County areas.

"6. The services proposed to be offered by Applicant and by Concord Telephone Company are similar in some respects, although they are not identical. The principal differences in the two services are:

(a) The telephone company proposes to offer a two-way dial service whereby a subscriber may dial any number and any subscriber may dial him in his mobile unit, affording local and toll service the same as a stationary telephone in a private home or business; the subscriber to the miscellaneous common carrier's service may directly reach only the company's dispatcher through a code call. The dispatcher must then switch

or connect the subscriber to the person the subscriber wishes to reach and a two-way conversation can then be held. If the facilities of the mobile common carrier are interconnected to the land-line telephone company's facilities, the dispatcher can put the subscriber in touch with a telephone company subscriber by performing the telephoning functions for him and then making the necessary connections for a two-way conversation. If the facilities of the mobile radio common carrier are not interconnected with those of the land-line telephone company, a subscriber to the mobile radio service can reach only that company's dispatcher and, through the dispatcher, only that company's other subscribers to mobile service, in this case, a maximum of forty (40) other unites [*sic*]. A unit does not connote a separate subscriber; one subscriber can have several units.

(b) The mobile radio common carrier offers a message retention service, *i.e.*, the subscriber may leave a message for another subscriber to be retained or later relayed. In connection therewith, the mobile radio service itself or by arrangement with others, offers a telephone answering service. The telephone company does not offer message retention or a telephone answering service.

(c) The mobile radio common carrier's rates are predicated upon a flat rate for a prescribed number of message minutes, each call counting no less than a minute. All calls above the limit are charged at a special rate per call. The telephone company proposes to offer its mobile service at a flat rate per month, without regard to the number of calls made.

(d) The mobile radio common carrier offers a 'paging' service whereby a subscriber may be contacted by means of a tone or 'beep' or by one-way voice communication from the dispatcher to the subscriber. The telephone company does not have concrete plans for offering any form of 'paging' system.

"7. The Applicant * * * has made arrangements with manufacturers for credit purchases of equipment, and has a site for its microwave tower available."

Upon these findings of fact, the Commission reached conclusions, of which the following are material to this appeal:

"1. The Supreme Court of North Carolina held in STATE v. TELEGRAPH Co., 267 N.C. 257, that mobile radio common car-

riers are offering a service to the public for the transmission of messages and communications and are, therefore, public utilities within the purview of G.S. 62-3(23), are subject to certification pursuant to G.S. 62-110, and to regulation by the Utilities Commission. We, therefore, conclude that we have jurisdiction over the subject matter of the application and the service we have found Applicant proposes to offer; further, that Applicant is properly before the Commission.

"2. We conclude and hold, based on the facts established by Applicant, that the public convenience and necessity justifies or reasonably will justify, the service proposed and that the Applicant is fit, ready, willing, and able to provide such service on a continuing basis.

* * *

"4. We conclude and hold that this Commission is without statutory authority to order Concord Telephone Company, as a land-line telephone company, or any other land-line telephone company to interconnect with a mobile radio common carrier, including Applicant. This conclusion is made as a matter of law and is based principally upon the following language in the Supreme Court's opinion (*supra*) * * *

"5. We conclude and hold that it has not been shown that the Protestant land-line telephone company (Concord) which holds a certificate from this Commission to occupy and is occupying the territory involved for the provision of general telephone service cannot or will not or does not desire to render a similar service in the area in question. This conclusion arises on our findings from the evidence that Concord is well embarked upon, and well able to execute, a program to provide a mobile telephone service in the area affected, and becomes a ruling as a matter of law primarily on our interpretation of the language of the Supreme Court in the case of STATE v. TELEGRAPH CO., *supra*, as follows * * *

"6. Therefore, we conclude and hold that we are bound by the Supreme Court decision in STATE v. TELEGRAPH CO., *supra*, as we interpret it, and that the application for a certificate of convenience and necessity in this docket must be denied as a matter of law."

The Commission thereupon ordered that the application be denied, Commissioner Worthington dissenting.

The superior court sustained the applicant's exceptions to Conclusions 5 and 6 and to the entry of the Commission's order, which the superior court ordered reversed. The superior court also sustained the applicant's exception to the failure of the Commission to find the following facts:

> *"The mobile radio common carrier,* in addition to the services set forth above and not dependent on telephone interconnection, directly or indirectly, *offers* to its subscribers *a complete two way radio system,* including antenna, antenna site, equipment, maintenance, instruction, operation and an operator; and it offers mobile to portable service, mobile to mobile service, control to mobile service, mobile dispatch service and vice versa, together with each of these to increase the effective range a repeater function, doubling in most instances the effective range. Further, *the protestant, Concord Telephone Company, does not, or does not intend to, offer such service."* (Emphasis added.)

The Commission and the protestant now assign as error each of the foregoing rulings of the superior court.

Edward B. Hipp for North Carolina Utilities Commission.

E. T. Bost, Jr., and Ronnie A. Pruett for Concord Telephone Company.

Vaughan S. Winborne for Two Way Radio Service, Inc.

Joyner & Howison for Amicus Curiæ.

LAKE, J. Each of the findings of fact made by the Commission is supported by competent, material and substantial evidence in view of the entire record. Each such finding is, therefore, binding upon the reviewing court. *Utilities Commission v. Coach Co.,* 269 N.C. 717, 153 S.E. 2d 461; *Utilities Commission v. Telegraph Co.,* 267 N.C. 257, 269, 148 S.E. 2d 100; *Utilities Commission v. Champion Papers, Inc.,* 259 N.C. 449, 130 S.E. 2d 890.

The superior court was in error in sustaining the applicant's Exception No. 3 to the order of the Commission, this exception being that the Commission erred in failing to find certain facts, set forth in the foregoing statement of facts. The superior court may not make findings of fact or reverse an order of the Utilities Commission on the ground that the Commission should have found the facts to be as the court believes the evidence indicates. The superior court may, in proper cases, remand the matter to the Commission for a finding by it upon a question of fact as to which the Commission

made no finding, or may reverse or remand because a finding made by the Commission is not supported by competent and substantial evidence before the Commission, but it may not reverse the order of the Commission because the Commission did not find facts which the court believes it should have found. See *Utilities Commission v. Membership Corporation,* 260 N.C. 59, 131 S.E. 2d 865. The Commission, not the reviewing court, is the fact finding body. The court's function, upon an appeal from an order of the Commission, is set forth in G.S. 62-94. Furthermore, the evidence before the Commission would not support the findings which the superior court said the Commission should have made with reference to the protestant's intent to offer communication service between two vehicles, between a vehicle and the dispatcher in the office of the owner of the vehicle or between any of these and the protestant's operator. Finally, upon this question, the other facts which the superior court held that the Commission should have found would have added nothing of consequence to what the Commission did find concerning differences in the two proposed services. The applicant's Exception No. 3 to the order of the Commission cannot, therefore, be deemed a sufficient basis for reversing that order.

The judgment of the superior court was that the order of the Commission be reversed and that the cause be remanded to the Commission, with directions to grant to the applicant "a certificate of convenience and necessity as applied for." The application was for "a certificate of convenience and necessity to operate as a common carrier in intrastate communications providing mobile radio service *with interconnection with existing telephone service.*" (Emphasis added.) In the similar case of *Utilities Commission v. Telegraph Co., supra,* we said:

> "Even if the present record were sufficient to support the order granting the Applicant a certificate of public convenience and necessity 'to act as a common carrier of communications providing mobile radio service,' the Commission had no statutory authority to require Carolina [the telephone company there involved] to interconnect the Applicant's radio communications system with Carolina's land telephone system."

For the reasons there stated, no such interconnection could be required of the protestant in the present case.

There remains for consideration the question of whether, upon the facts found by the Commission, there was error of law in its refusal to grant to the applicant a certificate of public convenience and necessity for its proposed operation without such interconnection, the

record showing that the applicant sought such a certificate without interconnection if interconnection could not be had. The determinative questions upon this phase of the case are: Is the protestant authorized by its certificate of convenience and necessity, previously issued, to render a service substantially similar to that proposed by the applicant? If so, may a certificate be issued to the applicant when the protestant is ready, able and willing to render in the same area such substantially similar service? See *Utilities Commission v. Coach Co., supra.*

In accordance with our decision in *Utilities Commission v. Telegraph Co., supra,* the Commission concluded that one rendering the service proposed by the applicant is a public utility, as that term is defined in G.S. 62-3(23); that the Commission has jurisdiction to grant a certificate of convenience and necessity for such service; that the public convenience and necessity, within the area in question, justifies the service proposed; and that the applicant is fit, ready, willing and able to provide such service. There is no exception to these conclusions and they are supported by the facts found by the Commission. It does not, however, follow necessarily that the applicant is entitled to the issuance of such certificate to it.

The applicant did not except to the Commission's Findings of Fact Nos. 5 and 6 and, as we have seen, there is ample evidence in the record to support these findings. They establish that the protestant proposes to provide and is ready, able and willing to provide "Improved Mobile Telephone Service" in this area and that the principal differences between the two proposed services are as stated by the Commission. The Commission's Conclusion No. 5 necessarily implies that the certificate heretofore granted to the protestant, authorizing it "to render telephone service," grants to it the right to furnish, within its service area, its proposed "Improved Mobile Telephone Service." There is no error in this implied conclusion.

A certificate of public convenience and necessity, which authorizes its holder to render "telephone service," does not limit the holder to the practice of the art of telephony as it was known and practiced on the date the certificate was issued, nor to the use therein of devices, equipment and methods then in use. Obviously, it is the intent of such a certificate to authorize the holder to improve its service by adopting and using new and improved devices and methods for telephonic communication. The holder of such a certificate may, indeed, in a proper case, by proper procedures and upon proper proof, be required by the regulatory commission to do so. G.S. 62-32; G.S. 62-42. The very term "mobile telephone service" shows that the art of telephony has now been broadened to include the transmission of the

human voice by a system of communication not wholly dependent upon wires.

The Commission and the courts may take judicial notice of the well known fact that telephone companies today habitually transmit conversations by electrical impulses traveling through part of the intervening space without proceeding upon wires. There transmissions are a part of "telephone service" as that term is used and understood today. See *Commercial Communications v. Public Utilities Commission,* 50 Cal. 2d 512, 327 P. 2d 513, app. dism. and cert. den., 359 U.S. 119, 341, 79 S. Ct. 722, 896, 3 L. Ed. 2d 674, 927. It is not necessary for us in this case to determine when such wireless transmission of the human voice, or other sound, ceases to be a part of "telephone service." It suffices for the present to say, as we do, that that point will not be reached by the mobile service proposed by the protestant here. Consequently, the protestant is authorized by the certificate of public convenience and necessity heretofore issued to it to offer to the public, and to render in its service area, the mobile telephone service it proposes in this record. It follows that its certificate entitled it to the same protection against competition in this portion of "telephone service" that its certificate affords it with reference to other portions of that service.

In *Utilities Commission v. Telegraph Co., supra,* we said:

> "[T]he basis for the requirement of a certificate of public convenience and necessity, as a prerequisite to the right to serve, is the adoption, by the General Assembly, of the policy that, nothing else appearing, the public is better served by a regulated monopoly than by competing suppliers of the service. The requirement of such a certificate is not an absolute prohibition of competition between public utilities rendering the same service. [Citations omitted.] There is, however, inherent in this requirement the concept that, once a certificate is granted which authorizes the holder to render the proposed service within the geographic area in question, a certificate will not be granted to a competitor in the absence of a showing that the utility already in the field is not rendering and cannot or will not render the specific service in question."

We further said in that case that "the two services need not be identical in every respect in order to give the utility already serving the area the prior right." Obviously, a "mobile telephone service" is not a "general telephone service," but it is an adjunct or part of a general telephone service which has developed through the gradual evolution of the art of telephony. Neither the answering service nor

the message relaying service proposed to be rendered by the applicant is an inherent and necessary part of either of the proposed systems of communications. This is a subsidiary service which the applicant proposes to provide by means of a contract with an existing answering service. It is, of course, immaterial whether this subsidiary service is to be supplied by the applicant through its own employees or through an independent contractor. The material circumstance is that this answering service is not, in itself, a public utility within the meaning of G.S. 62-3(23). No certificate of public convenience and necessity is required as a prerequisite to engaging in the business of rendering such a service. The issuance of a certificate for the supplying of "telephone service" gives the certificate holder no exclusive or preferential right to supply a "telephone answering service" or a "message relaying service." Conversely, one who offers or supplies such answering or relaying service does not thereby become eligible for a certificate authorizing him to render a "telephone service" in competition with an established telephone utility holding such a certificate for the area in question. These non-utility services are not determinative of the question of whether the proposed "telephone service" is substantially the same as that of the existing company.

The proposed availability of the "personal paging unit" in the applicant's proposed service does not make the applicant's proposed public utility service substantially different from the service of the protestant. The protestant, having a certificate authorizing it to render mobile telephone service and engaging in the rendition of such service, can be required by the Utilities Commission to install this incident of that service, if and when the Commission properly finds that public convenience and necessity requires it to be added. G.S. 62-42.

There being no substantial difference in the nature of the mobile communication service proposed by the protestant and the mobile communication service proposed by the applicant, there was no error in the conclusion of the Commission that the application for a certificate of public convenience and necessity should be denied. The judgment of the superior court is, therefore,

Reversed.

WILLIAM GRAY HARRELSON, BY HIS NEXT FRIEND, CLYDE C. RANDOLPH, JR., v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

AND

JOHN W. HARRELSON v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY.

(Filed 2 February, 1968.)

1. Appeal and Error § 57—

An exception to a finding of fact not supported by evidence must be sustained.

2. Same—

Upon appeal, the reviewing court may refer to the evidence in the record to interpret the findings of fact of the trial court.

3. Same—

The trial court's findings of fact supported by competent evidence are conclusive upon appeal, but the trial court's conclusions drawn from the findings are subject to review.

4. Insurance § 3—

An insurance policy is a contract between the insurer and the insured, and its provisions will govern the rights of the parties unless the provisions are in conflict with the law of the State.

5. Insurance § 3—

Statutory provisions applicable to a policy of insurance are to be read into the policy as if written therein.

6. Insurance § 53.2—

The provisions of the Motor Vehicle Financial Responsibility Act of 1957 must be read into a policy issued pursuant to the Assigned Risk Plan and construed liberally to effectuate its purpose of providing financial protection to persons injured by the negligent operation of a motor vehicle.

7. Insurance § 54—

It is mandatory that the owner of a registered motor vehicle maintain proof of financial responsibility throughout the registration of the vehicle, G.S. 20-309, and such proof may be satisfied by a policy of automobile liability insurance, G.S. 20-314, G.S. 20-279.19, which may be procured by compliance with the Assigned Risk Plan, G.S. 20-314.

8. Insurance § 61—

A policy of insurance issued pursuant to the Assigned Risk Plan may be cancelled by the insurer only when it has been shown that (1) there has been a nonpayment of premium or a suspension of the insured's driver's license, and (2) the Commissioner of Insurance has approved the cancellation. G.S. 20-279.34, G.S. 20-314.

9. Same—

The failure of an insured under the Assigned Risk Plan to pay his insurer a fee for filing a certificate of financial responsibility (Form SR-22) with the Department of Motor Vehicles is not a nonpayment of premium

within the purview of G.S. 20-279.34 for which the insurer may cancel a policy of automobile liability insurance.

10. Trial § 57—

While it is irregular for the court, in a trial by the court under agreement of the parties, to submit issues to itself, such procedure is harmless error where the findings of facts and the conclusions of law drawn therefrom can be ascertained in the judgment.

APPEAL by defendant from *Johnston, J.*, at the 27 February 1967 Civil Non-Jury Session of FORSYTH.

These are companion suits brought by an infant son and his father, consolidated for trial in the superior court. The pleadings are identical except in matters not material to the issues presented. In each case the plaintiff alleges that the defendant issued its policy of automobile liability insurance to Edward Kenneth Turner, that, on 5 September 1964, Turner was driving the Ford automobile named in the policy and negligently struck and injured the minor plaintiff, each plaintiff sued and recovered judgment against Turner, the father's judgment being for medical expenses incurred in the treatment of the son's injury, execution was issued and returned unsatisfied upon each judgment, and the plaintiff therefore seeks recovery of the amount of his judgment from the defendant. The answer in each case alleges that the policy of insurance was not in effect at the time of the accident for the reason that the defendant had cancelled it in accordance with G.S. 20-310. In each case the plaintiff filed a reply denying cancellation of the policy.

The plaintiffs introduced in evidence the pleadings, judgments and executions in their suits against Turner and two policies of insurance issued by the defendant to Turner, one covering the Ford automobile which he was driving at the time of the accident and the other covering a Dodge automobile owned by him. The policy covering the Ford automobile, upon its face, insured Turner against liability from the operation of the insured automobile from September 20, 1963 to September 20, 1964, the accident having occurred September 5, 1964.

Turner, called as a witness for the plaintiff, testified that he obtained the policy covering the Ford automobile through Floyd's Insurance Agency under the Assigned Risk Plan. It is not contended that Floyd's Insurance Agency was the agent of the defendant. In April 1964, Turner's wife had her driver's license revoked by the State Motor Vehicles Department for failure to maintain proof of financial responsibility. Turner, through Floyd, applied to the defendant for the issuance by it to the Department of Motor Vehicles of its certificate (Form SR-22), certifying his two policies as proof

of his wife's financial responsibility, this being permitted under the statute. The defendant did this and Turner received from the defendant a letter advising him that the certification had been so filed with the Motor Vehicles Department. Turner did not pay the additional premium charged by the defendant for the issuance of this certification.

Evidence introduced by the defendant tended to show:

On 27 September 1963, the defendant issued to Turner its "non-certified assigned risk policy" naming his Ford automobile as the insured vehicle, the stated period of the policy being from 20 September 1963 to 20 September 1964. Subsequently, it issued to Turner a second policy naming his Dodge automobile as the insured vehicle, the stated period of this policy being from 25 February 1964 to 20 September 1964. At the time of the issuance of each of these policies, the full premium then charged for that policy was paid by Turner. (The Ford automobile named in the first policy was being operated by Turner, himself, at the time of the accident in question.)

Thereafter, at the request of Turner, filed through the Floyd Agency, the defendant issued and caused to be filed with the Department of Motor Vehicles the above mentioned certification on Form SR-22, which stated, "This certification is effective from 5-11-64 and continues until cancelled or terminated in accordance with the financial responsibility laws and regulations of this state."

On 22 May 1964, the defendant mailed to Turner a properly addressed letter notifying him that the requested Form SR-22 had been filed with the Department of Motor Vehicles and that an additional premium of $4.00 was due on or before 22 June 1964. The defendant has never received payment of this additional premium.

On 7 July 1964, the due date for the payment of the additional premium having passed, the defendant mailed a properly addressed letter to Turner advising him that the policy covering the Ford automobile was cancelled as of 12:01 a.m., 23 July 1964 because of such non-payment, a certification by the Post Office showing the mailing on that date of "one piece of ordinary mail" so addressed. The letter so mailed to Turner on 7 July 1964 bore the pre-printed statement required by the statute upon notices of cancellation of automobile liability insurance policies, and the envelope in which it was so mailed bore upon its face the pre-printed statement "IMPORTANT INSURANCE NOTICE." At the same time, copies of the letter were mailed by the defendant to the manager of the North Carolina Assigned Risk Plan and to the Floyd Agency, the producer of record, and a form, designated "FS-4," was mailed by the defendant to the Department of Motor Vehicles showing the cancellation of the policy,

effective as of 23 July 1964. Each envelope bore the return address of the defendant. None of the letters were returned to it.

The unearned premium resulting from the cancellation of the policy covering the Ford automobile was then applied by the defendant to an additional premium which thereupon became payable on the policy covering the Dodge automobile since it was no longer a "second insured vehicle." Subsequently, this policy was also cancelled by the defendant for nonpayment of the balance of such additional premium. (The validity of such additional premium on the second policy and the validity of its cancellation are not material to this litigation.)

Turner, called as a witness by the plaintiff in rebuttal, first testified that he received from the defendant, about 22 May 1964, a notice that an additional premium of $4.00 was due to it from him, but that he did not receive the defendant's letter of 7 July 1964, the notice of cancellation. He then testified that the only letter which he had received from the defendant asking for payment of an additional premium was one dated 18 August 1964, which related to the additional premium then demanded by the defendant upon the policy covering the Dodge automobile.

William F. Floyd of the Floyd Insurance Agency, called as a witness by the plaintiff in rebuttal, testified that he did not receive a copy of the defendant's letter to Turner dated 7 July 1964, notifying Turner that the policy covering the Ford automobile was cancelled, or a copy of the defendant's letter of 22 May 1964 to Turner, notifying Turner that an additional premium of $4.00 was due from him to the defendant.

The court entered judgment for the plaintiffs' in which it enumerated certain findings of fact, including the following:

> "The defendant issued an Automobile Liability Insurance Policy to Edward Kenneth Turner and within the stated term of said policy, William Gray Harrelson was injured through the operation by Turner by his automobile named in said policy. Judgments by the plaintiffs against the policyholder, Turner, were obtained in this Court, executions issued and thereafter returned unsatisfied by reason of the insolvency of said policyholder. The stated term of the policy was from September 20, 1963 until September 20, 1964. The injury of William Gray Harrelson occurred on September 5, 1964. * * * On May 11, 1964 the defendant issued a Financial Responsibility Insurance Certificate (SR-22) to the Commissioner of Insurance [*sic*] of North Carolina on behalf of the insured's wife, Mary Inez Sellers Turner. Said certificate listed thereon both automobiles owned

by said insured * * *. All premiums due and owing on said two policies of insurance issued by the defendant to Edward Kenneth Turner were paid before said policies were issued and placed into effect. * * * When the defendant filed said SR-22 with the Commissioner of Insurance [*sic*] of North Carolina, it became entitled to a fee of $4.00 for this service. A request for said $4.00 was mailed to said insured, but not received by him. On July 7, 1964 the defendant issued a Notice of cancellation of the policy of insurance on the 1960 Ford owned by Edward Kenneth Turner (FS-4), to be effective on July 23, 1964. Said notice was directed to the Commissioner of Insurance [*sic*] of North Carolina and was received by him. The defendant mailed but the insured, Edward Kenneth Turner, did not receive a Notice of Cancellation of said insurance policy on said Ford automobile to be effective July 23, 1964. The insured Edward Kenneth Turner did not receive any billing or other notice asking for a proposed fee of $4.00 for the filing of said SR-22, nor did he receive any notice of any proposed cancellation to be effective July 23, 1964. * * * The producer of said policy of insurance issued to Edward Kenneth Turner, was William F. Floyd * * * Mr. Floyd did not receive copies of defendant's * * * request for payment of fee of $4.00 * * * and Notice of Cancellation * * *. Under the rules of the Commissioner as set forth in the Commissioner's Handbook in effect during 1964, notification to the Producer of Record of each cancellation made before the expiration date fixed on the policy, is required. The defendant failed to do that."

After these findings of fact the court stated in its judgment its conclusions in the form of answers to issues. In substance, these were that the defendant did not cancel the policy covering the Ford automobile prior to 5 September 1964, as of 23 July 1964 the defendant did not have the right to cancel such policy, the minor plaintiff was injured by the operation of the Ford automobile by Turner while the policy was in force, judgments were obtained by the plaintiffs against Turner on which executions were returned unsatisfied due to Turner's insolvency, and the plaintiffs are entitled to recover the amounts of such judgments, with interest and costs, from the defendant.

The defendant assigns as error substantially all of the foregoing findings and conclusions, the failure of the court to make findings of fact requested by the defendant, various rulings upon the admission of evidence, and the denial of the defendant's motions for judgment of nonsuit.

It is stipulated that the policy in question contained the following provision:

> "23. Cancelation. This policy may be canceled by the named insured by mailing to the company written notice stating when thereafter the cancelation shall be effective. *This policy may be canceled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than ten days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice.* The effective date and hour of cancelation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing." (Emphasis added.)

Deal, Hutchins and Minor by Richard Tyndall, Edwin T. Pullen and Roy L. Deal for defendant appellant.

Spry, Hamrick & Doughton by Bobby L. Newton and Edmund I. Adams for plaintiff appellees.

LAKE, J. The sole question upon this appeal is whether the policy of liability insurance issued by the defendant to Turner upon his Ford automobile was cancelled prior to the accident in which the minor plaintiff was injured.

While it is not expressly so found as a fact by the trial judge, it is established by the evidence of both parties, and not in dispute, that the policy was issued as an assigned risk policy and that Turner's driver's license had not been suspended. Consequently, at the time of issuance, this policy was what is known as a non-certified assigned risk policy, issued pursuant to and subject to the provisions of the Financial Responsibility Act of 1957. G.S. 20-309 *et seq.*

The court below concluded that (1) the defendant did not cancel the policy prior to the accident, and (2) the defendant did not have the right to cancel such policy. If either of these conclusions is supported by the court's findings of fact, which findings, in turn, are supported by the evidence, the judgment for the plaintiff must be affirmed.

There is no evidence whatever in the record of any handbook or rules or regulations issued or promulgated by the Commissioner of Insurance or by the Commissioner of Motor Vehicles. The record shows that the plaintiff attempted to examine their witness Floyd with reference to some handbook, but the defendant's objection to such testimony was sustained by the court and there is nothing to indicate that any handbook or rule or regulation of either Commis-

sioner was introduced or offered in evidence. There being no evidence to support the trial court's finding of fact with reference to a rule of the Commissioner of Insurance, the defendant's exception to this finding, and to the finding that the defendant failed to comply with such rule, must be sustained and these findings must be disregarded. See: *Little v. Stevens*, 267 N.C. 328, 148 S.E. 2d 201; *Trust Co. v. Miller*, 243 N.C. 1, 89 S.E. 2d 765.

Obviously, the statement in the trial court's finding of fact that the notice of cancellation issued by the defendant was directed to and received by the Commissioner of Insurance was a mere *lapsus linguæ*. Clearly, the court intended to find that such notice was directed to and received by the Commissioner of Motor Vehicles, all of the evidence so indicating and there being no contrary contention or suggestion. It is equally apparent that in the findings that the defendant issued the notice of cancellation on 7 July and that the defendant mailed such notice to Turner, the court intended to find that such mailing occurred on 7 July 1964, all of the evidence so indicating and there being no contention or suggestion of a mailing of the notice on a different date. We so construe these findings of fact. Upon appeal we may look to the evidence in the record to interpret the findings of fact made by the trial judge. See *Wynne v. Allen*, 245 N.C. 421, 426, 96 S.E. 2d 422.

The findings of fact by the trial court, except as above noted, are supported by evidence in the record. These findings are, therefore, conclusive. *Insurance Co. v. Insurance Co.*, 266 N.C. 430, 146 S.E. 2d 410; *Stewart v. Rogers*, 260 N.C. 475, 133 S.E. 2d 155; *Goldsboro v. R. R.*, 246 N.C. 101, 97 S.E. 2d 486; *Wynne v. Allen, supra.* The trial court's conclusions drawn from these findings of fact are, however, subject to review. We turn first to the trial court's conclusion that the defendant had no right to cancel the policy.

Although there was no finding of fact concerning it, it is undisputed that the policy in question contained, with reference to the company's right to cancel, the provision quoted above in the statement of facts. Obviously, this clause in the contract does not purport to limit the company's right to cancel to any particular factual situation. The clause, on its face, gives the company the right to cancel for any reason satisfactory to it by following the procedure prescribed in the clause. An insurance policy is a contract between the parties thereto and its provisions will govern their rights thereunder unless those provisions are in conflict with the law of the State. *Insurance Co. v. Insurance Co.*, 269 N.C. 341, 152 S.E. 2d 436; *Muncie v. Insurance Co.*, 253 N.C. 74, 116 S.E. 2d 474. On the other hand, a statutory requirement or limitation, which is applicable to a policy of insurance, is to be read into the policy as if written

therein and controls a contrary provision actually written into the policy. *Crisp v. Insurance Co.*, 256 N.C. 408, 124 S.E. 2d 149; *Swain v. Insurance Co.*, 253 N.C. 120, 116 S.E. 2d 482; *Howell v. Indemnity Co.*, 237 N.C. 227, 74 S.E. 2d 610.

The policy in question having been issued pursuant to the Assigned Risk Plan and for the purpose of fulfilling the requirement of the Financial Responsibility Act of 1957, the provisions of that act, relative to the cancellation of such policies, must be read into this policy and construed liberally so as to effectuate the purpose of the act. *Jones v. Insurance Co.*, 270 N.C. 454, 155 S.E. 2d 118; *Insurance Co. v. Hale*, 270 N.C. 195, 154 S.E. 2d 79. The purpose of that act is to assure the protection of liability insurance, or other type of established financial responsibility, up to the minimum amount specified in the act, to persons injured by the negligent operation of a motor vehicle upon the highways of this State. *Jones v. Insurance Co., supra; Insurance Co. v. Hale, supra; Swain v. Insurance Co., supra.* To that end, the act makes it mandatory that the owner of a registered motor vehicle maintain proof of financial responsibility throughout such registration of the vehicle. G.S. 20-309. This may be done by the owner's obtaining, and maintaining in effect, a policy of automobile liability insurance. G.S. 20-314; G.S. 20-279.19. To enable an owner so to comply with this requirement of the act, even though he is unable to procure such insurance in the usual way, the act provides that the provisions of the Financial Responsibility Act of 1953, with reference to the Assigned Risk Plan, "shall apply to filing and maintaining proof of financial responsibility required by" the Act of 1957. G.S. 20-314.

Insurance supplied by a policy issued under the Assigned Risk Plan is compulsory both as to the insured owner and as to the insurance carrier. *Insurance Co. v. Hale, supra.* The right of the carrier to cancel such a policy is subject to the provisions of the 1957 Act, as so implemented by the provisions of the 1953 Act incorporated by reference therein. The two acts are to be construed together so as to harmonize their provisions and to effectuate the purpose of the Legislature. *Faizan v. Insurance Co.*, 254 N.C. 47, 118 S.E. 2d 303. Their provisions, liberally construed to effectuate the legislative policy, control any provision written into the policy which otherwise would give the company a greater right to cancel than is provided by the statute.

The 1957 Act, in G.S. 20-309(e) and in G.S. 20-310(a), prescribes the procedure pursuant to which a policy issued for the purpose of complying with the requirements of that act may be cancelled by the insurance carrier having the right to cancel. In order to can-

cel such policy, the carrier must comply with these procedural requirements of the statute or the attempt at cancellation fails. *Insurance Co. v. Hale, supra.* Of course, the requirements of the policy, itself, must also be fulfilled for an effective cancellation.

The 1957 Act in G.S. 20-310(b) limits the right of the insurance carrier to cancel a policy which has been in effect for 60 days, as the Turner policy here in question had been, to certain factual situations. These are, in substance: (1) Failure of the insured to pay the premium or any part thereof; (2) violation by the insured of a valid provision of the policy; (3) suspension or revocation of the driver's license of the insured for more than 30 days; or (4) his conviction or forfeiture of bail for certain offenses. It is expressly provided in G.S. 20-310(b) that the provisions thereof shall not apply to policies issued under the Assigned Risk Plan. Obviously, however, it was not the purpose of the Legislature to give to the company a more extensive right of cancellation of an assigned risk policy than of other policies.

G.S. 20-279.34, incorporated by reference into the Financial Responsibility Act of 1957 by G.S. 30-314 (See *Faizan v. Insurance Co., supra*), provides that the carrier to whom a risk is assigned under the plan "shall upon payment of a proper premium issue a policy" and authorizes the Commissioner of Insurance "to approve the cancellation of a motor vehicle liability policy by an insurance carrier." This section then provides: "[T]he power of the Commissioner of Insurance to approve the revocation or cancellation of insurance under the provisions of this article shall be exercised only in the event of nonpayment of premium or when the Department of Motor Vehicles suspends the license of the insured under the authority granted to it under the Motor Vehicles Act." Interpreting this statute liberally, in order to accomplish the legislative purpose of maintenance of financial responsibility throughout the period of registration of the vehicle, we construe it to mean that, notwithstanding provisions in the policy, an insurance carrier may cancel an assigned risk policy, issued to fulfil the requirements of either the Act of 1953 or the Act of 1957, only when it is shown both that (1) there has been a nonpayment of premium or a suspension of the driver's license of the insured, and (2) the Commissioner of Insurance has approved the cancellation, which he may apparently do by the issuance of general rules and regulations with reference thereto.

Since G.S. 20-279.34 is incorporated by reference into the Financial Responsibility Act of 1957, it is unnecessary for us to determine upon this appeal whether the Turner policy, originally issued as a "non-certified assigned risk policy" to meet the requirements of the 1957 Act, became, in legal effect, a "certified assigned risk policy,"

subject to all the provisions of the 1953 Act, when the defendant certified this policy to the Department of Motor Vehicles, by filing Form SR-22, as proof of financial responsibility of Mrs. Turner, whose driver's license had been suspended. In either event, the company's right to cancel is contingent upon a "nonpayment of premium" by Turner, his driver's license not having been suspended or revoked.

The trial court found as a fact, and it is not disputed, that when the policy was originally issued, Turner paid the premium thereon in full. When the certificate (Form SR-22) was filed with the Department by the defendant at Turner's request on behalf of Mrs. Turner, the defendant was entitled to demand and receive an additional $4.00, which it did demand but did not receive. Construing "nonpayment of premium," as used in G.S. 20-279.34, and as incorporated by reference into the Financial Responsibility Act of 1957, so as to accomplish the purpose of the Legislature, we hold that this charge, while lawfully and rightfully due the defendant, was not a premium on the policy, but was a charge for the issuance by the defendant of a separate and distinct document whereby it incurred a different obligation. It follows that whatever right the nonpayment of this charge may have given the defendant to cancel the SR-22 certificate, such nonpayment of this charge did not give the defendant the right to cancel the policy. We, therefore, approve this conclusion by the trial court.

Since the company had no right to cancel the policy, its attempt to do so, even if it followed the prescribed procedure for cancellation, was of no effect. Thus, it is unnecessary for us to determine the correctness of the trial court's conclusion that it did not follow the prescribed procedure for cancellation. In *Faizan v. Insurance Co., supra,* we said that G.S. 20-279.22, prescribing a procedure for cancellation of a certified liability policy, does not apply to the cancellation of a policy issued pursuant to the 1957 Financial Responsibility Act; that is, to a "non-certified assigned risk policy," such as Turner's policy was at the time of its issuance. For the reasons above mentioned, it is not necessary for us now to determine whether the Turner policy became, in legal effect, a "certified" policy subject to all the requirements of the 1953 Act when the SR-22 certificate was issued by the defendant. Thus, it is not necessary for us now to determine whether, by reason of the issuance of the SR-22 certificate, G.S. 20-279.22 applies to the attempt at cancellation in this case. Obviously, the procedure there prescribed was not followed in this instance.

It was irregular for the trial court to state its conclusions in the form of issues submitted to itself. *Sherrill v. Boyce,* 265 N.C. 560,

144 S.E. 2d 596; *Anderson v. Cashion*, 265 N.C. 555, 144 S.E. 2d 583; *Daniels v. Insurance Co.*, 258 N.C. 660, 129 S.E. 2d 314. The defendant excepted to this, but this irregularity is harmless error in this instance, it being clear from the judgment what the court found as facts and what conclusions of law it drew thereon, these being separated in the judgment.

Affirmed.

JACKIE RAY MOSS, BY HER NEXT FRIEND, ERNEST MOSS, JR., v. SOUTHERN RAILWAY COMPANY, A CORPORATION, AND J. A. BEAL.

(Filed 2 February, 1968.)

1. Railroads § 5; Master and Servant § 32—

Where the jury finds that the engineer on defendant's train was not guilty of negligence in failing to keep a proper lookout at a crossing in respect to the approach of the minor plaintiff on a bicycle, such finding does not exonerate the railroad company sought to be held liable under the doctrine of *respondeat superior* where plaintiff pleads and proves that other employees of the defendant were negligent in failing to warn the engineer of the approaching child.

2. Railroads § 5—

Evidence that brushes and weeds permitted to grow near the crossing partially obstructed plaintiff cyclist's view of an oncoming train imposes a duty of increased vigilance on behalf of the railroad's employees in approaching the crossing.

PLESS, J., dissents.

APPEAL by plaintiff from *Braswell, J.*, May 29, 1967 Civil Session, WAKE Superior Court.

The plaintiff, Jackie Ray Moss, by her next friend, instituted this civil action against the Southern Railway Company and its Engineer, J. A. Beal, to recover damages for the personal injuries she sustained when she was hit by a Southern Railway train at a grade crossing in the Town of Garner. According to the allegations of the complaint and the evidence, the accident occurred at 9:15 on the morning of July 28, 1961 as the plaintiff, age 13, riding her bicycle south on Saint Mary's Street, attempted to cross the defendant's track and was hit by the defendant's eastbound train, consisting of a diesel engine, ten freight cars and a caboose. Saint Mary's Street is a main north-south thoroughfare which crosses the defendant's east-west track approximately at a right angle.

As against the Southern Railway Company the complaint, among other allegations of negligence, contained the following:

"Defendant Southern Railway Company permitted, and failed to cut, a growth of weeds and bushes upon its right of way and along its tracks in such a manner as to obstruct the view of this minor plaintiff when approaching the crossing and to hinder and prevent her from seeing the approaching train; . . .

* * *

Defendant Southern Railway Company, by and through its employees, failed to maintain a reasonable and proper and lawful lookout so as to ascertain this minor plaintiff's position upon entering and crossing the tracks; . . ."

The plaintiff testified:

". . . When I came to the crossing I stopped and I looked to see if I saw a train, and I listened but I didn't hear or see one. I then went on across. I did not get across. I don't remember anything else until I woke up in the hospital.

* * *

As I went down St. Mary's Street toward this train crossing on my right-hand side it was trees and it was a house with a little house with a lot of trees around it, and there was bushes and tall trees and weeds. These weeds and bushes with relation to the train track itself were next to the railroad track. As to the height of these weeds and bushes, they were over my head. I couldn't see. I mean I couldn't see over the bushes or trees."

The plaintiff offered medical and other evidence of her critical and permanent injuries. She remained in the hospital for 46 days, submitting to a number of serious surgical operations, one for the removal of her spleen. She missed half a year from school, has limited physical handicaps and a number of disfiguring scars.

The evidence disclosed that the defendant Beal, the Engineer, was at his station on the right side of the engine. He could not and did not see the plaintiff approaching the crossing from the north. However, A. V. Denkins, General Foreman of Engineers, happened to be riding with E. G. Wrenn, Fireman, both on the left side of the engine. They were in a position to see and did see the plaintiff at the crossing. Denkins testified:

". . . As we got about fifteen car lengths to the crossing I saw this small child, a girl, riding a bicycle coming from north to east, traveling from northeast. From the north side of the track

to the east side of the track, she was going to the south — southside, correction. She was then about five to six automobile car lengths from the track. She was moving. I told the engineer to cut down on the whistle there was a little girl riding a bicycle."

On cross-examination, the witness said:

"When I first saw the child I was approximately 1400 feet west of the crossing. . . ."

Both Denkins and Wrenn saw the child approach and saw her actions and efforts to apply the brakes to her bicycle. ". . . She was in a motion of trying to stop." Her movements were apparently visible while the engine was hundreds of feet away from the crossing. Mr. Wrenn, the Fireman, did not give Engineer Beal any warning. The only warning apparently given by Denkins, according to his story, was to "cut down on the whistle there was a little girl riding a bicycle."

Beal testified:

"Well, as I came to the crossing I was continuously blowing the whistle and watching Denkins and about the time we got to the crossing he grunted and said something and raised up and when he did I put the brakes in emergency and raised up for I didn't know what we were going to strike."

According to Beal's testimony, he did not have any notice of any need for brakes until he was practically at the crossing.

The judgment, here quoted, was entered after the jury had answered the issues as set out therein.

"1. Was plaintiff injured and damaged by the negligence of the defendant Southern Railway Company, as alleged in the complaint?
Answer: Yes.

2. Was plaintiff injured and damaged by the negligence of the defendant J. A. Beal, as alleged in the complaint?
Answer: No.

3. Did plaintiff, by her own negligence, contribute to her injury as alleged in the answer?
Answer: No.

4. What amount, if any, is plaintiff entitled to recover?
Answer: $50,000.00.

It is therefore ORDERED, ADJUDGED AND DECREED that the plaintiff recover nothing of the defendants, or either of them, and that the costs be taxed against the plaintiff. . . ."

From the judgment dismissing the action against both defendants and taxing the plaintiff with the costs, she appealed.

Dupree, Weaver, Horton, Cockman & Alvis by Jerry S. Alvis for plaintiff appellant.

William T. Joyner; Smith, Leach, Anderson & Dorsett by John H. Anderson for defendant appellees.

HIGGINS, J. The Court denied the plaintiff's motion for judgment against the Southern Railway Company notwithstanding the jury's answer to Issues 1, 3 and 4. Apparently the Court denied the motion because of the jury's answer to Issue 2 finding Engineer Beal was not negligent. It must be conceded that unless the plaintiff has alleged and has offered evidence that some agent of the railroad other than Beal was guilty of negligence, which was a proximate cause of the plaintiff's injuries, the Court was correct in denying the motion for judgment against the railroad. However, it is equally true that when the acts of more than one agent are involved, the negligent act of any agent alleged and proved to have been a proximate cause of the injuries will suffice to charge the principal with liability.

This Court is committed to this legal principle:

> "When the servant is the actor, the employer cannot be called upon to respond in damages for his actions which are not wrongfully or negligently committed. *Morrow v. R. R.*, 213 N.C. 127, 195 S.E. 383. When the master must be held, if at all, under the doctrine of *respondeat superior*, a verdict and judgment against the plaintiff on the issue of negligence is an action against the servant bars a later action by the same plaintiff against the master." *May v. R. R.*, 259 N.C. 43, 129 S.E. 2d 624.

In *May*, the plaintiff sought to hold the railroad, because the members of its train crew, at night, pushed an unlighted freight car across the street immediately in front of intestate's moving automobile. When the freight car blocked the crossing her speed was such as made it impossible for her to stop and her vehicle crashed into the side of the unlighted freight car. Her death resulted from the collision. Her personal representative brought suit against the railroad company and all members of its train crew. The Court, at the conclusion of the evidence, ordered nonsuit against defendants Stanly

and Kingsbury. The jury found the other members of the crew were not guilty of negligence. The jury found the railroad guilty of negligence. The case was complicated by a finding the intestate was guilty of contributory negligence. However, all agents of the railroad charged with the responsibility of giving warning of the train's movement over the crossing, having been found free of negligence, and no facts were alleged upon which the railroad could be held independently responsible, nonsuit of the action against the railroad was required.

The plaintiff in this case alleged and testified that bushes and weeds were permitted to grow near the track which partially obstructed her view of the approaching train. This situation increased the need for vigilence in approaching the crossing. *Parrish v. R. R.*, 221 N.C. 292, 20 S.E. 2d 299. As the train approached from the west, at 50 miles per hour, Engineer Beal was on the right (south) side of the engine. The plaintiff approached the crossing from the north. Fireman Wrenn and Denkins, defendant's General Foreman of Engineers, were on the left of the engine. According to his evidence, Denkins saw the plaintiff "a small child, a girl, on a bicycle" approaching from the north at a time when the train was 1400 feet from the crossing. All he did was tell the Engineer to cut down on his whistle. The plaintiff alleged the Southern Railway Company was negligent "by and through its employees" for failure to maintain a reasonable and proper and lawful lookout so as to ascertain the minor plaintiff's approach and to give due and adequate warning and take proper precautions for the child's safety. Wrenn saw the child "in the motion of trying to stop." Instead of calling on the Engineer to apply the emergency brakes, he actually said nothing but relied on the notice given by Denkins "to cut down on the whistle."

The finding of negligence against the railroad may well have been based on the failure of an agent other than Beal to exercise due care which the little girl's safety required. The only fact the verdict established as against the plaintiff was that Engineer Beal was not guilty of negligence. The verdict exonerated only Beal. This is understandable. The first time he ever saw the little girl was at the trial of this action in the Superior Court. He was at his position on the engine which did not permit him to see her approach from his left. The other members of the train crew gave him inadequate warning.

The Court committed error in holding the answer to the second issue (exonerating Beal) also exonerated the Southern Railway Company. The cause is remanded to the Superior Court for the entry of a judgment in favor of the plaintiff for the amount of damages fixed

by the jury. From the judgment, the defendant railroad will have the right to note its appeal and have the trial reviewed by the Court of Appeals. The judgment dismissing the action as to the railroad company is set aside and the cause is remanded for judgment in accordance with the verdict.

Reversed and remanded.

PLESS, J., dissents.

STATE HIGHWAY COMMISSION v. L. A. REYNOLDS COMPANY AND CONTINENTAL CASUALTY COMPANY.

(Filed 2 February, 1968.)

1. Appeal and Error § 26—

An exception to the judgment presents for review whether error of law appears on the face of the record, and this includes whether the facts found and admitted are sufficient to support the judgment.

2. Eminent Domain § 13; State § 4—

Where private property is taken for a public purpose by a governmental agency having the power of eminent domain under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner, in the exercise of his constitutional right, may maintain an action of "inverse condemnation" to obtain just compensation therefor.

3. Highways § 7—

A contractor employed by the Highway Commission cannot be held liable by the owner of land for damages resulting from the construction of a highway in strict compliance with the contract with the Commission, the Commission being primarily liable for damages resulting from the exercise of eminent domain, but the contractor may be held liable for damages resulting from negligence in the manner in which he performs the contract.

4. Same— Highway contractor cannot be liable for damages in absence of negligence.

The Highway Commission brought action against a contractor to recover for compensation paid to the owner of a building damaged by the contractor in the construction of a highway for the Commission. The contract between the parties provides that the contractor indemnify the Commission for all claims of damages sustained as a result of the contractor's performance. The stipulated facts are to the effect that the contractor constructed the highway in strict compliance with the specifications of the Commission and under the supervision of Commission employees. *Held:* It was not contemplated by the parties that the contractor, in the absence of negligence on his part proximately causing damage, would be liable for sums paid by the Commission in discharge of its primary liability, and the ruling of the trial court denying recovery by the Commission is without error.

5. Contracts § 12—

A contract must be construed with regard to the intention expressed by the language of the parties, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.

APPEAL by plaintiff from *Gambill, J.*, March 27, 1967 Session of FORSYTH.

The State Highway Commission instituted this action November 13, 1964, against the contractor (Reynolds) and its surety (Continental) on a highway construction contract and bond dated February 27, 1962, relating to the building of the roadway and structures for 4.37 miles of road on relocated U. S. Highway No. 52 in Forsyth County according to plans and specifications for Project 8.17374.

The Commission's action is to recover the amount it paid ($69,737.52) to satisfy a judgment the landowners obtained on September 5, 1963, against it in the condemnation proceeding entitled, *"State Highway Commission v. W. L. Money and wife, Maxine B. Money, et al.,"* "for damage to their *building* after the original taking." (Our italics.)

The Money property is within the acute angle formed by the convergance of *old* U. S. Highway No. 52 and N. C. Highway No. 8 The Ed Banner Restaurant building was located thereon. Access to the front was from *old* U. S. No. 52. Access to the back was from N. C. No. 8.

The Commission instituted the condemnation proceeding on December 29, 1961, (1) to acquire a perpetual right of way over a strip of land at the back of the Money property approximately thirty feet wide and adjoining the then right of way of N. C. Highway No. 8, and (2) to acquire certain rights with reference to control of access to and from the Money property. In their answer, the Moneys alleged they were entitled "to just compensation for the part of their property taken by the plaintiff and . . . to full damages to the remainder of their land" on account of said taking.

On November 19, 1962, the Moneys, by leave of court, filed an amendment to their answer in which they alleged that road construction operations on the property the Commission was condemning in this proceeding, but outside the portion of the Money property on which said building was located, had so damaged the building as to constitute a taking thereof for which they were entitled to just compensation. They alleged the building was undermined, shaken and shattered by the waters of a creek diverted by the construction of a fill, and by vibrations caused by the operation of bulldozers and other earth-moving equipment, etc., to such extent the building had become unfit for use. On November 19, 1962, an order was entered by Gambill, J., directing the clerk to appoint commissioners to

"appraise the damages to the lands . . . and said restaurant building thereon by reason of the taking of the land and damage to the building . . ."

Upon trial in the superior court before Fountain, J., at July 1963 Civil Term, the jury, answering the first issue, assessed the landowners' damages at $10,000.00 "for the taking of the easement of right of way across their lands as set out in the proceedings herein on December 29, 1961," and, answering the second issue, assessed at $65,200.00 the damages the landowners were entitled to recover "for damage to their building after the original taking." Judgment in accordance with the verdict was entered. The present appeal relates solely to the amount the landowners recovered "for damage to their building after the original taking." Nothing in the record indicates whether the Commission objected to any of the orders, proceedings, submission of issues, etc., in the condemnation proceeding. It did not appeal from the final judgment.

Neither Reynolds, the contractor, nor Continental, its surety, was a party to the condemnation proceeding or participated therein.

In its complaint herein, the Commission alleged that the Money restaurant property was damaged substantially in the manner alleged by the landowners in said condemnation proceeding and that such damage was caused by the operations of Reynolds pursuant to its contract with the Commission.

The Commission bases its action on the italicized portions of Section 7.14 of the "North Carolina State Highway Commission, Raleigh, Standard Specifications for Roads and Structures, April 1, 1959," which by reference is incorporated into and constitutes a part of said construction contract of February 27, 1962, and on the italicized portions of the "Contract Bond," set forth below.

Section 7.14 of said Standard Specifications provides: "7.14 RESPONSIBILITY FOR DAMAGE CLAIMS. *The contractor shall indemnify and save harmless the Commission, its officers, and employees, from all suits, actions, or claims of any character brought because of any injuries or damages received or sustained by any person, persons, or property on account of the operations of the said contractor;* or on account of or in consequence of any neglect in safeguarding the work; or through use of unacceptable materials in constructing the work; or because of any act or omission, neglect, or misconduct of said contractor; or because of any claims or amounts recovered from any infringements of patent, trade-mark, or copyright; or from any claims or amounts arising or recovered under the 'Workmen's Compensation Act,' or any other law, ordinance, order, or decree; and so much of the money due the said contractor under and by virtue of his contract as shall be considered necessary by the Commission for such

purpose, may be retained for the use of the State; or, in case no money is due, his surety shall be held until such suit or suits, action or actions, claim or claims for injuries or damages as aforesaid shall have been settled and suitable evidence to that effect furnished to the Commission; except that money due the contractor will not be withheld when the contractor produces satisfactory evidence that he is adequately protected by the public liability and property damage insurance." (Our italics.)

The "Contract Bond" provides: "Now Therefore, the conditions of this obligation are such, that if the above bounden 'Principal,' as Contractor, shall in all respects comply with the terms of the contract and conditions of said contract, and his, their, and its obligations thereunder, including the specifications and plans therein referred to and made part thereof, and such alterations as may be made in said specifications and plans as therein provided for, and shall well and truly, and in a manner satisfactory to the Chief Engineer or his authorized representative, complete the work contracted for, and shall save harmless the State Highway Commission of North Carolina from any expense incurred through the failure of said Contractor to complete the work as specified, and from any damage growing out of the negligence of said Contractor, or his, their, or its servant, and from any liability for payment of wages or salaries due or for material furnished said Contractor, and shall well and truly pay all and every person furnishing material or performing labor in and about the construction of said project all and every sum or sums of money due him, them, or any of them, for all such labor and materials for which the Contractor is liable; *and also shall save and keep harmless the said State Highway Commission of North Carolina against and from all losses to it from any cause whatever,* including patent, trade-mark and copyright infringements in the manner of constructing said project, then this obligation shall be void; otherwise it shall be and remain in full force and effect." (Our italics.)

The judgment entered by Judge Gambill recites that, at a pretrial conference, the facts were stipulated as set forth in the findings of fact appearing in the judgment, and thereupon defendants moved for judgment on the pleadings and stipulations. The court granted defendants' said motion and entered judgment as set forth below.

The findings of fact set forth in the judgment include the factual matters narrated above and in addition the following:

"(12) That any damages to the restaurant building brought about by reason of the construction project were caused by the operation of the contractor, L. A. Reynolds Company, in the construction of

the highway, pursuant to the contract and specifications attached hereto as Exhibit A and according to the plans. . . .

"(13) That any damages to the restaurant building owned by Mr. and Mrs. Money occurring during the construction undertaken by L. A. Reynolds Company pursuant to the contract arose out of the ordinary and customary use of standard and accepted machinery and road-building equipment used in the work in accordance with standard and accepted methods and techniques in the road construction industry; that any such damages did not result from blasting operations.

"(14) That the State Highway Commission Resident Engineer and two inspectors, employed by the State Highway Commission, supervised the construction of the project to see that the project was constructed according to plans and specifications and to pay the contractor according to the work performed. The State Highway Commission did not reserve the right to specify the types of equipment, the use of the equipment, nor the methods and techniques used in the construction of the project."

The court, based on said findings of fact, concluded as a matter of law that plaintiff was not entitled to recover. Accordingly, the court entered judgment dismissing the action and taxing plaintiff with the costs. Plaintiff excepted to the court's conclusions of law and to the judgment and appealed.

Attorney General Bruton, Deputy Attorney General Lewis, Trial Attorney Smith and Associate Attorney John R. Surratt for plaintiff appellant.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson and W. F. Maready for defendant appellee L. A. Reynolds Company.

Blackwell, Blackwell, Canady, Eller & Jones for defendant appellee Continental Casualty Company.

BOBBITT, J. Plaintiff did not except to any of the court's findings of fact. Indeed, the judgment recites these facts were "judicially stipulated." Plaintiff's assignments of error are based solely on its exceptions to the court's conclusions of law and judgment.

"An exception to a judgment raises the question whether any error of law appears on the face of the record. This includes the question whether the facts found and admitted are sufficient to support the judgment, . . ." *Moore v. Owens*, 255 N.C. 336, 121 S.E. 2d 540; 1 Strong, North Carolina Index 2d, Appeal and Error § 26.

Facts established by findings (12), (13) and (14), quoted in our preliminary statement, may be summarized as follows: Reynolds' operations were conducted pursuant to and in accordance with its contract with the Commission and under the supervision of the Commission's resident engineer and two inspectors. Whatever damage was done to the restaurant building arose out of the ordinary and customary use by Reynolds "of standard and accepted machinery and road-building equipment used in the work in accordance with standard and accepted methods and techniques in the road construction industry."

There is no allegation or contention that Reynolds' operations were conducted in a negligent manner. Plaintiff bases its case entirely on what it contends to be the contractual obligations of defendants.

The Commission, in the proceeding instituted by it, did not seek to condemn any portion of the land on which the restaurant building was located. The landowners, in their "Amendment to Answer," asserted the damages to their building resulting from highway construction work in the area constituted a taking of their building for highway purposes. Thus, the landowners' claim for compensation for the taking of their building was a new action of the nature now denominated "inverse condemnation." With reference to the building, the landowners recovered on the ground the Commission, having taken their property by virtue of its right of eminent domain, was obligated to pay just compensation therefor.

The doctrine of "inverse condemnation," as established in this jurisdiction, is as follows: Where private property is *taken* for a public purpose by a governmental agency having the power of eminent domain and no procedure provided by statute affords an applicable or adequate remedy, the owner, in the exercise of his constitutional rights, may maintain *an action* to obtain just compensation therefor. *McKinney v. High Point,* 237 N.C. 66, 74 S.E. 2d 440; *Eller v. Board of Education,* 242 N.C. 584, 89 S.E. 2d 144; *Sale v. Highway Commission,* 242 N.C. 612, 89 S.E. 2d 290; *Cannon v. Wilmington,* 242 N.C. 711, 89 S.E. 2d 595; *Rhyne v. Mount Holly,* 251 N.C. 521, 112 S.E. 2d 40; *Insurance Co. v. Blythe Brothers Co.,* 260 N.C. 69, 131 S.E. 2d 900; *Midgette v. Highway Commission,* 260 N.C. 241, 132 S.E. 2d 599; *Charlotte v. Spratt,* 263 N.C. 656, 140 S.E. 2d 341; *Sherrill v. Highway Commission,* 264 N.C. 643, 142 S.E. 2d 653.

Whether the landowners' said "inverse condemnation" action was a proper cross action in the Commission's condemnation proceeding is not presented. In this connection, see *Charlotte v. Spratt, supra.*

Suffice to say, the landowners' said action was pleaded and prosecuted to final judgment.

Although the Commission was obligated to the landowners for the taking of their restaurant building as determined by final judgment, the facts found by Judge Gambill and set forth in the judgment fail to disclose any obligation of Reynolds to the landowners for whatever damage was done to their building on account of its operations.

While not necessary to decision of the precise question then presented, this Court, in opinion by Ervin, J., in *Moore v. Clark,* 235 N.C. 364, 70 S.E. 2d 182, said: "A contractor who is employed by the State Highway and Public Works Commission to do work incidental to the construction or maintenance of a public highway and who performs such work with proper care and skill cannot be held liable to an owner for damages resulting to property from the performance of the work. The injury to the property in such a case constitutes a taking of the property for public use for highway purposes, and the only remedy available to the owner is a special proceeding against the State Highway and Public Works Commission under G.S. 136-19 to recover compensation for the property taken or damaged. *Yearsley v. W. A. Ross Const. Co.,* 309 U.S. 18, 60 S. Ct. 413, 84 L. Ed. 554; *Burt v. Henderson,* 152 Ark. 547, 238 S.W. 626; *Marin Municipal Water Dist. v. Peninsula Paving Co.,* 34 Cal. App. 2d 647, 94 P. 2d 404; *Maezes v. City of Chicago,* 316 Ill. App. 464, 45 N.E. 2d 521; *Moraski v. T. A. Gillespie Co.,* 239 Mass. 44, 131 N.E. 441; *Garrett v. Jones,* 200 Okl. 696, 200 P. 2d 402; *Svrcek v. Hahn* (Tex. Civ. App.), 103 S.W. 2d 840; *Panhandle Const. Co. v. Shireman* (Tex. Civ. App.), 80 S.W. 2d 461. But if the contractor employed by the State Highway and Public Works Commission performs his work in a negligent manner and thereby proximately injures the property of another, he is personally liable to the owner therefor. *Broadhurst v. Blythe Brothers Co.,* 220 N.C. 464, 17 S.E. 2d 646; *Burt v. Henderson, supra; Moraski v. T. A. Gillespie Co., supra.* See, also, in this connection: 63 C.J.S., Municipal Corporations, section 1259(d)." It is noted that *Moore v. Clark, supra,* was decided prior to the decisions cited above relating to "inverse condemnation."

The statement quoted from the opinion of Ervin, J., in *Moore v. Clark, supra,* is pertinent to decision herein. We adopt it as authoritative in this jurisdiction.

In addition to the decisions cited by Ervin, J., attention is derected to those considered below.

In *Tidewater Const. Corp. v. Manly,* 194 Va. 836, 75 S.E. 2d 500, the landowners alleged the contractor, while engaged in the construc-

tion of a tunnel, had damaged their building by the removal of its subjacent support. It was admitted that the contractor was not guilty of negligence in the construction of the tunnel and that it performed the work thereon strictly in accordance with the plans and specifications embraced in its contract with the Tunnel Commission, a governmental agency vested with the right of eminent domain. A judgment in favor of the landowners was reversed. Whittle, J., for the Supreme Court of Appeals of Virginia, said:

"If this were not the rule (*i.e.*, if the contractor were liable under these circumstances), the State or subdivisions thereof having the power to condemn private property for public use would find it difficult to secure bids from contractors. The contractor's bid is based upon the theory that the public agency has a legal right to submit its plans and specifications for the work to be performed, and that if he performs the work in accordance with the plans and specifications he will incur no liability in the absence of negligence. The public agency and not the contractor is the party clothed with the power of eminent domain, and if there is to be any special or unforeseen liability attached to the exercise of this power then it should be borne by the agency as an incident to the peculiar power.

"This conclusion is amply supported by the authorities. The public agency or corporation causing the land to be condemned or the work to be done is primarily liable for injuries caused by the exercise of the power of eminent domain. *Village of Glencoe v. Hurford,* 317 Ill. 203, 148 N.E. 69; 20 C.J. 845, note 59, 29 C.J.S., Eminent Domain § 195. And this applies to property taken or damaged by a city, county or other political subdivision. *Hulen v. City of Corsicana,* 5 Cir., 65 F. 2d 969, *certiorari* denied 290 U.S. 662, 54 S. Ct. 77, 78 L. Ed. 573; *Coy v. City of Tulsa,* D.C. Okl., 2 F. Supp. 411. A contractor or agent lawfully acting on behalf of a principal to whom the right of eminent domain has been accorded, in making a proposed public improvement, cannot be held personally liable for damages if such improvement is made without negligence on his part. *Yearsley v. W. A. Ross Const. Co.,* 309 U.S. 18, 60 S. Ct. 413, 84 L. Ed. 554, 557; *Burt v. Henderson,* 152 Ark. 547, 238 S.W. 626; *Marin Municipal Water Dist. v. Peninsula Paving Co.,* 34 Cal. App. 2d 647, 94 P. 2d 404; *Bondy v. Utah Const. Co.,* Sup., 23 N.Y.S. 2d 125; *Svrcek v. Hahn,* Tex. Civ. App., 103 S.W. 2d 840; *Panhandle Const. Co. v. Shireman,* Tex. Civ. App., 80 S.W. 2d 461; 29 C.J.S., Eminent Domain, § 195, page 1098, note 41."

With reference to a similar factual situation, Jones, J., in *Valley Forge Gardens v. James D. Morrissey, Inc.,* 385 Pa. 477, 123 A. 2d 888, speaking for the Supreme Court of Pennsylvania, and in accord

with numerous decisions cited, including *Tidewater Const. Corp. v. Manly, supra,* states: "(I)t has been uniformly held that in the absence of negligence or wilfully tortious conduct on the part of an independent contractor, he is not liable for injury to another's property which is caused by the performance of his contract with a governmental instrumentality in accordance with its plans and specifications." Accord: *Myers v. United States,* 323 F. 2d 580; *Wood v. Foster and Creighton Co., et al.,* 191 Tenn. 478, 235 S.W. 2d 1; *Southeast Construction Co. v. Ellis,* 233 Ark. 72, 342 S.W. 2d 485; 40 C.J.S., Highways § 212(b), p. 208.

In our preliminary statement, we quoted provisions of Section 7.14 of the Standard Specifications and also provisions of the "Contract Bond." Plaintiff relies on the italicized portions thereof. However, these words must be considered in the context of the entire provision in which they appear. As often stated, "(t)he heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Electric Co. v. Insurance Co.,* 229 N.C. 518, 520, 50 S.E. 2d 295, 297. Accord: *Howland v. Stitzer,* 240 N.C. 689, 84 S.E. 2d 167; *Sell v. Hotchkiss,* 264 N.C. 185, 191, 141 S.E. 2d 259, 264.

We agree with the legal conclusions set forth in Judge Gambill's judgment. In our view, and we so decide, it was not contemplated or intended that Reynolds should reimburse the Commission for any amount paid by the Commission in discharge of *its own primary liability;* and that reimbursement was contemplated and intended only in instances in which the Commission was called upon to discharge a liability to which it was subject on account of some wrongful act of Reynolds and for which Reynolds was primarily liable.

Under the factual situation before us, the obligation to the landowners was on the Commission, not on Reynolds. The Commission cannot maintain an action against Reynolds for reimbursement for money paid by the Commission to discharge an obligation for which the Commission was, but Reynolds was not, legally liable.

In view of the conclusions reached, it is unnecessary to discuss the fact that defendants would not be obligated in any event for *the amount of the judgment* the landowners obtained against the Commission. It is simply noted that defendants have had no day in court in respect of *the amount* of the damages to the landowners' building that may have been caused by non-negligent operations of the contractor in the performance of its contract with the Commission.

For the reasons stated, the judgment from which plaintiff appeals is affirmed.

Affirmed.

ARLEE LAWSON, ADMINISTRATRIX OF THE ESTATE OF BEN LAWSON, DECEASED, v. ERNEST BRADLEY BENTON.

(Filed 2 February, 1968.)

1. Negligence § 11—

Where defendant relies upon contributory negligence as a defense, he is required specifically to plead in his answer the acts and omissions of plaintiff relied upon as constituting contributory negligence and to prove them at the trial. G.S. 1-139.

2. Pleadings § 28—

Allegation without proof and proof without allegation are equally fatal.

3. Pleadings § 29; Automobiles § 94—

In the absence of appropriate allegations in the answer as to the negligence of plaintiff's intestate in riding in an automobile operated by defendant while defendant was in a state of intoxication, the trial court was not required to submit that issue of intestate's contributory negligence to the jury.

4. Automobiles § 94—

Evidence that defendant was operating his automobile within the permissible speed limit until he attempted to overtake and pass two automobiles in front of him on a sweeping curve, that plaintiff's intestate then told him to "mash it," and that the defendant accelerated to a speed of 110 miles per hour and that the car went out of control and overturned, *held* insufficient to be submitted to the jury on the issue of intestate's contributory negligence, since the sole reasonable inference permissible from the evidence is that intestate merely urged defendant to return quickly to the proper lane for the safety of the passengers.

5. Same—

A passenger in an automobile is not held to a duty of remonstrating with the driver as to his reckless conduct in the overtaking and passing of another vehicle when to do so would increase the hazard of passing.

6. Appeal and Error § 4—

An appeal, of necessity, follows the theory of trial in the lower court, and where a cause has been tried on one theory in the court below, appellant will not be permitted to urge a different theory on appeal.

APPEAL by defendant from *Cohoon, J.*, 10 April 1967 Civil Session of LENOIR.

Civil action by plaintiff to recover damages from automobile operator and owner for wrongful death of her intestate sustained when he was a guest passenger in defendant's automobile which left the highway and overturned in a ditch on the north side of the highway. Plaintiff alleged in substance as follows: That her intestate, Ben Lawson, died on 30 August 1964 while a resident of Lenoir County; that she is the duly appointed and qualified administratrix of his estate; that she is informed and believes that defendant was the owner and operator of a 1956 Lincoln automobile on 30 August 1964 and that said automobile on that date was registered in defendant's name; that she is informed and believes that about 12:30 p.m. on 30 August 1964 her intestate was a passenger sitting on the right front seat of the said Lincoln automobile which was being operated by defendant in a westerly direction on U. S. Highway #70 about five miles east of the city limits of Kinston; that at such time and place said highway was wet and slick due to rain which had been falling that day; that defendant, while operating his automobile at a speed in excess of 60 miles per hour on said wet, slick highway, attempted to pass two automobiles which were in front of him, also proceeding in a westerly direction; that in attempting to do so defendant lost control of his automobile which left the highway, ran onto the shoulder, and overturned in a ditch on the north side of the highway; that as a direct and proximate result of said operation of the automobile her intestate, who was 39 years of age, gainfully employed, and of good health and habits, received injuries from the overturning of the automobile from which he died instantly; that defendant was negligent in the following respects: (1) driving his automobile on said highway at an excessive rate of speed under the conditions and circumstances then and there existing which rate of speed was also greatly in excess of the speed limit; (2) operating the automobile negligently when he knew or should have known that the tires on said automobile were worn, defective, and unsafe; (3) operating his automobile carelessly, recklessly, without regard for the rights and safety of others, and in a manner so as to be likely to endanger persons, particularly decedent; and (4) failing to keep said automobile under proper control.

Defendant in his answer admitted that plaintiff was the duly appointed and qualified administratrix of Ben Lawson's estate; that on the date alleged in the complaint he was the owner and operator of said Lincoln automobile; that Ben Lawson was a passenger riding in the front seat of the automobile; and that said automobile was traveling in a westerly direction on U. S. Highway #70 about five miles east of the city limits of Kinston. Defendant denied all allegations of negligence. In his further answer and defense, defend-

ant alleged, as a plea in bar, the contributory negligence of plaintiff's intestate. Defendant further alleged that if he were negligent, which is denied, then plaintiff's intestate, Ben Lawson, was guilty of contributory negligence in the following respects: (1) Plaintiff's intestate suggested to the defendant that he try the old Lincoln out and see what it would do, and that immediately prior to the accident complained of plaintiff's intestate told defendant to step on it and see what it would do when her intestate was aware of the weather and road conditions and also of any other circumstances relating to the operation of defendant's automobile at said time and place; (2) if defendant operated said Lincoln automobile negligently as contended by plaintiff, which is denied, then it was the duty of plaintiff's intestate to remonstrate with him concerning the manner in which said automobile was being operated, but plaintiff's intestate failed to remonstrate with defendant as required and actively urged and egged the defendant on, suggesting on more than one occasion that the defendant see what the automobile would do.

Both plaintiff and defendant offered evidence.

During the course of the trial defendant through counsel stipulated that the court might answer "Yes" to the issue concerning whether defendant was negligent. The following issues were submitted to the jury and answered as indicated:

"1. Was the plaintiff's intestate, Ben Lawson, killed by the negligence of the defendant, as alleged in the complaint?

ANSWER: Yes.

"2. What amount, if any, is the plaintiff entitled to recover of the defendant?

ANSWER: $17,500.00."

From judgment entered in accord with the verdict, defendant appeals.

Turner and Harrison by Fred W. Harrison for defendant appellant.

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

PARKER, C.J. Defendant has one assignment of error reading as follows:

"That the Court erred in that the Court failed to declare and explain the law arising on the evidence given in this case as required by G.S. 1-180 in that the Court failed to charge the Jury as to the law arising upon the evidence given in this case

as it relates to the defense of contributory negligence in Tort Actions based upon negligence."

G.S. 1-139 specifies: "In all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it must be set up in the answer and proved on the trial." In this jurisdiction a plea of contributory negligence is an affirmative defense, and when relied upon as a defense, it must be set up in the answer and proved on the trial. The first requirement is that the defendant must have specifically pleaded in his answer an act or omission of plaintiff constituting contributory negligence in law; and the second requirement is that the defendant must prove on the trial the act or omission of the plaintiff so pleaded. Allegation without proof and proof without allegation are equally unavailing to the defendant. *Oil Co. v. Miller,* 264 N.C. 101, 141 S.E. 2d 41; *Rodgers v. Thompson,* 256 N.C. 265, 123 S.E. 2d 785; *Maynor v. Pressley,* 256 N.C. 483, 124 S.E. 2d 162; *Murray v. Wyatt,* 245 N.C. 123, 95 S.E. 2d 541; *Hunt v. Wooten,* 238 N.C. 42, 76 S.E. 2d 326.

Plaintiff offered evidence tending to show the following facts: About 12:30 p.m. on 30 August 1964 defendant was driving his 1956 or 1957 Lincoln automobile in a westerly direction on U. S. Highway #70 about five miles east of the city limits of Kinston. William Fisher, James Fisher, Charlie Koonce, and plaintiff's intestate Ben Lawson were passengers in the automobile. There had been a heavy downpour of rain for about twenty minutes to half an hour. The tires on the back of the Lincoln automobile were slick and those on the front had some tread but were fairly worn. As he approached a long curve defendant drew up behind two cars in front of him. He was operating the Lincoln automobile at a speed of 60 to 70 miles an hour. After defendant had passed the second car in front of him which had slowed down a little to give him more room to pass, he cut rather abruptly in front of the automobile, whereupon the rear of the Lincoln automobile spun around in the direction of travel. It then left the highway on the right shoulder of the road and went into a drainage ditch, proceeded down the drainage ditch backward several hundred feet, hit a culvert in the road, and jumped into the air from six to eight feet. A door on the right side of the Lincoln automobile came open and someone fell out of the automobile. The car then continued through the air, fell on its right side, and slid for 50 or 60 feet.

A State Highway Patrolman, Bert Mercer, arrived at the scene about 1:20 p.m. The highway at the scene of the wreck was 22 feet wide and the shoulders on each side were 10 feet wide. Proceeding toward Kinston from this point, the highway curves in a long sweep-

ing manner to the right, and visibility at that point is approximately 200 to 300 feet. The patrolman measured the distances involved in the accident. The distance from the edge of the pavement to the culvert was 222 feet, and from the culvert to the rear portion of the automobile where it came to rest was 69 feet. Mercer testified in substance on cross-examination: When a wrecker turned the Lincoln automobile over, its glove compartment came open; and he noticed therein a pint bottle containing clear liquid. He smelled the contents of this bottle, and in his opinion it was nontaxpaid whiskey. About an hour and a half after the accident, he saw defendant in the emergency room at Lenoir Memorial Hospital. Defendant at that time had a very strong odor of some intoxicant about him, and in Mercer's opinion he was under the influence of an intoxicating beverage.

During the trial defendant stipulated that plaintiff's intestate died as a result of injuries received from the automobile accident herein involved.

Defendant offered evidence tending to show: On the morning of the wreck James Fisher, Durwood Fisher, Charles Koonce, plaintiff's intestate, and defendant went to Dover in defendant's Lincoln automobile. They went to a house on the other side of Dover. Defendant, plaintiff's intestate, and James Fisher went into the house, stayed approximately 25 minutes, came back out, and started back to Kinston. They did not take anything into the house, and they did not bring anything out of the house. Plaintiff's intestate suggested the trip to Dover. Defendant did not drive fast on the way to Dover. Defendant did not drive fast coming back from Dover until just before they reached this sweeping curve. As defendant was nearing the curve, plaintiff's intestate told him to "mash it," and the car increased its speed up to 110 miles an hour. Charles Koonce, a passenger in the automobile, glanced at the speedometer just before the automobile reached the curve. He got down on the floor. Charles Koonce also testified on cross-examination that he had a case then pending as a result of this collision, and in fact the jury was out right then considering his case. He further testified on redirect examination that after Ben Lawson said "mash it" he (Koonce) told the driver to stop and let him out, but the driver did not stop.

Durwood Fisher, a witness for defendant and a passenger in the automobile, testified in substance: He saw plaintiff's intestate and defendant take a drink of some alcoholic beverage. Defendant got the beverage from under the seat of the car. Defendant drank some and plaintiff's intestate drank some. Then his brother drank some. He did not see anyone drink anything else that morning. After they took this drink of liquor, he heard plaintiff's intestate say to defend-

ant "mash it," just before they got to the curve in the road. Defendant "mashed it." The car began "running" and doing 110 miles an hour. Plaintiff's intestate did not ask to be let out of the automobile. After this, they passed two cars in the curve and then the Lincoln "went to spinning around." He got down in the seat and that is all he remembers until after the car had turned over. He got hurt in the accident and his claim against the defendant has been settled.

Defendant, testifying in his own behalf, admitted that he was operating the Lincoln on the occasion complained of. He does not remember why they went to Dover except that plaintiff's intestate had some business to talk with somebody there. He did have a drink of intoxicating beverage. The intoxicating liquor was in the automobile. He had it before he got out of the city limits of Dover. He testified: "We were coming down the road and run up behind this car, I believe it was a station wagon and I started by it. I was going pretty fast. I saw that I had room to pass the second car, so I kicked it into overdrive, picked up speed a little bit; so I could go by and it was running up around 60 to 70 miles an hour."

Defendant contends in his brief that he was entitled to an issue of contributory negligence and a charge on it, because plaintiff's evidence and his own shows that a bottle of nontaxpaid whiskey was found in the automobile after the collision, and that the patrolman saw defendant about an hour and a half after the accident in the hospital, and he was under the influence of liquor, and that riding with a driver who is under the influence of liquor has been held to be contributory negligence as a matter of law. This contention is untenable, for nowhere in the answer is there any reference to the defendant's operating the automobile under the influence of liquor or while drinking. Nor is there any intimation in the answer that if in fact defendant was operating the automobile under the influence of liquor plaintiff's intestate knew of it. There is no statement or reference in the complaint that defendant at the time had a drink or was operating his automobile while under the influence of liquor. In the absence of appropriate allegations on the subject of intoxicating liquor, the presiding judge was neither required nor permitted to leave to the jury the question as to whether the defendant proximately caused his automobile to overturn by reason of operating it under the influence of intoxicating liquor.

There is no evidence to support the allegations in the plea of contributory negligence that on the return trip to Kinston plaintiff's intestate suggested to the defendant that "he try the old Lincoln out and see what it would do." There is evidence in the record that

when defendant started to overtake and pass two automobiles on the long sweeping curve, plaintiff's intestate told him to "mash it." There is no evidence in the record that plaintiff's intestate "actively urged and egged the defendant on and suggested on more than one occasion that the defendant see what his car would do," except the one instance of plaintiff's intestate telling defendant to "mash it" as he started to overtake and pass the two automobiles in front of him. There is no allegation in the answer that the tires on the Lincoln automobile were slick, worn out, or defective in any way, or that if they were plaintiff's intestate knew their condition. There is no allegation in the answer that defendant was an inexperienced or unskilled or a careless and reckless driver. There is no allegation in the answer that defendant was incapacitated physically to drive an automobile safely or that defendant was sleepy.

This is said in 8 Am. Jur. 2d, Automobiles and Highway Traffic, § 524:

> "A person riding in a motor vehicle driven by another, even though not chargeable with the driver's negligence, is not absolved from all personal care for his own safety, but is under the duty of exercising reasonable or ordinary care to avoid injury — that is, such care as an ordinarily prudent person would exercise under like circumstances. The failure to do so constitutes contributory negligence which will bar recovery against a third person or the owner or operator of the vehicle, except under certain guest statutes, for injuries sustained in an accident, if such contributory negligence was a proximate cause of the accident or had a causal connection therewith.
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> "While the standard of duty of a guest is to exercise reasonable or ordinary care for his own safety, the precautions required to be taken by a guest are less than those required of the driver. The duty of driving and the correlative duty of exercising due care for the safety of a guest rests primarily upon the driver. A guest should not undertake to supervise or direct the driver, except where such action is reasonably necessary for the guest's own safety. He is entitled to assume that the driver will exercise proper care and caution, until it becomes apparent to him that he can no longer rely upon the driver to protect him."

When motor vehicles are proceeding along a highway in the same direction, there is no rule of law that compels one to travel indefinitely behind the other or gives one the unqualified right to overtake

and pass the other, but rather, the traveler in the rear position may, at a proper place, pass another vehicle when he may do so in safety. *Oil Co. v. Miller, supra;* 7 Am. Jur. 2d, Automobiles and Highway Traffic, § 221.

G.S. 20-150(a) provides:

> "The driver of a vehicle shall not drive to the left side of the center of a highway, in overtaking and passing another vehicle, proceeding in the same direction, unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety."

Section (b) of the same statute provides:

> "The driver of a vehicle shall not overtake and pass another vehicle proceeding in the same direction upon the crest of a grade or upon a curve in the highway where the driver's view along the highway is obstructed within a distance of five hundred feet."

Sections (c), (d), and (e) of this same statute have no application to the evidence in this case. The manifest purpose of this statute is to promote safety in the operation of automobiles on the highways and not to obstruct vehicular traffic. This safety statute must be given a reasonable and realistic interpretation to effect the legislative purpose. There is no allegation in defendant's answer that when defendant turned out to pass the two automobiles in front of him that there was any oncoming traffic and that he was not free of oncoming traffic for a sufficient distance ahead to permit his automobile to overtake and pass the two preceding automobiles in safety, nor is there any allegation in defendant's answer that defendant attempted to pass these two preceding automobiles on a curve and that the defendant's view along the highway was obstructed within a distance of five hundred feet.

When the defendant turned to his left to overtake and pass the two preceding automobiles, plaintiff's intestate told him to "mash it." Defendant started to pass on a long sweeping curve. It seems reasonable to infer that the defendant's utterance to "mash it" was an expression for the defendant to accelerate his speed and pass the automobiles on the curve and get in the right lane of traffic for his own safety and for the safety of his passengers. There is evidence that defendant when he proceeded to pass got up to a speed of 110 miles an hour. It is apparent that defendant suddenly increased his speed to 110 miles an hour. In *Samuels v. Bowers,* 232 N.C. 149, 59 S.E. 2d 787, the Court said:

"The principle is generally recognized that when a gratuitous passenger becomes aware that the automobile in which he is riding is being persistently driven at an excessive and dangerous speed, the duty devolves upon him in the exercise of due care for his own safety to caution the driver, and, if his warning is disregarded and speed unaltered, to request that the automobile be stopped and he be permitted to leave the car. [Citing authority.] He may not acquiesce in a continued course of negligent conduct on the part of the driver and then claim damages from him for injury proximately resulting therefrom. But this duty is not absolute and is dependent on circumstances."

In the following cases where there was evidence of excessive speed, the question of whether a guest passenger was guilty of contributory negligence was held properly submitted to the jury for determination: *King v. Pope,* 202 N.C. 554, 163 S.E. 447; *Taylor v. Caudle,* 210 N.C. 60, 185 S.E. 446. In the following cases of a guest passenger where there was evidence of excessive speed, no issue of contributory negligence was submitted to the jury, and this Court found no error in the trial: *Norfleet v. Hall,* 204 N.C. 573, 169 S.E. 143; *York v. York,* 212 N.C. 695, 194 S.E. 486.

The undisputed evidence is that defendant was driving his automobile safely and within the permissible speed limit until he turned to the left to overtake and pass the two automobiles in front of him on a sweeping curve. Considering the totality of the evidence, we believe that it was not and should not have become apparent to plaintiff's intestate that defendant, in passing these two cars on this long sweeping curve, was operating his automobile in such a negligent and reckless fashion that the exercise of reasonable care required plaintiff's intestate to remonstrate with defendant concerning the latter's recklessness and attempt to persuade him to drive carefully. Indeed, for plaintiff's intestate to have so remonstrated with defendant at this time or to have requested him to stop so that plaintiff's intestate could get out of the car would have added to the usual hazard incident to the overtaking and passing of one car by another. In other words, we see no evidence of contributory negligence of plaintiff's intestate in this case to require the court to charge on it. We are fortified in our opinion because defendant and his able and experienced counsel did not (1) except to the two issues submitted to the jury; (2) did not tender an issue of contributory negligence; (3) did not ask for any special instructions upon contributory negligence; and (4) did not except to any part of the charge.

"An appeal, of necessity, follows the theory of trial in the lower court. . . . Where a cause has been tried on one theory in the lower court, appellant will not be permitted to urge a different theory on appeal." 1 Strong, N. C. Index 2d, Appeal and Error, § 4. What is said in *Mills v. Dunk*, 263 N.C. 742, 140 S.E. 2d 358, is relevant here: "A litigant, however, may not acquiesce in the trial of his case in the Superior Court upon one theory and here complain that it should have been tried upon another."

It is manifest that defendant is dissatisfied with the amount of damages awarded by the jury, and having tried his case on one theory in the lower court is attempting to try it on another theory in the Supreme Court. This he cannot do.

The judgment of the lower court is

Affirmed.

ROBERT C. OVERBY v. LUCILLE J. OVERBY.

(Filed 2 February, 1968.)

1. Divorce and Alimony § 13—

In the husband's action for divorce on the ground that he and his wife had lived separate and apart continuously for a period of one year next preceding the institution of the action, the husband is not required to establish that he is the injured party, G.S. 50-6, and the sole defense to the husband's right to divorce on such ground is that the separation was caused by the husband's wilful abandonment of her, which defense the wife must allege and prove.

2. Same—

In an action for absolute divorce under G.S. 50-6, appellant's contention that the trial court should have instructed the jury that abandonment imports wilfulness *is held* without merit.

3. Husband and Wife § 14—

An instruction to the jury that if the wife furnishes the entire purchase price of land from her own and separate funds and has the conveyance deeded to the wife and husband jointly, then the husband would be declared to hold the land in trust for the benefit of the wife, *held* to give the wife a more favorable instruction than she is entitled, and her exception thereto cannot be sustained.

4. Evidence § 31—

The testimony of a bank officer as to the manner in which a wife and husband deposited their pay checks and in which they made payments on various loan accounts, such transactions being within the personal observation of the officer, does not contravene the best evidence rule when the testimony was not offered to prove the contents of any writing or document.

5. Banks and Banking § 4; Gifts § 2—

The fact that a wife deposited in her individual bank account funds borrowed jointly by the husband and wife does not create the presumption that the husband intended the funds to be a gift to the wife, and a special instruction to that effect is properly refused by the trial court.

APPEAL by defendant from *Brock, S.J.*, 15 May 1967 Civil Session of MOORE.

This is an action for divorce on the ground of separation for one year. Defendant pleaded abandonment by plaintiff. In a further answer she alleged that two lots had been purchased during the marriage with her sole and separate property, and that title had been taken in the names of plaintiff and defendant as tenants by the entirety. She further alleged that she had furnished money and property of the total value of $1,800 as down payment on a mobile home purchased during the marriage and that the mobile home had been repossessed and sold for failure of plaintiff to maintain payments. Defendant asked that plaintiff's action as to her be dismissed, that she be awarded the two lots owned by them as tenants by the entirety, that she be allowed support and counsel fees *pendente lite*, that she be awarded permanent support, and that she recover judgment against plaintiff in the amount of $1,800.

Five issues were submitted to the jury. The first three issues relating to the marriage of plaintiff and defendant, residency of plaintiff, and separation of the parties for more than one year were answered "Yes." The fourth issue — "Did the plaintiff abandon the defendant as alleged in the Cross Action?" — was answered "No." The jury likewise answered both parts of the fifth issue "No." These were: "Did the defendant pay the purchase price of the Whispering Pines lot from her separate funds as alleged in the Cross Action?" and "Did the defendant pay the purchase price of the Tranquil Harbour lot from her separate funds as alleged in the Cross Action?"

The court entered judgment granting plaintiff an absolute divorce and denying the relief sought by defendant in her counterclaim and cross-action. The court further adjudged that the lots in controversy be held by plaintiff and defendant as tenants in common. Defendant appealed.

Watkins and Edmundson by R. Gene Edmundson, and Johnson, Johnson and Poole by Samuel Poole for defendant appellant.

Seawell, Van Camp & Morgan by James R. Van Camp and William J. Morgan for plaintiff appellee.

PARKER, C.J. There is no controversy as to the first three issues. The court did not submit an issue as to defendant's claim for

the $1,800 allegedly paid by her on the mobile home and the record shows no exception to this determination. Defendant's assignments of error relate to the evidence and charge on the questions of abandonment and entitlement to the lots.

Appellant assigns as error the failure of the court to charge the jury that if the plaintiff abandoned the defendant, he was not entitled to a divorce from her, and failure of the court to instruct the jury that abandonment imports willfulness. The record shows the following evidence relating to these questions.

Plaintiff and defendant were married in November, 1957. Both were residents of Moore County. No children were born of the marriage. At the time of the marriage, plaintiff was a part-time employee at McCain, North Carolina. Approximately six months later, he got a job in Burton, South Carolina, 240 miles away from McCain. He worked there for a year and a half. At the end of this period, he returned to work at McCain, sometime in 1960. While working in South Carolina, he usually came home on week ends.

In the fall of 1960, they purchased a house trailer and lived in it together in the country near McCain. Defendant was employed by the State of North Carolina as a nurse and worked at the McCain Sanatorium. On 25 July 1962, she was transferred to Butner, North Carolina, to work in the John Umstead Hospital. Defendant had living quarters at Butner. Plaintiff continued to live in the house trailer at McCain and to work at McCain for three or four months after defendant had moved to Butner. He was then transferred to a job on the North Carolina coast. In January, 1963, he was transferred to Morganton, North Carolina. After defendant moved to Butner, plaintiff would visit her there on week ends and holidays. The defendant visited plaintiff at McCain several times prior to his transfer to the coast.

In July, 1963, while plaintiff was employed in Morganton, he visited defendant in Butner and suggested that they enter into a separation agreement. Defendant's response to the proposal, as testified to by her, was: " 'I'll sign the separation papers, but, Bob, are you sure, is this what you want, that I'd rather you wouldn't do it.' I sit and talked with him for quite a while and I said, 'If you are sure that's what you want, and that's the you you feel, I'll sign separation papers.' I never did sign separation papers because he never brought them to me to sign. That was the last time I saw Mr. Overby."

Plaintiff testified to several encounters with the defendant's former husband. One such occasion was described as follows: "The next time I saw him there was about a year later, if I recall right. I went to work one morning and had to pay my car insurance and I realized

I had left the papers at home, so I asked to be off to go pay the insurance and I went to the house to get my papers and when I drove up his car was sitting there again, and when I walked in he was sitting at the table eating breakfast with her. That was around 8:30." Again, testifying as to marital difficulties, plaintiff said: "I found out she was having men visitors and I came in one time and didn't park my car in the yard. I left it over across from the trailer behind some shrubbery and I was there about five minutes when this guy came in and I talked to her later about it and told her that I couldn't put up with those things. I found some letters too, and she told me one day if I didn't like it I could get out. It was the following May that she came and told me that she was out of a job at McCain and we talked about it and she told me she wanted to keep working for the State. I didn't want her to go off at Butner. That was the only chance of continuing her work for the State so she went on and stayed there." In partial explanation of his reasons for desiring a separation agreement plaintiff stated: "I went up there to get her to sign separation papers and told her I didn't want to live with her ex-husband around and other men coming around. That is my reason for it."

On the question of abandonment the court instructed the jury, in part, as follows:

> "Members of the jury, there is no hard and fast rule that I can give you to determine or define exactly what constitutes abandonment of one spouse by the other, but generally speaking neither spouse is justified in withdrawing or leaving the other unless the conduct of the other is such as would likely render it impossible for the withdrawing spouse to continue the marital relation with safety, with health, or with self-respect. Otherwise, members of the jury, the separation of the parties would have to be mutual consent. In other words the law would not allow one to withdraw wilfully from the other without just cause or provocation and then come into court and seek a decree of absolute divorce based upon his or her own wrong.
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> ". . . I instruct you that if the defendant, Mrs. Overby, has satisfied you by the greater weight of the evidence that the plaintiff, Mr. Overby, wilfully discontinued living with her as husband and wife, and that he did this without just cause or adequate provocation from her, then it would be your duty to answer the fourth issue in favor of the defendant."

In an action by the husband against his wife for an absolute divorce under G.S. 50-6 on the ground of separation for the required statutory period, he is not required to establish that he is the injured party. If he alleges and establishes that he and his wife have lived separate and apart continuously for the required statutory period, one year or more next preceding the commencement of the action, her only defense is that the separation was caused by his act in willfully abandoning her. The wife must allege and establish his willful abandonment as an affirmative defense. *Pickens v. Pickens,* 258 N.C. 84, 127 S.E. 2d 889; *Taylor v. Taylor,* 257 N.C. 130, 125 S.E. 2d 373; *Johnson v. Johnson,* 237 N.C. 383, 75 S.E. 2d 109; *Cameron v. Cameron,* 235 N.C. 82, 68 S.E. 2d 796. The court correctly placed the burden of proof on this issue and defined abandonment in accordance with decisions of this Court. *Pressley v. Pressley,* 261 N.C. 326, 134 S.E. 2d 609; *Caddell v. Caddell,* 236 N.C. 686, 73 S.E. 2d 923; *Hyder v. Hyder,* 215 N.C. 239, 1 S.E. 2d 540. Appellant's contention that abandonment imports willfulness is, in this case, an exercise in semantics. To the contrary, abandonment requires that the separation or withdrawal be done willfully and without just cause or provocation. The phrase was used in *Workman v. Workman,* 242 N.C. 726, 89 S.E. 2d 390, in holding that a complaint in an action for alimony without divorce under G.S. 50-16 was sufficient, when liberally construed, to withstand demurrer, and has no application here. These assignments of error are overruled.

Defendant testified, in substance, as follows regarding the purchase of the lots: In the fall of 1960, "we" purchased a lot in Whispering Pines. The down payment of $500 was borrowed from the Citizens Bank and Trust Company of Southern Pines. "Mr. Overby and I both probably paid that back to the bank." The $500 was placed in defendant's individual account, and the down payment was made by a check drawn on her account. Subsequent installments were paid in the same manner. In May or June, 1960, the parties purchased a lot in Tranquil Harbour. A down payment of $30 was made, and subsequent installment payments were $10 per month. The monthly installments were paid by checks drawn on the defendant's individual account. She testified that she does not remember whether she or plaintiff made the down payment. She testified that she made "practically" all the installment payments.

Concerning the handling of family finances, the plaintiff testified as follows: "When I went to the bank to borrow money she signed the papers along with me. . . . Most of the money was deposited to her account because she wrote checks, paid the bills and I was always working and didn't have time to go off the job. So a

lot of times she would work on the night shift and had the day off, you see, and most of the time we applied the money to her account so that she could write the check for it. Some of the money that was paid on the lots at Whispering Pines and one at Tranquil Harbour came through me. I'd say half of it did. . . . Prior to 1963, I paid all the money that was borrowed at the bank. I didn't make any payments to Mr. Pruitt. The agreement between me and her was she paid the payments on all the lots. We were fifty-fifty. If I pay the bank payment and payment on the mobile home, course, what money was left I helped her with other debts. We borrowed money at the bank and deposited most of it to her account and I paid the money back. So therefore, I figure I put money in the lots."

An officer of the Citizens Bank and Trust Company of Southern Pines, N. C., described the manner in which the pay checks of plaintiff and defendant were received at the bank. He testified that Mr. and Mrs. Overby had been doing business with his bank since 1956 or 1957. He knew the parties as well as he knew his own family. He was a loan officer, and his desk was located near the teller's cage. Because of his frequent loan transactions with the plaintiff and the defendant and of his friendship with them, he frequently handled their routine deposits. He testified: ". . . (A)t the time Mr. and Mrs. Overby both had loans with our bank, each had an automobile loan and each might have had a personal loan and payments to be made on these loans and some money would be deposited to Mr. Overby's account and some money would be deposited to Mrs. Overby's account. The fact that the checks of Mr. Overby, his pay check, would be endorsed and would be presented at the bank either to be cashed and the note payment made and the deposit made to his account and maybe in some incidences *(sic)* I am sure . . . Some incidences *(sic)* money would be deposited to Mrs. Overby's account now the same is true with loan proceeds. Loan proceeds some of the loans we would have to them were joint loans and proceeds would be divided, some would go into his account and some would go into her account. I know that most of it, of course, did go to Mrs. Overby's account because she did most of the attending to the business."

During the period when monthly installment payments were being made on the two lots, there were, of course, many other family living expenses. The plaintiff was making monthly installment payments of $113 on the house trailer. The parties had charge accounts at some eight or nine stores. They had two automobiles. The joint use of their incomes to acquire family property and the interpretation placed upon the transactions by defendant are illustrated by

her testimony concerning a certain gift: "In March, 1961, I purchased a Stereo set for $700.00. It was given to me by Mr. Overby as a gift for my birthday and valentine and Easter of that particular year. I helped pay the money back some of it that was borrowed when we made the payments on it."

Appellant's major argument is that the court erred when "it failed to instruct the jury that when a wife buys a piece of land with her separate funds and has title put in the joint names of husband and wife that this raises a presumption of a resulting trust in favor of the wife which must be rebutted by the husband." Assuming that appellant's analysis of the law of Trusts is correct, *Dunn v. Dunn,* 242 N.C. 234, 87 S.E. 2d 308; *Wise v. Raynor,* 200 N.C. 567, 157 S.E. 853; *Deese v. Deese,* 176 N.C. 527, 97 S.E. 475, the court's instruction gave her more than she was entitled to. On this point, the court said in its instruction: "(I)f the wife furnishes or pays the entire purchase price from her sole and separate funds and income, the conveyance to the husband and the wife jointly creates a trust in favor of the wife in the one-half interest held by the husband, and the husband will be declared to hold the one-half interest in trust for the benefit of the wife. . . . (I)t is clear, members of the jury, that if a wife does take her sole and separate money, or income, and purchase property and has the deed made to her and her husband jointly, then under those circumstances unless there was an intended gift, and again, I instruct you that there was no evidence of any intended gift in this case, then the husband would be declared to be the holder in trust for the benefit of the wife." Thus, the court did not merely charge that the appropriate finding would raise a presumption of a resulting trust in favor of defendant. Instead, the court charged that the appropriate finding would create a trust and that the husband would be declared to be the holder in trust for the benefit of the wife. Appellant cannot complain because of an instruction that was more favorable to her position than the circumstances required. This assignment of error is overruled.

Defendant objected and excepted to admission of the testimony of the loan officer regarding his transactions with plaintiff and defendant, and argues that such admission violated the best evidence rule. This rule is based on the theory that a writing itself is the best evidence of its contents and ordinarily requires the production of the original writing itself if its contents are to be proved. 3 Strong, N. C. Index 2d, Evidence, § 31; Stansbury, N. C. Evidence, 2d Ed., § 190. The rule is not applicable if the writing is only collaterally involved, 3 Strong, N. C. Index 2d, Evidence, § 31; Stansbury, *op. cit.,* § 191, or where the contents or terms of the writing are not in

question. Stansbury, *op. cit.*, § 191; *Winkler v. Amusement Co.*, 238 N.C. 589, 79 S.E. 2d 185; *S. v. Ray*, 209 N.C. 772, 184 S.E. 836; *S. v. Casey*, 204 N.C. 411, 168 SE. 512. The bank officer's testimony did not purport to prove the specific terms or contents of any writing or document. Having handled the banking transactions of the parties, he testified from personal observation, and corroborated plaintiff's testimony that most of the family banking transactions were handled by defendant, and that some of plaintiff's money, in the form of loan proceeds and pay check proceeds, was deposited in defendant's account. This assignment of error is overruled.

Defendant, at the appropriate time, requested the following special instruction: "(I)f the jury was satisfied that the plaintiff and the defendant jointly borrowed the sum of $500.00 from the bank and that those funds were deposited in the defendant's bank account, that this created the presumption that the husband intended that these funds should be a gift to the wife and that they would become her sole and separate funds." She excepted to and assigned as error the court's denial of her motion for special instructions. She also assigned as error failure of the court "to instruct the jury that if a wife receives and uses her husband's money, there is the presumption of a gift in the absence of a contract to repay."

The court correctly refused to give the requested instruction, and also the one which appellant now says should have been given. Appellant argues, and properly so, that when a husband pays the purchase price for land and has the deed made to his wife, the law presumes that he intended the property to be a gift. 2 Strong, N. C. Index, Gifts, § 2; *Carlisle v. Carlisle*, 225 N.C. 462, 35 S.E. 2d 418. However, this Court has not extended such presumption to the case where money belonging to the husband comes into the wife's hands. Appellant relies upon *Smith v. Smith*, 255 N.C. 152, 120 S.E. 2d 575, as some authority for his contention. That case dealt with the deposit in a joint account with his wife of funds owned by the husband, and the Court held that the transaction did not constitute a gift, but that the wife had, at most, authority as agent to withdraw funds. To the extent that the principles of that case are applicable, they are contrary to appellant's contention.

Appellant cites *Shoe v. Hood*, 251 N.C. 719, 112 S.E. 2d 543. This was a negligence action, in which the injured party sought to have the negligence of the husband who was driving the car imputed to his wife who was its owner. The husband had purchased the automobile and registered the title in the name of his wife. Ownership was admitted. There being no question as to ownership, the case does not support appellant's contention.

A more analogous case is *Bullman v. Edney*, 232 N.C. 465, 61 S.E. 2d 338. In that case plaintiff alleged that she and her husband had purchased an automobile; that she paid $500 of the purchase price and her husband agreed to pay the $300 balance due, and that title in the automobile was to be taken in her name. The Court held that if this allegation were true the plaintiff and her husband became tenants in common of the automobile. These assignments of error are overruled.

All the remaining assignments of error have been carefully considered, and no error has been made to appear.

No error.

DAN HOOTS, ADMINISTRATOR OF THE ESTATE OF TIMOTHY RAY HOOTS, v. RAY ELLIS BEESON.

(Filed 2 February, 1968.)

1. Negligence § 16—

An infant between the ages of seven and fourteen is presumed incapable of contributory negligence, but the presumption is rebuttable.

2. Same—

The test for determining contributory negligence of a minor is whether the child acted as a child of its age, capacity, discretion, knowledge and experience would ordinarily have acted under similar circumstances.

3. Same; Negligence § 28—

In the trial of an issue relating to the contributory negligence of a child between the ages of seven and fourteen, it is incumbent upon the trial court to instruct the jury on the rebuttable presumption that such child is incapable of contributory negligence, and his failure to do so constitutes prejudicial error. Overruling *Leach v. Varley*, 211 N.C. 207.

4. Negligence § 28—

An instruction on the issue of contributory negligence incorrectly charging an eleven-year-old boy with the same standard of care as an adult *is held* not cured by a subsequent instruction which charges that such child is rebuttably presumed incapable of contributory negligence but which omits the factors of capacity, discretion, knowledge and experience as determinative of the child's ability to avoid danger.

APPEAL by plaintiff from *Shaw, J.*, February 6, 1967 Session of YADKIN.

Timothy Ray Hoots, plaintiff's eleven-year-old son, was killed Sunday afternoon, August 1, 1965, when struck by a 1959 Oldsmobile operated by defendant. Plaintiff, in his capacity as adminis-

trator of Timothy's estate, instituted this action to recover damages on account of his intestate's death.

The fatal accident occurred on a portion of N. C. Highway No. 67 in Yadkin County between East Bend and Boonville where the highway runs generally east and west. Timothy, riding a bicycle, was attempting to cross from a private driveway on the south side of the highway to the north side thereof. When struck he had reached approximately the center of the twenty-foot hard-surfaced portion of the highway. Defendant, driving east on No. 67, approached the point of collision from Timothy's left.

Plaintiff alleged Timothy's death was proximately caused by defendant's negligence in that defendant, operating his car at excessive speed, without keeping it under proper control, failed to keep a proper lookout, and, notwithstanding he saw or should have seen Timothy with the bicycle on the south side of the highway, failed to give warning by horn or otherwise of his approach and drove without decreasing speed to the scene of collision.

Defendant, answering, denied all allegations as to his negligence, and alleged conditionally that Timothy was contributorily negligent in that, notwithstanding he saw or should have seen the approaching car of defendant, he failed to keep a proper lookout, failed to keep his bicycle under proper control, and suddenly moved from a place of safety on the south side of the highway directly across the highway lane in which defendant's car was approaching.

Evidence was offered by plaintiff and by defendant.

The court submitted and the jury answered the following issues: "1. Was the plaintiff's intestate, Timothy Ray Hoots, killed by negligence of the defendant as alleged in the complaint? ANSWER: Yes. 2. If so, did the plaintiff's intestate, Timothy Ray Hoots, by his own negligence contribute to his death as alleged in the answer? ANSWER: Yes. 3. What amount, if any, is the plaintiff entitled to recover of the defendant? ANSWER....."

In accordance with the verdict, the court entered judgment that plaintiff recover nothing of defendant, that plaintiff's action be dismissed, and that the costs be taxed against plaintiff.

Plaintiff excepted and appealed.

H. Smith Williams and R. Lewis Alexander for plaintiff appellant.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson for defendant appellee.

BOBBITT, J. There was ample evidence to warrant submission of the negligence and contributory negligence issues and to support

the jury's findings thereon. The jury answered the negligence issue, "Yes." The question for decision is whether there was error in the portion of the court's charge relating to the contributory negligence issue.

Plaintiff excepts, *inter alia,* to the following portions of the court's instructions to the jury: (1) "It being the law, members of the jury, that where both parties to an action like this are negligent, that neither can recover, that the negligence of one offsets the other, so we have here the issue of contributory negligence and the law here, members of the jury, is the same as I have just given you earlier in the charge in regard to actionable negligence, except that contributory negligence here applies to the acts of the plaintiff intestate, Timothy Ray Hoots, whereas actionable negligence in the preceding issue applies to the acts of the defendant." (2) "Upon this second issue, rephrasing it, did the plaintiff's intestate fail to exercise that degree of care which a reasonably prudent *person* would have exercised under the same or similar circumstances and when charged with a like duty, and, if so, was his failure to do so one of the proximate causes of the death of the plaintiff's intestate." (Our italics.)

The instructions quoted above, standing alone, are erroneous in that they fail to take into consideration the fact Timothy was eleven years old. They are prejudicial to plaintiff unless elsewhere in the charge the court gave correct instructions concerning the significance of Timothy's age and the consideration to be given thereto in the jury's determination of the contributory negligence issue.

The court gave this general instruction: "Whether a child of tender years can exercise due care under the circumstances is to be determined in relationship to the age, knowledge, intelligence, exprience, discretion of the particular child involved."

The only instruction *in the original charge* bearing upon the contributory negligence issue in which inference is made to the ages of children and particularly to the age of Timothy is the following: "The court instructs you that the evidence in this case tends to show that the plaintiff's intestate at the time of his injury was a boy 11 years of age. The rule of law in regard to the negligence of an adult person and the rule of law with regard to a child of tender years is quite different. By adult there must be given that care and attention that is ordinarily exercised by a person of ordinary intelligence and discretion. Of a child of tender years less intelligence and discretion is required and the degree depends upon his age and knowledge. Of a child of *three* years less discretion would be required than one of *seven,* and of a child of *seven* less than one of *twelve* or *fifteen.* The care required is according to the capacity of the child, and this is to be determined in each case by the circumstances of that case. All that

is required of an infant is that he exercise due care equal to his maturity and capacity." (Our italics.)

The instruction quoted in the preceding paragraph, in all material respects, is in the language of an instruction approved in *Leach v. Varley,* 211 N.C. 207, 189 S.E. 636, an action in which the plaintiff failed to recover because the jury found the intestate, the plaintiff's eight and one-half year old daughter, guilty of contributory negligence. In *Leach,* as in the original charge in the present case, the instruction contained no reference to a presumption relating specifically to a child between the ages of seven and fourteen. The instruction approved in *Leach* is in conflict with decisions discussed below.

In this jurisdiction, a child under seven years of age, as a matter of law, is incapable of contributory negligence. *Walston v. Greene,* 247 N.C. 693, 102 S.E. 2d 124, and cases cited. With reference to a child fourteen years of 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." *Welch v. Jenkins,* 271 N.C. 138, 155 S.E. 2d 763, and cases cited.

The opinion in *Leach* states the instruction approved therein "is almost in the exact language *used*" in *Alexander v. Statesville,* 165 N.C. 527, 81 S.E. 763. (Our italics.) In *Alexander,* a personal injury action, the plaintiff was a boy "about 7 years old." Issues of negligence, contributory negligence and damages were submitted. The jury answered the negligence issue, "No," and did not answer the other issues. Although the jury's answer to the negligence issue was determinative, the opinion of Walker, J., is replete with quotations from this and other jurisdictions relating to rules applicable in determining whether a child of tender years is contributorily negligent, including a quotation, in substantial accord with the instruction approved in *Leach,* from the opinion of Mr. Justice Hunt in *Railroad Company v. Gladmon,* 82 U.S. (15 Wall.) 401, 21 L. Ed. 114 (1872). The plaintiff therein, a seven-year-old boy, sued a street railway company. The case was heard by the Supreme Court of the United States on defendant's appeal from an adverse verdict and judgment in a trial court of the District of Columbia. The defendant assigned as error the court's failure to instruct the jury *as requested* in relation to contributory negligence. It was held the requested instructions were properly refused because they failed to take into account the fact the plaintiff was a seven-year-old boy.

The opinion in *Leach* also refers to the instruction approved therein as having been approved in *Boykin v. R. R.,* 211 N.C. 113,

189 S.E. 177. In *Boykin,* the plaintiff's intestate was a ten-year-old boy. The plaintiff appealed from a judgment of involuntary nonsuit entered at the conclusion of the plaintiff's evidence on the ground the plaintiff's intestate was guilty of contributory negligence as a matter of law. In reversing the nonsuit, Stacy, C.J., stated: "There is *a presumption* which comes to the aid of a child of tender years." (Our italics.) *Caudle v. R. R.,* 202 N.C. 404, 163 S.E. 122, is cited in support of the quoted statement. The opinion in *Boykin* refers to and quotes from *Rolin v. Tobacco Co.,* 141 N.C. 300, 53 S.E. 891.

In *Rolin,* Connor, J., quotes from the opinion of Haralson, J., in *Tutwiler Coal, Coke and Iron Co. v. Enslen, Adm.,* 129 Ala. 336, the following: "Between 7 and 14 a child is *prima facie* incapable of exercising judgment and discretion, but evidence may be received to show capacity."

In *Caudle,* the plaintiff's intestate was a twelve-year-old boy. A demurrer on the ground the facts alleged in the complaint disclosed the plaintiff's intestate was contributorily negligent as a matter of law, was overruled. This Court affirmed. With reference to contributory negligence, the opinion of Clarkson, J., contains this statement: "*Prima facie* presumption exists that an infant between ages of 7 and 14 is incapable of contributory negligence, but presumption may be overcome. Test in determining whether child is contributorily negligent is whether it acted as child of its age, capacity, discretion, knowledge and experience would ordinarily have acted under similar circumstances." In support of the quoted statement, the opinion cites *Chitwood v. Chitwood,* 159 S.C. 109, 156 S.E. 179.

In *Chitwood,* the opinion contains the following: "As to capacity, it is held in this State, by analogy to the criminal law, that an infant under 7 years of age is conclusively presumed to be incapable of contributory negligence (citations); that between the ages of 7 and 14 there is a *prima facie* presumption of such incapacity, which, however, may be overcome by evidence showing capacity (citations); and, by clear implication, that an infant of the age of 14 years or over will be presumed capable of contributory negligence in the absence of proof to the contrary (citations)."

Our research indicates *Leach* has been cited only in *Hughes v. Thayer,* 229 N.C. 773, 51 S.E. 2d 488, an action in which the plaintiff's intestate was eight years of age. Issues of negligence, contributory negligence and damages were answered in favor of the plaintiff. Upon the defendant's appeal, this Court found no error. *Leach* was one of three cases cited by Ervin, J., in support of the general proposition that whether the plaintiff's intestate was contributorily negligent was "a question of fact to be answered by the jury in the

light of the intelligence, age, and capacity of the intestate." Although not challenged on appeal as erroneous, the record shows the trial judge included in his charge an instruction in accord with that approved in *Leach*.

The opinions in *Leach* and in *Hughes* contain no reference to *Caudle v. R. R., supra*. *Caudle* was cited in *Walston v. Greene, supra,* where Parker, J. (now C.J.), in marking the distinction between a child under seven years of age, who is conclusively presumed incapable of contributory negligence, quotes *Caudle* as authority for the proposition that a "*prima facie* presumption exists that an infant between ages of 7 and 14 is incapable of contributory negligence, but presumption may be overcome."

In *Adams v. Board of Education,* 248 N.C. 506, 103 S.E. 2d 854, this Court, in opinion by Johnson, J., said: "The rule obtains in this jurisdiction that in determining whether a child is contributorily negligent in any given situation a *prima facie* presumption exists that an infant between the ages of seven and fourteen is incapable of contributory negligence, but the presumption may be overcome. 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." *Caudle* and *Walston* are cited in support of this statement. The opinion in *Adams* refers to Annotations, "Contributory negligence of children," in 107 A.L.R. 4 and in 174 A.L.R. 1080. *Adams* and decisions from other jurisdictions in accord with *Adams* are cited in Annotation, "Modern trends as to contributory negligence of children," 77 A.L.R. 2d 917, 925-927.

The legal principles stated by Johnson, J., in *Adams,* quoted above, have been accepted and applied consistently in our later decisions. *Hutchens v. Southard,* 254 N.C. 428, 432, 119 S.E. 2d 205, 208; *Hamilton v. McCash,* 257 N.C. 611, 619, 127 S.E. 2d 214, 219; *Ennis v. Dupree,* 258 N.C. 141, 145, 128 S.E. 2d 231, 235; *Champion v. Waller,* 268 N.C. 426, 429, 150 S.E. 2d 783, 786; *Bell v. Page,* 271 N.C. 396, 156 S.E. 2d 711. (In these, judgments of involuntary nonsuit were reversed.) *Hedrick v. Tigniere,* 267 N.C. 62, 65, 147 S.E. 2d 550, 552; *Harris v. Wright,* 268 N.C. 654, 656, 151 S.E. 2d 563, 565. (In these, judgments of involuntary nonsuit were affirmed on the ground there was insufficient evidence to support a finding of negligence.) *Brown v. Board of Education,* 269 N.C. 667, 671, 153 S.E. 2d 335, 339. (In this, the Industrial Commission's finding that the twelve-year-old school boy was not contributorily negligent was upheld.) *Wilson v. Bright,* 255 N.C. 329, 331, 121 S.E. 2d 601, 603; *Phillips v. R. R.,* 257 N.C. 239, 243, 125 S.E. 2d 603, 606; *Weeks v.*

Barnard, 265 N.C. 339, 143 S.E. 2d 809; *Wooten v. Cagle,* 268 N.C. 366, 371, 150 S.E. 2d 738, 742; *Watson v. Stallings,* 270 N.C. 187, 193, 154 S.E. 2d 308, 312. (In these, issues of negligence, contributory negligence and damages were submitted to the jury. In each instance, the contributory negligence issue related to a child between the ages of seven and fourteen. In *Wilson,* the jury answered the contributory negligence issue, "No." In *Phillips, Weeks, Wooten* and *Watson,* the jury answered the contributory negligence issue, "Yes.")

In *Wilson, Phillips, Weeks, Wooten* and *Watson,* the court, in charging the jury, gave instructions to the effect that the child involved was presumed to be incapable of contributory negligence, but that such presumption may be rebutted by evidence showing such capacity.

We are of opinion, and so decide, that, upon the trial of an issue relating to the alleged contributory negligence of a child between the ages of seven and fourteen, the rebuttable presumption that such child is incapable of contributory negligence is a substantial feature of the case, and that it is incumbent upon the trial judge to instruct the jury as to its significance. The burden of proof on such contributory negligence issue is on the defendant. Hence, the presumption does not run in favor of the party upon whom rests the burden of proof but is adverse to such party. A failure of the trial judge to instruct the jury as to this presumption constitutes prejudicial error.

The instruction quoted and approved in *Leach v. Varley, supra,* is in conflict with our later decisions and is erroneous. In this respect, *Leach* is expressly overruled.

There remains for consideration whether the erroneous instructions in the original charge were prejudicial in view of the matters stated below. After the judge had completed his original charge, counsel for plaintiff was permitted to approach the bench. Thereafter, the record shows: "COURT: Members of the jury, I want to read to you a legal comment on the document of contributory negligence of minors. As a matter of law, a child under seven years of age is incapable of contributory negligence. Thus it has been held that a 3 year old child, a 4 year old child, and a 4½ year old child are incapable of negligence, primary or contributory. A child between the ages of 7 and 14 is presumed to be incapable of contributory negligence but the presumption is rebuttable between the ages of 7 and 14, a child is not chargeable with the same degree of care as an adult but is required to exercise such prudence for his own safety as one of his *age* may be expected to possess. And that is a question for the jury." (Our italics.)

The portions of the charge to which plaintiff excepted, appropriate to a determination of contributory negligence with reference to an adult, are erroneous in that they fail to take into consideration the fact that Timothy was eleven years of age. The instruction given the jury in the original charge with reference to the contributory negligence of an eleven-year-old boy was deficient and erroneous. With reference to the court's brief supplemental statement, it is noted: No child of the age of three or four or four and one-half years was involved in this case. Too, *age* was the *only factor* mentioned as a basis for determination of the capacity of a child between the ages of seven and fourteen. This was error. The presumption that a child between the ages of 7 and 14 is incapable of contributory negligence "may be overcome by evidence that the child did not use the care which a child of its *age, capacity, discretion, knowledge,* and *experience* would ordinarily have exercised under the same or similar circumstances." (Our italics.) *Weeks v. Barnard, supra.*

The question is whether this supplement, even if treated as a positive instruction, was sufficient to clarify the legal principles applicable to the contributory negligence issue. We are constrained to hold it was insufficient to remove what otherwise was prejudicial error. Indeed, as indicated, the supplement itself was deficient and therefore erroneous. Hence plaintiff is awarded a new trial.

New trial.

STATE v. HENRY ROBERT LEE GREENLEE, ALIAS JAMES C. SMITH, ALIAS CHARLES T. BROWN.

(Filed 2 February, 1968.)

1. Criminal Law § 76—

When the State offers into evidence an alleged confession of the defendant, it is the duty of the trial court, in the absence of the jury, to hear the evidence of the State and of the defendant upon the question of the voluntariness of the confession and to make findings of fact thereon, and such findings are binding on appeal if supported by competent evidence.

2. Forgery § 2—

Evidence tending to show that defendant broke into an office of a corporation and took therefrom several blank checks bearing the firm's name and a designated account at a named bank, and that thereafter defendant filled in, endorsed and cashed one of the checks, which was falsely signed with the purported signature of the firm's owner, *held* sufficient to be submitted to the jury on the issue of defendant's guilt of the forgery of the check and of uttering the forged check.

3. Forgery § 1—

The false making of checks with fraudulent intent, which checks are capable of effecting a fraud, constitutes forgery. G.S. 14-119.

4. Same—

The offense of uttering a forged instrument consists in offering to another the forged instrument with knowledge of the falsity of the writing and with intent to defraud. G.S. 14-120.

5. Criminal Law § 104—

Contradictions and discrepancies in the State's evidence are for the jury to resolve and do not warrant nonsuit.

6. 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.

7. Indictment and Warrant § 10—

A difference between the spelling of defendant's alias in the indictment and in a check forged by him in the name of the alias is not fatal, the defendant's correct name appearing also on the indictment and being admitted to by defendant during the trial.

APPEAL by plaintiff from *Armstrong, J.*, 29 May 1967 Criminal Session of GUILFORD—Greensboro Division.

Criminal prosecution upon an indictment containing two counts: The first count in the indictment charges defendant with the forgery of a check, a violation of G.S. 14-119, which check reads as follows:

"CHARLES T. BROWN TRUCK LINES, INC. No. 66-55/531

Tax Account
2203 Asheboro Street 1208 Buff St.
Greensboro, North Carolina March 3, 1967

Pay to the Order of James E. Smith, Jr. $65.00
Sixty Five ..... DOLLARS
NORTH CAROLINA
NATIONAL BANK /s/ Charles T. Brown

For Labor (Stamped NOT PAID March 6, 1967)

Endorsed on back: /s/ James E. Smith, Jr.
For Deposit Only to the credit of The Great Atlantic & Pacific Tea Company, Inc.
Store #303 (initialed F)
Bank Stamp March 6, 1967."

The second count in the indictment charges the defendant with uttering and publishing as true a forged check, a violation of G.S. 14-120, which check reads as follows:

"CHARLES T. BROWN TRUCK LINES, INC. No. 66-55/531

Tax Account
2203 Asheboro Street
Greensboro, North Carolina March 3, 1967

Pay to the Order of James E. Smith, Jr. $65.00
Sixty Five ..... DOLLARS

NORTH CAROLINA
NATIONAL BANK /s/ Charles T. Brown
For Labor (Stamped NOT PAID
March 6, 1967)

Endorsed on back: /s/ James E. Smith, Jr.
For Deposit Only to the credit of The Great
Atlantic & Pacific Tea Company, Inc.
Store #303 (initialed F)
Bank Stamp March 6, 1967."

Defendant, who was present in court in his own proper person and with his court-appointed counsel, Benjamin S. Marks, Jr., entered a plea of not guilty. Verdict: Guilty on both counts as charged in the bill of indictment.

From a judgment of imprisonment on the verdict of guilty as charged in the first count in the indictment of not less than two years nor more than five years, and from a judgment of imprisonment on the verdict of guilty as charged in the second count in the indictment of not less than two years nor more than five years, defendant appeals to the Supreme Court.

Attorney General T. W. Bruton, Deputy Attorney General Harrison Lewis, and Staff Attorney James E. Magner, Jr., for the State.

Benjamin S. Marks, Jr., for defendant appellant.

PARKER, C.J. When the defendant, an indigent, made his entries of appeal in the trial court, the trial court entered an order commanding Guilford County to pay for and furnish to him a transcript of the trial, and also directed Guilford County to pay for the mimeographing of the record of the trial and the brief of the defendant in the same manner as is done in the case of solvent defend-

ants. The court also entered an order appointing and directing the defendant's trial attorney to perfect his appeal, file a brief, and argue his case in the Supreme Court. All of this was done at the expense of the taxpayers of Guilford County.

The State introduced evidence; the defendant introduced no evidence.

Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of all the evidence. The State's evidence, considered in the light most favorable to it and giving it the benefit of every reasonable inference to be drawn therefrom, tends to show the following facts: Charles T. Brown Truck Lines, Inc., had established several bank checking accounts in the city of Greensboro. One such account was a Federal tax account with the North Carolina National Bank. Mrs. Mae Brown and Mrs. Julia Brown were the only persons authorized to sign checks on the North Carolina National Bank account of Charles T. Brown Truck Lines, Inc. The check book of Charles T. Brown Truck Lines, Inc., containing its Federal tax account with the North Carolina National Bank was kept in the left-hand desk drawer in its business office in Greensboro, which was separate from the rest of the building. This check book contained printed checks of Charles T. Brown Truck Lines, Inc. After the close of business on 3 March 1967 the glass was knocked out of the rear door of its business office. This break-in was discovered on the morning of 4 March 1967. On 8 March 1967 this firm's business office was broken into again. On 15 March 1967 the North Carolina National Bank notified the firm that its Federal tax account with it was overdrawn. Thereafter the firm discovered that six checks were missing from its check book containing its Federal tax account with the North Carolina National Bank. The evidence tends to show that three of these checks were taken on the first break-in and three additional checks were taken on the second break-in.

Before 5 p.m. on 4 March 1967 a man went into the A & P Store on Commerce Street in the city of Greensboro and bought some groceries, for which he tendered the check described in the first count of the indictment and received for that check $65 in goods and money. An employee of the A & P Store in Greensboro put the check in cash receipts which were turned in at the end of the day and put in the safe and subsequently deposited in the bank.

Several days later the same man who passed the check in the A & P Store on 4 March 1967 went into the store to buy a broom, cigarettes, and cleaning stuff and tendered in payment a check drawn on the same account. When he did so, the checker, John William Wyrick, Jr., took this check to Mr. Clendenin, the store manager,

and told him that he had cashed a similar check several days previously. Mr. Wyrick does not remember the individual who gave him the second check. It was the similarity of the second check that he remembered and not the individual. When the second check was presented, he called the manager because the person who presented the second check was the same person who presented the first check.

The check which was passed with the A & P Store dated 3 March 1967 is marked State's Exhibit No. 1. This check was shown to Mr. Clendenin, who examined it and recognized it by his initial "F" which appears on the back of the check. This check was returned unpaid. The A & P Store did not lose $65 on this check. Mr. Clendenin did, because he had to make up the loss to the store. On 6 March 1967 he saw the defendant in the A & P Store on Commerce Street. His checker, John William Wyrick, Jr., approached him with a check on Charles T. Brown Truck Lines, Inc., and refreshed his memory that he had cashed a check several days previously for this boy. Mr. Clendenin inquired of the boy who had the second check for identification, and the boy answered, "I do not have any." The boy had purchased a carton of cigarettes and a broom, but Mr. Clendenin refused to cash the check. Mr. Clendenin told the police that he thought the boy who was attempting to pass the second check was about 5'6" or 7" tall, light colored, and 17, 18, or 19 years old. After he had described this boy to the police officers of Greensboro, they showed him a picture which Clendenin positively identified as the defendant.

The State offered further evidence tending to show that the signature in the lower right-hand corner of the check marked for identification as State's Exhibit No. 1 is not the signature of anyone authorized to sign checks for Charles T. Brown Truck Lines, Inc., on their Federal tax account with the North Carolina National Bank.

The State proposed to offer in evidence a confession of defendant to R. D. Huckabee, a member of the Greensboro police department. Whereupon, the trial court excused the jury and, in its absence, heard the evidence, both that of the State and that of the defendant, upon the question of the voluntariness of defendant's confession, which is the correct procedure as set out in *S. v. Gray*, 268 N.C. 69, 150 S.E. 2d 1; and *S. v. Rogers*, 233 N.C. 390, 64 S.E. 2d 572. Upon the *voir dire* in the absence of the jury, the trial court heard the testimony of police detectives Eli Welch and R. D. Huckabee and of the defendant. The officers testified that they warned defendant fully of his constitutional rights before defendant made any statement. Defendant, testifying in his own behalf on the *voir dire*, testified in substance: He could not recall whether Huckabee had ad-

vised him of his constitutional rights. He would not say "yes" or "no." He could not remember. After listening to the evidence on the *voir dire,* the trial court found the following facts:

> "I'll find that these, the statements made by the defendant to Officers Welch and Huckabee were freely and voluntarily made and that no inducements or threats of any kind were offered or made, against the defendant and that he was fully advised of his right to remain silent and that anything he said could be used against him in a court of law, that he had the right to the presence of an attorney and that if he couldn't afford one an attorney would be furnished for him before any questioning of him was made and that he waived all of these rights and that none of his constitutional rights were violated."

The findings of fact of the trial court are fully supported by competent evidence. The trial judge ruled that the confession was admissible in evidence, and we agree. *S. v. Rogers, supra.*

When the jury was recalled into the courtroom, Eli Welch without objection testified in substance as follows: He advised defendant that a man in the A & P Store was able to identify his picture as being the man who attempted to cash another check. Defendant told him that he (defendant) might as well go on and tell the truth about the situation and get it over with. Defendant stated that he went into Mr. Brown's office between 7 and 7:30 p.m. on 3 March 1967. He stated that he broke the glass out of the rear door, reached in and unlocked it, and went in and took three checks out of a check book which was in a desk. He took these checks out, went back out, and locked the door. Defendant stated that on 8 March 1967 he went back into this place by breaking another glass and reaching in and unlocking the door, and that he took three more checks out. He also stated that he cashed a check, which he wrote out himself, at the North Carolina National Bank in the amount of $76. He also stated that he cashed a check at the A & P Store on Commerce Street, and that he went back the following Monday and purchased a broom and a carton of cigarettes and attempted to cash another check, but the man refused to cash it and he got scared and threw the checks away. At the time defendant made these statements he was in the county jail and locked in, and the conversation took place in a small room where people walk in and out. The defendant also stated that when he went back to the A & P Store on the second occasion he got scared and tore up the checks. Officer Huckabee testified without objection that he showed to defendant the check marked State's Exhibit No. 1, and that defendant told him he had made that check. He said he cashed it at the A & P Store on Com-

merce Street. The defendant stated that he just presented the check and endorsed it, and that he made a purchase and paid for the merchandise with the check. He told him he represented himself to be James E. Smith, Jr., and that he endorsed the check James E. Smith, Jr. Defendant further stated that on Monday he went back and attempted to cash another check when he tried to make a purchase, and that this check was questioned. He stated that he got scared and left and tore up the checks and destroyed them.

The State's evidence was amply sufficient to permit a jury to find (1) a false writing of the check described in the first count of the indictment; (2) an intent to defraud on the part of defendant who falsely made the said check; and (3) the check as made was apparently capable of defrauding. These are the three essential elements necessary to constitute the crime of forgery. *S. v. Keller,* 268 N.C. 522, 151 S.E. 2d 56; *S. v. Phillips,* 256 N.C. 445, 124 S.E. 2d 146; *S. v. Dixon,* 185 N.C. 727, 117 S.E. 170; Annot. 164 A.L.R. 621; 23 Am. Jur., Forgery § 6.

G.S. 14-120 in relevant part reads:

> "If any person, directly or indirectly, whether for the sake of gain or with intent to defraud or injure any other person, shall utter or publish any such false, forged . . . check . . .; or shall pass or deliver, or attempt to pass or deliver, any of them to another person (knowing the same to be falsely forged . . .), the person so offending shall be punished by imprisonment. . . ."

Uttering a forged instrument consists in offering to another the forged instrument with the knowledge of the falsity of the writing and with intent to defraud. 2 Wharton's Criminal Law and Procedure, Anderson Ed., Forgery and Counterfeiting § 648. This is said in 23 Am. Jur., Forgery § 5: "But, generally, the mere offer of the false instrument with fraudulent intent constitutes an uttering or publishing, the essence of the offense being, as in the case of forgery, the fraudulent intent regardless of its successful consummation; . . ." G.S. 14-119 prohibits the forgery of bank notes, checks and other securities. G.S. 14-120 also prohibits the uttering of forged paper or instruments containing a forged endorsement. In this State, by virtue of G.S. 14-120, uttering is an offense distinct from that of forgery which is defined in G.S. 14-119.

It is manifest from the record and the judge's charge that the second count in the indictment charging uttering a forged check refers to the same check described in the first count in the indictment. The State's evidence was amply sufficient to permit a jury to find

that the defendant feloniously uttered and published a forged check in offering to the A & P Store on Commerce Street the forged check with a knowledge of the falsity of the writing and with intent to defraud, and procured by means of this forged check $65 in merchandise and cash. These are the essential elements necessary to constitute the crime of uttering a forged check.

We realize that there are contradictions and discrepancies in the State's evidence. However, contradictions and discrepancies, even in the State's evidence, are for the jury to resolve, and do not warrant nonsuit. 2 Strong, N. C. Index 2d, Criminal Law, § 104.

Considering the State's evidence in the light most favorable to it and giving it the benefit of every reasonable inference to be drawn therefrom (2 Strong, N. C. Index 2d, Criminal Law § 104), it is clear that the total combination of facts shown by the evidence shows substantial evidence of defendant's guilt of all essential elements of the felonies charged in both counts of the indictment and is amply sufficient to carry the cases charged in both counts of the indictment against him to the jury and to support the verdict of guilty as to each count in the indictment. The trial judge properly overruled defendant's motion for judgment of compulsory nonsuit.

We have carefully examined other alleged errors of the trial court in admitting certain testimony and other alleged errors in its charge. This Court has often emphasized its reluctance to lengthen its opinions with tedious considerations of numerous lesser points raised in the brief. While defendant's well-prepared brief presents contentions involving fine distinctions, a careful examination of the assignments of error discloses no new question or feature requiring extended discussion. Such being the case, it would serve no useful purpose to take the same old stick to beat the same old bush to force the same old rabbit out for the same old run (a paraphrase of a graphic expression of Justice Brogden, a former learned judge and stylist of this Court). The record here appears to be free from substantial error, and the charge of the court, when considered as a whole, correctly presented to the jury the law applicable to the facts in evidence fairly, impartially, and accurately. The verdict of the jury and the judgment of the court were firmly founded on ample and convincing evidence. Separate judgments, each complete within itself were pronounced on separate counts in the indictment. See *S. v. Stonestreet*, 243 N.C. 28, 89 S.E. 2d 734. The two sentences imposed here are to run concurrently. *S. v. Duncan*, 208 N.C. 316, 180 S.E. 595; *In re Parker*, 225 N.C. 369, 35 S.E. 2d 169; *S. v. Efird*, 271 N.C. 730, 157 S.E. 2d 538.

We note that in the indictment it is alleged "that Henry Robert Lee Greenlee alias James C. Smith alias Charles T. Brown. . . ."

Defendant testified on the *voir dire* under the name of Henry Robert Lee Greenlee and stated that he was the defendant in the case. The checks were signed and endorsed "James E. Smith, Jr." The defendant's correct name appears in the indictment and in the record as "Henry Robert Lee Greenlee." Any possible defect in the name of the alias is not fatal. 42 C.J.S., Indictments and Informations, § 41. See also G.S. 15-153 and G.S. 15-155.

In the trial below we find

No error.

JEWEL BOX STORES CORPORATION AND THE JEWEL BOX OF MORGANTON, INC., v. J. ROY MORROW.

(Filed 2 February, 1968.)

1. Venue § 2—

The residence of a domestic corporation formed after July 1, 1957, for the purpose of determining venue of an action instituted by it, is the county in which the registered office of the corporation is located. G.S. 1-79.

2. Contracts § 7—

A covenant that the seller of a business will not engage in the same business in competition with the purchaser is valid and enforceable (1) if it is reasonably necessary to protect the legitimate interests of the purchaser; (2) if it is reasonable in respect to time and to territory; and (3) if it does not interfere with the public interest. G.S. 75-4, G.S. 75-5(d).

3. Good Will—

A person who builds up a business by his skill and industry acquires a property right in the good will of his patrons, and he may sell his right of competition to the full extent of the field from which he derives his profit and for a reasonable length of time.

4. Contracts § 7—

The reasonableness of a restraining covenant is a question of law for the court and depends upon the particular circumstances of each case.

5. Same—

A covenant by the owner of a jewelry store not to engage in jewelry business competition with the purchaser within 10 miles of the city where the seller's jewelry store is located for a period of 10 years, *held* not void as being unreasonable as to time or territory.

6. Same—

Where a person sells a business and agrees not to engage in the same business in the same place, the obvious intention is to sell the good will of the business, and the consideration for the sale of good will may be found in the general consideration for the sale of the business.

7. Same—

A contract in restraint of trade must be supported by a consideration, but, unless the contract be a fraud upon the party sought to be restrained or *nudum pactum*, the court will not ordinarily inquire into the adequacy of the consideration, it being sufficient that a legal consideration appear on the face of the contract.

APPEAL by defendant from *Carr, J.*, 8 May 1967 Session of GUILFORD.

Action to enjoin defendant J. Roy Morrow from engaging in the jewelry business in violation of his contract with plaintiff The Jewel Box Stores Corporation not to compete with plaintiff The Jewel Box of Morganton, Inc. The parties waived a jury trial. The essential facts are not in dispute.

Plaintiffs Jewel Box Stores Corporation (Stores) and The Jewel Box of Morganton, Inc. (Jewel Box) are North Carolina corporations. The latter is the wholly-owned subsidiary of the former, and the registered office of each is in Guilford County. The principal place of business of Stores is Greensboro; of Jewel Box, Morganton.

On 29 September 1963, defendant Morrow (Seller) and Stores, as agent for Jewel Box, a corporation to be formed (Buyer), executed a written contract (denominated "Bill of Sale and Agreement") whereby defendant sold his business known as Morrow's Jewelers to Jewel Box for the price of $22,337.90. The purchase price was allocated in the following manner:

"1.	Inventory	$ 5,651.88
2.	Furniture, fixtures and equipment	4,961.77
3.	Accounts receivable	2,689.25
4.	Trade name and good will	25.00
5.	Lease rights	10.00
6.	Improvements to building	9,000.00
		$22,337.90"

Buyer was granted all interest in defendant's trade name, "Morrow's Jewelers, for a period of six (6) months, together with the good will of the business symbolized by said trade name," and granted the right to "advertise the ending of business at Morrow's Jewelers." Paragraph 6 of the contract provided:

"Seller agrees with Buyer and its assignee that he will not directly or indirectly own, manage, operate, control or participate in the ownership, management or control of, lend money to, endorse obligations of, or be connected in any manner as officer, stockholder, employee, partner or otherwise, for a period of ten (10) years from the date hereof, any retail jewelry business, or any business in com-

petition with purchaser, in Morganton, N. C., or within ten (10) miles of Morganton, except with Buyer's prior written consent."

Pursuant to the contract of sale, plaintiffs immediately ran notices in a local newspaper that Stores had purchased the assets of Morrow's Jewelers; that the merchandise of the business would be sold at discount prices; and that Stores was opening a new store. Since January 1964, plaintiffs have not used the name Morrow's Jewelers. At the time defendant sold his jewelry store, there were four competing retail jewelry stores in the City of Morganton, including Morrow's Jewelers (which became Jewel Box). Since September 1964, there have been five competing retail jewelry stores within the City of Morganton.

On 29 September 1963 (and at all times since), the City of Morganton had a population of approximately 9,100 persons. Its trading area extended in a 10-mile radius of the city and contained an additional 25,000 people.

On or about 31 October 1966, defendant, who was operating a gift shop in Morganton directly across the street from Jewel Box, advertised by radio and newspaper that he was selling diamonds, watches, watchbands, wedding rings, birthstone rings, earrings, and other retail jewelry items. He had an inventory of retail jewelry items in the amount of at least $1,800.00 on 29 November 1966.

Plaintiffs instituted this action to restrain defendant, until noon on 29 September 1973, from selling retail jewelry items and from engaging in the jewelry business in Morganton and within 10 miles of its city limits. Accordingly, on 29 November 1966, Judge McConnell signed a temporary restraining order which Judge Olive, on 13 December 1966, continued to the final hearing. Thereafter defendant filed a motion that the cause be removed from Guilford County to Burke County because (1) Stores was not a proper party-plaintiff; (2) the principal office and only place of business of Jewel Box was in Burke County; and (3) the contract, which is the subject of this action, was executed in Burke County, where it was to be performed. This motion for a change of venue was denied by Judge Armstrong on 24 January 1967 upon his finding — not controverted by defendant — that the registered office of each plaintiff is in Guilford County.

Judge Carr heard the case on its merits on 25 May 1967 and, upon the foregoing facts, concluded as a matter of law that (1) considering the nature of the retail jewelry business and the trading area of the Town of Morganton, defendant's covenant not to compete is reasonable both as to time and area and is, therefore, not an unlawful restraint of trade; (2) the covenant is supported by a good and valuable consideration; and (3) defendant's activities in advertising and offering jewelry items for sale constituted a breach of the

covenant. He enjoined defendant from selling retail jewelry items and engaging in the retail jewelry business in Morganton, and within 10 miles thereof, until noon on 29 September 1973.

Defendant excepted to the judgment and appealed.

Stern, Rendleman & Clark by David M. Clark and Robert O. Klepfer, Jr., for plaintiff appellees.

Simpson & Simpson by Dan R. Simpson for defendant appellant.

SHARP, J. This action is for an injunction to restrain the seller of a business from breaching his covenant not to compete with the purchaser. Its venue is the county in which plaintiffs or defendant (or any of them) resided at its commencement, G.S. 1-81. For the purpose of suing and being sued, the residence of a domestic corporation (formed after 1 July 1957 and having a registered office) is the county in which the registered office of the corporation is located. G.S. 1-79. A registered office may be, but need not be, the same as the corporation's place of business. G.S. 55-13. Defendant's first assignment of error is to Judge Armstrong's order denying defendant's motion for a change of venue. This order recites that the registered office of both plaintiffs is in Guilford County. Defendant does not challenge this finding. The action therefore was properly brought and heard in Guilford County. Defendant's first assignment of error is not sustained.

Assignments of error 2-7, based upon corresponding exceptions, are to the failure of the court to construe the written contract between plaintiffs and defendant in accordance with defendant's contentions. Although each purports to challenge a specific finding of fact, assignments 2-7, as well as defendant's remaining assignments 8-12, attack the court's conclusions of law. They raise only the question whether the facts found 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).

The appeal poses this question: Is defendant's covenant, made at the time he sold his retail jewelry business to plaintiffs, not to engage in that business in the Town of Morganton and within a radius of 10 miles of its city limits for a period of 10 years from the date of sale, a valid and enforceable contract?

It is the rule today that when one sells a trade or business and, as an incident of the sale, covenants not to engage in the same business in competition with the purchaser, the covenant is valid and enforceable (1) if it is reasonably necessary to protect the legitimate interest of the purchaser; (2) if it is reasonable with respect to both time and territory; and (3) if it does not interfere with the interest

of the public. G.S. 75-4; G.S. 75-5(d); *Buick Co. v. Motors Corp.*, 254 N.C. 117, 126, 118 S.E. 2d 559, 566; *Sineath v. Katzis*, 218 N.C. 740, 12 S.E. 2d 671; *Sea Food Co. v. Way*, 169 N.C. 679, 86 S.E. 603; *Shute v. Heath*, 131 N.C. 281, 42 S.E. 704; *King v. Fountain*, 126 N.C. 196, 35 S.E. 427; *Kramer v. Old*, 119 N.C. 1, 25 S.E. 813; *Cowan v. Fairbrother*, 118 N.C. 406, 24 S.E. 212. *Cf.* the tests which determine the validity of an employee's covenant not to compete with his employer at the termination of their relationship. *Buick Co. v. Motors Corp., supra; Welcome Wagon, Inc. v. Pender*, 255 N.C. 244, 120 S.E. 2d 739; *Kadis v. Britt*, 224 N.C. 154, 29 S.E. 2d 543, 152 A.L.R. 405; *Beam v. Rutledge*, 217 N.C. 670, 9 S.E. 2d 476; 17 C.J.S., Contracts § 247 (1963).

The modern rule permitting the sale of good will recognizes that one who, by his skill and industry, builds up a business, acquires a property right in the good will of his patrons and that this property is not marketable "unless the owner is at liberty to sell his right of competition to the full extent of the field from which he derives his profit and for a reasonable length of time. . . . Where the contract is between individuals or between private corporations, which do not belong to the *quasi*-public class, there is no reason why the general rule that the seller should not be allowed to fix the time for the operation of the restriction so as to command the highest market price for the property he disposes of should apply." *Kramer v. Old, supra* at 8-9, 25 S.E. at 813-14. *Accord, Beam v. Rutledge, supra; Sea Food Co. v. Way, supra; Wooten v. Harris*, 153 N.C. 43, 68 S.E. 898. See Breckenridge, Restraint of Trade in North Carolina, 7 N. C. L. Rev. 249 (1929).

The reasonableness of a restraining covenant is a matter of law for the court to decide. *Shute v. Heath, supra;* 7 N. C. L. Rev. 249, 256. In each instance, the reasonableness of the restraint depends upon the circumstances of the particular case. *Shute v. Shute*, 176 N.C. 462, 97 S.E. 392; *Sea Food Co. v. Way, supra; King v. Fountain, supra;* 17 C.J.S., Contracts § 246 (1963). "A contract, for instance, for a valid consideration not to engage in the manufacture and sale of firearms in general use would be allowed to cover a larger extent of territory than would a contract not to engage in the manufacture of timber or the ginning of cotton." *Shute v. Heath, supra* at 282, 42 S.E. at 704. For comprehensive annotations covering the reasonableness of territorial and time limitations, see respectively 46 A.L.R. 2d 119 (1956) and 45 A.L.R. 2d 77 (1956).

In the cases cited below, this Court has upheld covenants not to compete which accompanied the sale of a trade or business and contained limitations of ten, fifteen, and twenty years, as well as limitations for the life of one of the parties:

Baumgarten v. Broadway, 77 N.C. 8 (photographic gallery; no competition within city for 10 years); *Baker v. Cordon,* 86 N.C. 116 (drugstore; no competition in town while purchaser operated business); *Cowan v. Fairbrother,* 118 N.C. 406, 24 S.E. 212 (newspapers; no competition within State for 10 years); *Kramer v. Old,* 119 N.C. 1, 25 S.E. 813 (milling business; no competition in vicinity for lives of sellers); *Disosway v. Edwards,* 134 N.C. 254, 46 S.E. 501 (saloon; no competition in the city for 20 years); *Anders v. Gardner,* 151 N.C. 604, 66 S.E. 665 (livery business; no competition in city during life of seller); *Wooten v. Harris,* 153 N.C. 43, 68 S.E. 898 (mercantile business; no competition in town or environs during buyer's life); *Faust v. Rohr,* 166 N.C. 187, 81 S.E. 1096 (barber shop; no competition in town while purchaser operated business); *Sea Food Co. v. Way,* 169 N.C. 679, 86 S.E. 603 (fish dealership; no competition for 10 years within 100 miles of city); *Sineath v. Katzis,* 218 N.C. 740, 12 S.E. 2d 810 (drycleaning plant; no competition for 15 years in county); *Thompson v. Turner,* 245 N.C. 478, 96 S.E. 2d 263 (wholesale coffee, tea, and specialty business; no competition for life in seller's territory). For the cases from other jurisdictions involving limitations of ten years or more, see Annot: Sale — Covenant as to Competition — Time, 45 A.L.R. 2d 77, 238-291 (1956). See also 7 N. C. L. Rev. 248, 256 (1929); 38 N. C. L. Rev. 395, 396 (1960).

In this case, defendant sold a jewelry store which was a sole proprietorship. A jeweler who has attained the confidence of the public in his integrity and knowledge of gemmology imparts a peculiar value to the good will of his business, and he will take it with him when he leaves the business. The average person is unable to evaluate a precious stone and to judge its genuineness or perfection. When he makes a purchase, he will seek a jeweler of good repute — just as he would in selecting a doctor or a lawyer. As Avery, J., said in *Cowan v. Fairbrother, supra* at 411-12, 24 S.E. at 213: "Neither an editor, a lawyer or a physician can transfer to another his style, his learning or his manners. Either, however, can add to the chances of success and profit of another who embarks in the same business, in the same field, by withdrawing as a competitor. . . . The one sells his prospective patronage and the other buys the right to compete with all others for it and to be protected against competition from his vendor."

The purchaser of a retail jewelry business, operated by an individual, will usually feel that he cannot afford to pay full value for it unless he can obtain from the jeweler who sells it an enforceable restriction from competition until he can build his own good will. It takes time for any newcomer to acquire the confidence of the towns-

people. Individuals and businessmen alike must demonstrate competency, responsibility, and integrity for an appreciable length of time before they acquire general reputations for these attributes. We cannot say that ten years is more time than The Jewel Box needs to be protected from defendant's competition in a small town where individual businessmen are widely and personally known. Although a valid covenant not to compete must be reasonable as to both time and area, these two requirements are not independent and unrelated aspects of the restraint. Each must be considered in determining the reasonableness of the other. Furthermore, neither is conclusive of the validity of the covenant, but both are important factors in settling that question. See Note, 38 N. C. L. Rev. 395 (1960). In situations such as the one we now consider, a longer period of time is justified where the area in which competition is prohibited is relatively small. Certainly an area which encompasses only Morganton and the locality within a radius of 10 miles of its city limits is not unduly restrictive territorially. Furthermore, with four or five jewelry stores in the trading area, the elimination of defendant's competition cannot be deemed detrimental to the public interest.

Defendant's contention that plaintiffs purchased the good will of Morrow's Jewelry for a period of only six months; that only $25.00 was paid for it; and that there was no consideration for his covenant not to compete cannot be sustained. Considering the contract as a whole, the only reasonable and fair construction is that the six months' limitation applied only to plaintiffs' right to use the name Morrow's Jewelers. Along with the business of Morrow's Jewelers, however, defendant sold its good will. The covenant not to compete carried the good will. "Where a person sells a business and in connection therewith agrees not to engage in the same business in the same place, the obvious intention is to sell the good will of the business." 24 Am. Jur. Good Will § 13 (1939). Such a contract requires a consideration, "but the consideration for the sale of good will and the withdrawal from competition may be found in the general consideration for the sale of the business." *Id.*, § 15. *Accord, Kramer v. Old, supra.* In September 1963, defendant wanted to dispose of his business. It is clear that he could not have sold it for the price he received — if he could have sold it at all — without his covenant not to compete. It was, therefore, a material part of the consideration moving from defendant to his vendee. Having collected the purchase price, good faith and business justice now require him to keep his bargain. The covenant does not prohibit him from selling any merchandise except jewelry items within the prescribed territory; elsewhere, of course, he is entirely unrestricted.

In our opinion, the parties' allocation of $25.00 of the purchase price to good will is not pertinent to the questions posed by this appeal. Defendant makes no contention that the contract of sale lacked a valuable consideration. A contract in restraint of trade, like any other contract, must be supported by a consideration, but, unless the contract be a fraud upon the party sought to be restrained or *nudum pactum,* courts ordinarily will not inquire into the adequacy of the consideration. "It is sufficient that the contract shows on its face a legal and valuable consideration; but whether it is adequate or inadequate to the restraint imposed must be determined by the parties themselves upon their own view of all the circumstances attending the particular transaction." 36 Am. Jur., Monopolies, Combinations, Etc. § 56 (1941).

The judgment of the lower court is

Affirmed.

WILLIE L. MILLER, ADMINISTRATOR OF THE ESTATE OF JERRY DONALD MILLER, DEC'D., v. MARTHA HINSON WRIGHT AND RALPH MITCHELL HINSON.

(Filed 2 February, 1968.)

1. Death § 3—

Nonsuit is properly entered in an action for wrongful death when plaintiff's allegation that he was duly qualified and acting administrator of deceased is denied in the answer and plaintiff offers no evidence in support of his allegation.

2. Automobiles §§ 69, 85— Evidence held insufficient to show that defendant motorist failed to keep proper lookout or that cyclist exercised due care.

Plaintiff's evidence consisted in part of defendant's uncontradicted testimony on adverse examination to the effect that defendant's automobile was on the pavement on the inside lane of a four-lane highway when he struck the 24-year old intestate, that defendant's headlights were on low beam but that he could see at least 250 feet ahead, and that he did not see the deceased prior to the impact. The physical evidence showed that the front wheel of deceased's bicycle had been severely damaged, that damage to the rear wheel was negligible, that the bicycle had a reflector tape on the rear and no headlamp on the front, but the evidence failed to show whether the deceased was riding the bicycle or walking beside it. There was contradictory evidence as to whether defendant was passing another vehicle at the time of the collision. *Held:* The evidence is insufficient to show that defendant was negligent in proximately causing the collision or that the deceased was exercising due care for his safety at the time of the accident.

3. Trial § 21—

Upon motion for judgment of nonsuit, discrepancies in plaintiff's evidence must be resolved in his favor, but plaintiff may not avail himself of both conflicting accounts simultaneously.

4. Automobiles § 8—

A driver of a motor vehicle upon the highway owes a duty to all other persons using the highway to maintain a reasonable lookout in the direction of his travel.

5. Automobiles § 13—

The function of a headlight is to produce a driving light sufficient, under normal atmospheric conditions, to enable the operator to see a person 200 feet ahead. G.S. 20-129, G.S. 20-131.

APPEAL by plaintiff from *Froneberger, J.*, at the 29 May 1967 Schedule "B" Regular Civil Session of MECKLENBURG.

This is an action for damages for wrongful death and for conscious suffering of the deceased. The plaintiff appeals from a judgment of nonsuit.

The plaintiff's evidence is ample to show, and it is not controverted, that on 31 October 1965, at approximately 6:20 p.m., the deceased, 24 years of age, was struck by an automobile driven by the defendant Hinson while the deceased was riding upon or walking beside his bicycle on U.S. Highway 74, just east of the Mecklenburg-Union County line, and thereby sustained severe injuries from which he died a few hours thereafter. It is further clear from the evidence, and undisputed, that at this point Highway 74 consists of two paved lanes for eastbound traffic and two paved lanes for westbound traffic, a grass covered strip approximately 30 feet wide lying between the east and westbound lanes. It was dark at the time the accident occurred. The scene of the accident is in a rural area and there were no lights other than those of vehicles on the highway. The highway is straight for a considerable distance on either side of the place where the accident occurred but is somewhat hilly.

The complaint alleges that the injury and death were proximately caused by Hinson's negligence in that: (a) He failed to keep a careful lookout; (b) he drove at an excessive speed; (c) he failed to keep the vehicle under control; and (d) after he saw, or should have seen, Jerry Miller in a perilous position he failed to turn his automobile from the inside eastbound lane to the outside eastbound lane. The complaint further alleges that Jerry Miller was on the grass dividing strip of the highway, near but not on the pavement of the eastbound traffic lane and Hinson was traveling east in the inside eastbound lane. The complaint also alleges that the defendant Wright was the registered owner of the vehicle and Hinson was driving it as her agent in the course of the agency.

The answer admits that the defendant Wright was the registered owner of the automobile but denies that Hinson was her agent. It denies all allegations of negligence on the part of Hinson and pleads contributory negligence by the deceased in that he failed to keep a proper lookout, failed to have any light upon the bicycle, failed to proceed along the righthand side of the highway and placed himself in the path of the automobile. The answer does not admit that the plaintiff is the duly appointed administrator of the estate of Jerry Miller, averring that the defendants are without knowledge or information as to that matter.

The complaint alleges that Jerry Miller, with his bicycle, was crossing the dividing strip preparatory to crossing the eastbound lanes of Highway 74 en route to his home, which was south of the highway and upon a road which intersected the highway 1,000 feet to the east of the point of collision. The answer alleges that Jerry Miller was riding the bicycle in a westerly direction upon the inside lane for eastbound traffic. There is no evidence whatever to support either allegation. There is no evidence to show whether Miller was riding the bicycle or was walking or standing beside it. There is no evidence to show where Miller and his bicycle were at the moment of impact except the testimony of the defendant Hinson, on adverse examination introduced in evidence by the plaintiff, that Hinson's automobile did not leave the pavement until after the impact and that, at the time of the impact, his left wheel was at least 12 inches from the interior edge of the pavement of the lanes for eastbound traffic.

The plaintiff's evidence with reference to how the accident happened consisted of the damaged bicycle, two photographs of which are contained in the record, the deposition of George McRorie and the adverse, pre-trial examination of the defendant Hinson. The plaintiff also introduced evidence as to the earnings of the deceased, this not being material to the present appeal.

The photographs of the bicycle disclose that it was severely damaged at the front, that the damage at the rear was negligible and that there was no light on the front.

McRorie testified to the following effect: At the time of the accident he was traveling eastward on Highway 74. His lights were burning. Just west of the above mentioned intersection McRorie was in the outside eastbound lane driving 50 or 55 miles per hour. Hinson passed McRorie just before reaching the intersection and continued on in the inside eastbound lane. McRorie then cut over into the inside eastbound lane behind Hinson and followed him at a distance of about 75 feet. Seeing the defendant's brake lights come on, McRorie went back into the outside lane for eastbound traffic. The

defendant then pulled over into the grass dividing strip and began to get out of his car. McRorie then stopped on the outside shoulder some ten feet behind the defendant's car. The defendant said, "I hit something or somebody." Both ran back up the road and found Jerry Miller lying in the grass dividing strip. McRorie ran to summon an ambulance. Upon his return, he observed a bicycle in a drain trench in the center of the grassy strip east of the place where Miller lay. When his brake lights came on, Hinson was in the inside lane for eastbound traffic. He then "went down the road just a few feet and then started to the left, pulling off."

Hinson's testimony on adverse examination was to the following effect: He was the sole owner of the automobile, the title having been registered in the name of his sister, Mrs. Wright, solely because he was then a minor. He did not live with his sister and she had no control over his use of the car. At the point of impact he was going slightly down hill. His speed was 55 miles per hour. For a substantial distance he had been following another vehicle in the outside lane for eastbound traffic at 50 miles per hour and cut over into the inside lane to pass it. As he drew abreast of the other vehicle he glanced at it just "a split second" to see if it was coming into his, the inside, lane. Prior to that, he had been looking straight ahead and had observed nothing in the road. Just as he turned his eyes back to the road ahead, while still abreast of the car he was passing, he felt a thump and his windshield was shattered. He immediately applied his brakes, not knowing what he had struck, and pulled over into the grass dividing strip and stopped. The car which he was in the act of passing continued on and did not stop. No other car then stopped and no one else went back with him. He immediately ran back and found Miller lying about 120 feet to the rear of his stopped automobile, the closest part of Miller's body being about 18 inches from the edge of the pavement. Other vehicles then approached, which he flagged down and asked for help. The bicycle was discovered just beyond the center line of the grass dividing strip and a bit east of where Miller lay. Hinson's lights were on the "low beam" as he was passing the other car. With his lights "on low beam" he could see 250 feet. He never did see Miller or know what he had struck until he ran back after the accident. Hinson's left headlight and left front fender were damaged and the windshield shattered. Hinson saw no light or reflector on the bicycle prior to the impact. After the accident he observed a small piece of reflecting adhesive tape on the back mudguard of the bicycle. At the time of the impact Hinson's left front tire was on the pavement, 12 to 18 inches from the inner edge. Before beginning to pass the other vehicle, he had

glanced in his rear view mirror to see that it was safe to pass. There were no vehicles following him.

Welling & Miller for plaintiff appellant.
Kennedy, Covington, Lobdell & Hickman for defendant appellees.

LAKE, J. There is no evidence in the record to show that the plaintiff has been issued letters of administration upon the estate of Jerry Donald Miller. The allegation in the complaint that he is such administrator not being admitted in the answer, this is sufficient ground for affirmance of the judgment of nonsuit. *Kinlaw v. R. R.*, 269 N.C. 110, 152 S.E. 2d 329; *Graves v. Welborn*, 260 N.C. 688, 133 S.E. 2d 761; *Carr v. Lee*, 249 N.C. 712, 107 S.E. 2d 544.

The judgment of nonsuit must also be affirmed for the reason that the evidence of the plaintiff, considered in the light most favorable to him, does not show any negligent act or omission of the defendant Hinson which was the proximate cause of the injury and death of Jerry Donald Miller.

There is no evidence whatever to show where Jerry Miller was or what he was doing immediately prior to the impact. The adverse examination of Hinson, introduced in evidence by the plaintiff, and uncontradicted, is that at the moment of impact Hinson's automobile was on the pavement. It follows that the deceased, or part or all of his bicycle, or both, were on the pavement when struck. We can only conjecture as to whether he was riding the bicycle or walking or standing beside it, whether he was proceeding along the highway or attempting to cross it. The condition of the bicycle, introduced by the plaintiff, compels the conclusion that it was struck upon the front wheel either in a head-on collision (*i.e.*, while Miller was proceeding west upon the lane for eastbound traffic), or while Miller was crossing or preparing to cross the two lanes for eastbound travel from the grass dividing strip. In either event, any reflecting tape or other light-reflecting device upon the rear mudguard would not be visible to Hinson as he approached. There was no light on the front of the bicycle. There is no evidence to indicate that Hinson was driving at an excessive speed or that his vehicle left the paved surface prior to the impact.

There is an obvious conflict between the deposition of McRorie and the adverse examination of Hinson, both introduced in evidence by the plaintiff. According to McRorie's deposition, at the time Hinson's brake lights came on, which Hinson's testimony fixes as the moment of impact, the outside lane for eastbound travel was free of traffic and McRorie's car was in the inside lane for eastbound traffic following Hinson's. According to Hinson's testimony on ad-

verse examination, there was no car following him in the inside lane, and there was another vehicle abreast of his in the outside lane so that he could not have turned into that lane had he seen Miller. Upon a motion for judgment of nonsuit, discrepancies in the plaintiff's evidence must be resolved in his favor. *Coleman v. Colonial Stores, Inc.*, 259 N.C. 241, 130 S.E. 2d 338; *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307. The plaintiff cannot, of course, have the benefit of both of the conflicting accounts simultaneously. In his brief, the plaintiff says, "The defendant, Hinson, was in the act of passing another eastbound vehicle which was proceeding in the outside curb lane." Thus, he adopts Hinson's version of what occurred and abandons his allegation in the complaint that Hinson could have turned his automobile into the outside lane for eastbound travel. If, however, we accept McRorie's account, it was not negligence for Hinson to be driving in the inner lane for eastbound traffic prior to the time when he saw, or should have seen, Miller on his bicycle therein or in the immediate vicinity thereof. G.S. 20-146(a)(4). The uncontradicted evidence is that Hinson never saw Miller or his bicycle prior to the impact. His car was obviously under control for he stopped within a few feet of the point of impact which took him by surprise. There is, therefore, no evidence to support any of the allegations of the complaint with reference to negligence on the part of Hinson unless the evidence is sufficient to support a finding that he did not maintain a proper lookout.

Upon the question of lookout, the only evidence is the testimony of Hinson on adverse examination, introduced in evidence by the plaintiff. A driver of a motor vehicle upon the highway owes a duty to all other persons using the highway to maintain a reasonable lookout in the direction of his travel. *Sugg v. Baker*, 261 N.C. 579, 135 S.E. 2d 565; *Clontz v. Krimminger*, 253 N.C. 252, 116 S.E. 2d 804. When one is driving at night the duty to maintain a reasonable lookout includes the duty to have adequate headlights burning upon the vehicle so that such lookout can be effective. 60 C.J.S., Motor Vehicles, § 286. Hinson testified that his headlights were burning "on low beam" but that, nevertheless, they enabled him to see 250 feet. This is uncontradicted. The adequacy of headlights upon a motor vehicle, in normal atmospheric conditions such as prevailed upon this occasion, is determined by G.S. 20-129 and G.S. 20-131. In *O'Berry v. Perry*, 266 N.C. 77, 145 S.E. 2d 321, we said, "The function of a front light or headlight, defined by G.S. 20-129 and G.S. 20-131, is to produce a driving light sufficient, under normal atmospheric conditions, to enable the operator *to see* a person 200 feet ahead." Thus, the plaintiff's evidence discloses no inadequacy of

Hinson's headlights on this occasion, even though they were on the depressed or low beam.

Hinson's testimony was that he was looking straight ahead and saw nothing in front of him and then, being in the act of passing another car, glanced for a "split second" at it to see that he had the necessary clearance for passing in safety. This was not negligence. If, at this point, we return to McRorie's version of the occurrence and assume there was no other car abreast of Hinson in the outside lane, the requirement of a reasonable lookout does not mean that a driver having looked in the direction of his travel and seen nothing in his path or its vicinity, may not cast his eyes for a "split second" to the side and then back upon the road. Thus, the plaintiff's evidence does not show a failure by Hinson to maintain a reasonable lookout in the direction of his travel.

Mere proof of a collision and resulting injury is not enough to survive a motion for judgment of nonsuit. The plaintiff's evidence must not leave the matter to speculation or conjecture but, when interpreted most favorably to him, must be sufficient to support a finding that the defendant was negligent, as alleged in the complaint, and that such negligence was the proximate cause of the injury. *Ashe v. Builders Co.*, 267 N.C. 384, 148 S.E. 2d 244; *Jackson v. Gin Co.*, 255 N.C. 194, 120 S.E. 2d 540. The plaintiff's evidence having failed to show negligence by Hinson as a proximate cause of the injury and death of Miller, the judgment of nonsuit was properly entered.

A further reason compelling the affirmance of the judgment below is that the plaintiff's evidence compels the conclusion that if Hinson was negligent, as alleged in the complaint, Jerry Miller was guilty of contributory negligence which bars the plaintiff's recovery. While the evidence does not disclose where he was immediately prior to the collision or whether he was riding the bicycle or walking or standing beside it, the plaintiff's evidence leads inescapably to one of these conclusions: (1) He was riding an unlighted bicycle westwardly in the lane for eastbound traffic; (2) he was attempting to cross the highway in the face of an oncoming motor vehicle so near that such attempt to cross its path made a collision inevitable; (3) he was walking or standing beside his bicycle upon, or with his bicycle upon, the pavement or standing with the front wheel of his bicycle upon the pavement and he continued so to do until the moment of impact, though he could have seen the oncoming automobile in time to move out of its path. In any of these alternatives, Miller failed to exercise reasonable care for his own safety and that failure was one of the proximate causes of his injury and death.

Affirmed.

COLLINS RIDLEY AND WIFE, JOYCE RIDLEY, v. JIM WALTER CORPORATION AND MID-STATE HOMES, INC.

(Filed 2 February, 1968.)

1. Pleadings § 12—

A motion to dismiss the complaint on the ground that it fails to state a cause of action is equivalent to a demurrer.

2. Pleadings § 19—

Where both defendants join in a demurrer to the complaint upon the ground that it fails to set forth a good cause of action, the demurrer will be overruled if the complaint sets forth a good cause of action as to one of the defendants.

3. Bills and Notes § 10—

One who acquires a note as a mere assignee, without the paying of consideration therefor, is not a holder in due course. G.S. 25-3-306.

4. Money Received—

An action for money had and received may be maintained whenever the defendant has money in his hands which belongs to the plaintiff and which in equity and good conscience he ought to pay to the plaintiff.

5. Same; Usury § 1—

Allegations of a complaint to the effect that plaintiffs executed a note secured by a deed of trust and payable in 72 monthly installments, that upon default by plaintiffs some nine months after the execution of the note the holder accelerated the monthly payments and received from the foreclosure sale the entire balance due on the note, including the interest which would have been payable for the remaining life of the note, *held* sufficient to state a cause of action for money had and received to recover the excess paid as interest for the remaining life of the note.

APPEAL by plaintiffs from *Latham, S.J.*, at the 27 February 1967 Session of RANDOLPH.

The plaintiffs appeal from an order dismissing their complaint for the reason that it fails to state a cause of action. Prior to the entry of this order, Brock, S.J., had entered an order striking portions of the complaint, to which order the plaintiffs excepted. The order of Brock, S.J., allowed the plaintiffs 20 days from the entry thereof in which to amend their complaint, which time was subsequently extended by a consent order entered by the clerk. The time, so extended, had expired prior to the entry of the order by Latham, S.J., dismissing the complaint and no amendment to the complaint had been filed.

The material allegations of the complaint, summarized except as otherwise indicated, the portions stricken by the order of Brock, S.J., being in parentheses and the numbering being that of the complaint, are:

4. In August 1960 the plaintiffs negotiated with agents of Jim Walter Corporation for the construction of one of its shell homes on the plaintiffs' land. ("The plaintiffs and the defendant Jim Walter Corporation, by its agent, agreed that the [home] be built on plaintiffs' land by the defendant Jim Walter Corporation and that the plaintiffs would pay the sum of Two Thousand Eight Hundred Ninety-five ($2,895.00) Dollars for the building of said home.")

5. On 24 August 1960 the plaintiffs executed their note payable to the order of Jim Walter Corporation in the amount of $4,449.60, payable in 72 monthly installments of $61.80 each, the first payment to become due on 5 January 1961. (The face amount of the note "included the purchase price agreed to be paid for the house * * * with interest at 6% for a period of approximately six years.")

6. To secure the payment of the note, the plaintiffs executed a deed of trust on their two lots, which was duly recorded.

7. On 23 September 1960, Jim Walter Corporation "purportedly assigned to defendant Mid-State Homes, Inc. the note signed by the plaintiffs and the deed of trust signed by the plaintiffs * * *; that the plaintiffs are informed and believe and upon information and belief, allege that there was no consideration given for the purported assignment and that the defendant Mid-State Homes, Inc. knew at the time of the purported assignment that the note signed by the plaintiffs included interest for a period of six years; and that the defendant Mid-State Homes, Inc. is not a holder in due course of the note signed by the plaintiffs."

8. The plaintiffs defaulted in the monthly payments and the trustee foreclosed the deed of trust, the foreclosure sale being held on 9 June 1961. "[T]he land sold for the sum of Four Thousand Five Hundred, Forty-nine and 60/100 ($4,549.60) Dollars to the defendant Mid-State Homes, Inc. After deducting the cost of conducting the sale, the sum of Four Thousand Four Hundred Thirty-one and 80/100 ($4,431.80) Dollars was paid over to the defendant Mid-State Homes, Inc."

(9. "At the time of the foreclosure * * * the plaintiffs owed the defendant Jim Walter Corporation and the defendant Mid-State Homes, Inc. a sum not greater than Two Thousand Eight Hundred Ninety-five ($2,895.00) Dollars, the cost of building the house on their land plus interest at the highest lawful North

Carolina rate of 6% for nine months and fifteen days or One Hundred Fifty-four and 96/100 ($154.96) Dollars or a total of Three Thousand Forty-nine and 96/100 ($3,049.96) Dollars on the note. That the difference between the amount owed to the defendant Jim Walter Corporation and the defendant Mid-State Homes, Inc. and the amount that was actually paid to one of said corporations by the substituted trustee was One Thousand Three Hundred Eighty-one and 84/100 ($1,381.84) Dollars. That this surplus should have been paid to the plaintiffs; that the plaintiffs have demanded this sum from the defendant Jim Walter Corporation and the said defendant has failed and refused to pay the same.")

("WHEREFORE, the plaintiffs pray that they have and recover of the defendants, jointly and severally, the sum of One Thousand Three Hundred Eighty-one and 84/100 ($1,381.84) Dollars with interest thereon from the 4th day of August, 1961, for the cost of this action to be taxed against the defendants and for such other and further relief they may be entitled to in the premises.")

Ottway Burton for plaintiff appellants.
J. Patrick Adams for defendant appellees.

LAKE, J. The remnant of the complaint remaining after the order of Brock, S.J., obviously states no cause of action against either defendant. Consequently, there was no error in the order of Latham, S.J., considered without reference to the allegations stricken by the former order of Brock, S.J. The motion to dismiss the complaint on the ground that it states no cause of action, which was allowed by the order of Latham, S.J., is equivalent to a demurrer. See McIntosh, North Carolina Practice and Procedure, 2d Ed., §§ 1194, 1195.

The question then arises as to whether there was error in the order of Brock, S.J., striking allegations from the complaint. The ground of that order, as shown in the motion to strike, was that these allegations were irrelevant and immaterial, being in contradiction to the terms of the written note and deed of trust to which the complaint refers. If, with these provisions included, the complaint would still be demurrable for its failure to state a cause of action against either of the defendants, the striking of them would, at the most, be harmless error. We, therefore, turn to the sufficiency of the complaint with the stricken allegations restored.

The complaint, including the stricken allegations, alleges no cause of action against Jim Walter Corporation. It does not allege any breach by it of the contract to build the specified home on the lot of the plaintiffs. It alleges no mistake or wrongdoing in the preparation of the note or computation of the amount thereof. It alleges no action by Jim Walter Corporation after the alleged assignment by it of the note to Mid-State Homes, Inc. It alleges no receipt by Jim Walter Corporation of any part of the proceeds of the foreclosure sale. It alleges no relationship between the two corporate defendants except that of assignor and assignee of the plaintiffs' note. Therefore, if this were an action against Jim Walter Corporation alone, the complaint, including the stricken allegations, would not state a cause of action and would be demurrable. However, the defendants saw fit to file a joint demurrer. Having done so, the defendants must stand or fall together, and if the complaint states a cause of action against one of them, the joint demurrer should be overruled as to both defendants. *West v. Ingle,* 269 N.C. 447, 152 S.E. 2d 476; *Paul v. Dixon,* 249 N.C. 621, 107 S.E. 2d 141; *Conant v. Barnard,* 103 N.C. 315, 9 S.E. 575; McIntosh, North Carolina Practice and Procedure, 2d Ed., § 1195.

The complaint, with the stricken portions restored, alleges that the note for $4,449.60 included the principal indebtedness of $2,895 and interest at the maximum rate of 6% for six years. It obviously includes more than these items, but in the absence of any allegation to the contrary in the complaint, we must assume that other charges included were not unlawful. Since the complaint alleges that Mid-State Homes, Inc., was a mere assignee as distinguished from an endorsee of the note, that it paid no consideration for the note and that it knew at the time of the assignment that the face amount included interest for six years, Mid-State Homes, Inc., would have no greater right against the plaintiffs on the note than the payee, Jim Walter Corporation, would have had. The Negotiable Instruments Law, in effect at the time of this transaction, so provided in G.S. 25-64, such transferee not being a holder in due course as defined in that Act, G.S. 25-58. Although the Negotiable Instruments Law has now been superseded by the Uniform Commercial Code, there has been no change in the law in this respect. See G.S. 25-3-306.

The complaint, with the stricken portions restored, alleges that, at the time of the foreclosure sale, the total due and owing from the plaintiffs to the defendant Mid-State Homes, Inc., did not exceed $3,049.96; from the proceeds of the foreclosure sale, after deducting the costs of the sale, the trustee paid over to Mid-State Homes, Inc., $4,431.80, and the difference, $1,381.84, should have been paid to the

plaintiffs. The prayer for relief is that the plaintiffs recover this alleged excess from the defendants.

G.S. 45-21.31 prescribes the application to be made of the proceeds of a foreclosure sale. After the payment to the holder of the entire amount due upon the note, or other indebtedness, secured by the deed of trust, the trustee must pay over the balance of the proceeds either to the clerk, as provided in G.S. 45-21.31, or to the owner of the equity of redemption. *Skinner v. Coward,* 197 N.C. 466, 149 S.E. 682. The payment by the trustee of such surplus of the proceeds to a person not entitled thereto results in the unjust enrichment of that person at the expense of the owner of the equity of redemption.

An action for money had and received to the use of the plaintiff may be maintained "whenever the defendant has money in his hands which belongs to the plaintiff, and which in equity and good conscience he ought to pay to the plaintiff." *Wilson v. Lee,* 211 N.C. 434, 190 S.E. 742. As Johnson, J., speaking for this Court in *Allgood v. Trust Co.*, 242 N.C. 506, 88 S.E. 2d 825, said:

> "Recovery is allowable upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another. Therefore, the crucial question in an action of this kind is, to which party does the money, in equity and good conscience, belong? The right of recovery does not presuppose a wrong by the person who received the money, and the presence of actual fraud is not essential to the right of recovery. The test is not whether the defendant acquired the money honestly and in good faith, but rather, has he the right to retain it. In short, 'the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the test of natural justice and equity to refund the money.' *Moses v. MacFerlan,* 2 Burrow 1005, 97 Eng. Reprints 676."

It is aparent upon the face of the complaint that the plaintiffs made no payment whatever upon their note and the amount paid over by the trustee to Mid-State Homes, Inc., after deducting the costs of the foreclosure sale, was less than the face amount of the note. The plaintiff alleges it was more than was actually due thereon.

There is no allegation in the complaint that the note was not the valid obligation of the plaintiffs when made and delivered to Jim Walter Corporation, or that the full amount would not have been justly due to and collectible by the holder of the note if it had run its full expected life of 72 months. The theory of the complaint is that, upon default by the plaintiffs, the holder of the note, then Mid-State Homes, Inc., accelerated monthly installments not then due

and declared the entire balance due and owing upon the note immediately payable and, therefore, was not entitled to receive interest for the full originally expected life of the note.

The question is whether, when the holder of such a note lawfully accelerates its maturity, he is entitled to require payment to him of the agreed interest for the entire original period of the note, or is entitled only to the principal with interest to the date of payment, which in this case would be the date of the payment by the trustee of the proceeds of the foreclosure sale over to Mid-State Homes, Inc. This question was decided in *Moore v. Cameron,* 93 N.C. 51. There, separate bonds were given for the principal and for yearly installments of interest, the bond for the principal providing for its acceleration in event of default in the payment of any bond for interest. Such default occurred. The deed of trust securing the bonds was foreclosed and the property was purchased at the trustee's sale by the holder of the bonds for an amount in excess of the principal plus interest to the date of the distribution of the proceeds by the trustee, but not in excess of the principal plus interest for the total original period of the bonds. The holder of the equity of redemption sued for that portion of the proceeds paid over to the holder of the bonds which was in excess of the principal plus interest to the date of distribution by the trustee. This Court affirmed a judgment for the plaintiff, saying through Smith, C.J.:

> "The manifest and predominant purpose of both in making the loan was to provide ample security for the return of the money and the punctual payment of the successive installments of interest during the term of credit; and to this end the debtor's default is made a condition of its continuance at the option of the lender. The smaller bonds were executed not to create new obligations, but to put the interest in the form of an independent security, capable of transfer and separate enforcement by action. The relations of the one to the other are declared upon the face of each, and those for interest are intended to be of the nature and effect of coupons severed from the principal obligation. They represent and are meant to represent, as do proper coupons, the accruing interest as incident to the loan, and where a full payment is made of this, and its interest-bearing capacity is extinguished, there can be no interest as there can be no further forbearance of which it is the measure of value. Now can the form in which the obligation to pay interest is put be allowed the effect of making the debtor pay interest, when as such none does or can accrue?
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> * * *

"The defendants' contention permits the enforcement of a contract for a much larger rate of interest than the law allows for the loan of money, since the interest for a period of a little short of five years would be taken for the forbearance for less than one-half of that interval."

As Smith, C.J., there remarked, "It can make no difference in what form the obligations to pay interest is expressed."

In an annotation entitled "Usury as Affected by Acceleration Clause," it is said in 84 A.L.R. 1283:

"By the great weight of authority, it is held that the inclusion, in a contract to repay money, of a provision that, on default in the payment of the interest, or an installment of the principal, the entire indebtedness, including interest for the whole term or interest to the date of default, shall become due, does not constitute usury though the amount of such interest will exceed the legal rate. *The excess interest, however, is penal, and can neither be collected nor retained.*" (Emphasis added.)

In *Bakeries v. Insurance Co.*, 245 N.C. 408, 96 S.E. 2d 408, in which a different question was involved, Rodman, J., speaking for this Court, said:

"Had defendant [the holder of bonds] in January declared a default and demanded payment, it would only have been entitled to collect the debt and interest accrued thereon to the date of payment. Such is the holding in *Kilpatrick v. Germania Life Ins. Co.*, 75 N.E. 1124; *Union Cen. Life Ins. Co. v. Erwin*, 145 P. 1125, and *Steffen v. Refrigeration Discount Corporation*, 205 P. 2d 727, cited and relied upon by plaintiff. These decisions conform to our own holding in *Moore v. Cameron*, 93 N.C. 51."

Also in accord with the rule so established in this jurisdiction in *Moore v. Cameron, supra*, see: *Mid-State Homes, Inc., v. Knight*, 237 Ark. 802, 376 S.W. 2d 556; *Garland v. Union Trust Co.*, 63 Okl. 243, 165 P. 197, 203.

The holder of the note, having elected to exercise its option to accelerate the maturity of future installments and to foreclose the deed of trust, thereby receiving the payment in full of the principal, was not entitled to receive also interest for what otherwise would have been the remaining life of the loan. Thus, the complaint alleges that Mid-State Homes, Inc., received a larger amount from the proceeds of the foreclosure sale than it was entitled to receive and that this excess belonged to and should have been paid over to the plaintiffs. The complaint, therefore, states a cause of action for

money had and received which in equity and good conscience belongs to the plaintiffs.

This is not a violation of the Parol Evidence Rule, relied upon by the defendants. The allegations of the complaint, and the evidence offered in support thereof, do not contradict the terms of the written instrument. They merely go to the question of what amount was due and owing to the holder of the note thereon at the time of the distribution by the trustee of the proceeds of the foreclosure sale. The allegations stricken from the complaint by the order of Brock, S.J., were obviously relevant to the cause of action so set forth in the complaint and it was error to strike them.

The judgment of Latham, S.J., dismissing the complaint is reversed and the order of Brock, S.J., striking portions of the complaint is reversed and vacated. The cause is remanded to the Superior Court of Randolph County for such further proceedings as may be proper after the filing of the defendants' further pleadings, or the expiration of the time allowed by law therefor.

Reversed and remanded.

CULLEN BUNN BAILEY, JR. v. NORTH CAROLINA DEPARTMENT OF MENTAL HEALTH.

(Filed 2 February, 1968.)

1. Master and Servant § 93—

Except for jurisdictional findings, the findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence which would support findings to the contrary, but findings of fact resulting from a misapprehension of the law are not conclusive.

2. Same—

When findings of the Industrial Commission are not supported by evidence or when findings are insufficient to enable the court to determine the rights of the parties, the cause must be remanded to the Commission for proper findings.

3. Same—

Ordinarily, the Superior Court is without authority to remand a cause to the Industrial Commission for the taking of additional evidence except upon a proper showing by affidavit that newly discovered evidence will be introduced.

APPEAL by defendant from *Riddle, S.J.*, May 1967 Civil Session of WAKE.

BAILEY *v.* DEPT. OF MENTAL HEALTH.

Action under the State Tort Claims Act to recover damages for injury alleged to have been caused by negligence on the part of defendant in administering shock treatment and other medical treatment to claimant.

Evidence presented by claimant at the hearing held before J. W. Bean, Chairman of the North Carolina Industrial Commission, sitting as a hearing commissioner, on 4 May 1966, is summarized as follows:

Claimant, Cullen Bunn Bailey, Jr., testified that as a result of taking drugs, he was a patient at Dorothea Dix Hospital, Raleigh, N. C., from October 1962 until May 1964. Beginning in March 1963, he underwent a series of electric shock treatments which terminated in June 1963. Thereafter, on 3 December 1963, the electric shock treatment involved in this action was administered to claimant by Dr. Frierson. Among the attendants present on that date were a Mr. Smith and a Mr. Stewart. Before receiving prior treatments, claimant had received medication, but received no medication prior to the 3 December 1963 treatment except for a saliva injection. He had to be restrained on the table when the treatment was administered. After the treatment on 3 December 1963, claimant recalled regaining consciousness in the "seclusion room" in the presence of Dr. Frierson, who inquired of Bailey as to where he was experiencing pain. From there, he was taken to another part of the hospital to be x-rayed. On the next day Dr. Hartzog performed an operation on claimant's hip. Dr. Hartzog required that his leg be exercised beginning the day after the operation, although it was ordered that no weight be placed on it. Claimant was furnished with a wheel chair. In May 1964, he was transferred to John Umstead Hospital at Butner, N. C. There he was not furnished with a wheel chair but was offered a walker, which he declined to use. He was discharged from the hospital in July 1964. Claimant stated he had no fracture or injury to his body prior to the treatment on 3 December 1963. Further, that his ability to engage in his occupation as door-to-door salesman had been greatly impaired by the condition of his hip.

Other evidence was offered, including medical testimony of Dr. Thomas E. Castelloe and Dr. Robert Williams. This testimony revealed claimant suffered a fractured hip. We do not further summarize this testimony since it is not pertinent to this decision.

At the conclusion of plaintiff's evidence, defendant moved that the claim be dismissed for the reason that plaintiff failed to show a negligent State employee or a negligent act by an employee of the State.

On 11 May 1966, the hearing commissioner entered an order denying plaintiff's claim for damages.

Upon review by the Full Commission, the findings of fact, conclusions of law, and decision of the hearing commissioner were affirmed.

From the order of the Full Commission dated 25 July 1966, claimant appealed to Wake County Superior Court. The cause came on to be heard before Judge H. L. Riddle, Jr., and judgment thereon was filed 11 May 1967, pertinent portions of which are set out below.

> ". . . This Court finds as a fact that Chairman Bean and the Full Commission committed error, as a matter of law, in failing to find Dr. William Frierson to be the person who administered the shock treatment to the plaintiff and in finding and concluding that no State employee was present or had any knowledge of the injury sustained by the plaintiff. It follows that the Chairman and the Full Commission erred, as a matter of law, in concluding that, since there was no showing in the record that a State employee was present or had any knowledge of the injury sustained by the plaintiff, that it was not necessary to go into the question of negligence or contributory negligence.
>
> "And it further appearing to the Court, and the Court so finding as a fact, that based upon the testimony of the plaintiff and medical witnesses, the State having chosen not to offer testimony, and upon the very fact of the injury itself, the evidence taken as a whole was sufficient to raise an inference of negligence sufficient to suport the plaintiff's case for consideration by the Hearing Officer concerning the question of negligence and contributory negligence; and that the Chairman and the Full Commission erred, as a matter of law, in concluding that it was not necessary to go into the question of negligence or contributory negligence, and further erred in failing to make findings of facts and conclusions of law upon the question of negligence or contributory negligence.
>
> "3. And it further appears to the Court, and the Court so finds as a fact, that the record, as a whole, does not contain competent evidence sufficient to support the certain findings and conclusions set forth above and complained of by the plaintiff; nor, as a matter of law, are the facts found by the Chairman and adopted by the Full Commission sufficient to support the conclusions reached."

In accordance with the findings of the court, Judge Riddle entered an order setting aside and vacating the decision and order by Chair-

man Bean, filed on 11 May 1966, and the decision and order by the Full Commission filed 25 July 1966, and remanded the cause to the North Carolina Industrial Commission

> "for such rehearing as may be necessary to conform the findings of fact and conclusions of law previously determined with the evidence presently of record, and to make such additional findings of fact and conclusions of law as may be deemed necessary by any additional evidence heard upon rehearing."

Defendant appealed.

Douglas F. DeBank for plaintiff.

Attorney General Bruton and Staff Attorney L. Philip Covington for defendant.

BRANCH, J. G.S. 143-291 provides for payment of damages for personal injuries sustained by any person "as a result of a negligent act of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, . . . under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina. If the Commission finds that there was such negligence on the part of an officer, employee, . . . which was the proximate cause of the injury and that there was no contributory negligence on the part of claimant . . . the Commission shall determine the amount of damages which the claimant is entitled to be paid . . . but in no event shall the amount of damages awarded exceed the sum of ten thousand dollars ($10,000.00)." (The 1965 legislature increased the amount of possible recovery to $12,000.00, effective July 1, 1965, and the 1967 legislature increased the amount to $15,000.00, effective July 1, 1967.)

G.S. 143-293, which governs appeals from the Industrial Commission to Superior Court and the Supreme Court, in part provides:

> ". . . Such appeal shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to suport them. . . . Either party may appeal from the decision of the superior court to the Supreme Court as in ordinary civil actions."

The Industrial Commission's findings of fact are conclusive on appeal when supported by competent evidence, except for jurisdictional findings. This is true, even though there is evidence which

would support findings to the contrary. *Mica Co. v. Board of Education,* 246 N.C. 714, 100 S.E. 2d 72; *Teer Co. v. Highway Commission,* 265 N.C. 1, 143 S.E. 2d 247. However, where facts are found or where the Commission fails to find facts under a misapprehension of law, the court will, where the ends of justice require, remand the cause so that the evidence may be considered in its true legal light. *Stanley v. Hyman-Michaels Co.,* 222 N.C. 257, 22 S.E. 2d 570.

The scope of the reviewing court's inquiry in cases appealed from the Industrial Commission is succinctly stated by Ervin, J., in the case of *Henry v. Leather Co.,* 231 N.C. 477, 57 S.E. 2d 760, as follows:

> "In passing upon an appeal from an award of the Industrial Commission, the reviewing court is limited in its inquiry to two questions of law, namely: (1) Whether or nor there was any competent evidence before the Commission to support its findings of fact; and (2) whether or not the findings of fact of the Commission justify its legal conclusions and decision. 58 Am. Jur., Workmen's Compensation, section 530."

The crucial findings of fact and conclusions of law by the hearing commissioner and adopted by the Full Commission are:

> Finding of Fact: "8. That there is nothing in the testimony at the hearing to indicate the name of the State employee or employees that know anything about what caused the plaintiff's injury."
>
> Conclusion of Law: "Since there is no showing in the record that a State employee was present or had any knowledge of the injury sustained by the plaintiff, it is not necessary to go into the question of negligence or contributory negligence."

The uncontradicted testimony indicates that while claimant was a patient at Dorothea Dix Hospital on 3 December 1963, he was given a shock treatment resulting in injury. In this connection the record reveals testimony by claimant as follows:

> "Q. When was the next time after that that you again received an electric shock treatment?
>
> A. The evening of December 3, 1963. They gave me one in the evening instead of the regular time in the morning.
>
> Q. Who administered that shock treatment?
>
> A. Dr. Frierson, I understand his name is."
>
> "I recall the name of some of the attendants at the time I received the shock treatment — Mr. Smith and Mr. Stewart."

A careful examination of the record compels the conclusion that this finding of fact made by the hearing commissioner, which was adopted and affirmed by the Full Commission, was not supported by the evidence, and the conclusion of law and decision based on the finding was not justified. Upon reaching this conclusion it logically follows that the cause should be remanded for appropriate findings as to whether there was a negligent act of any named officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency, or authority which was the proximate cause of claimant's injury, and whether claimant was guilty of contributory negligence.

> "Specific findings of fact by the Industrial Commission are required. These must cover the crucial questions of fact upon which plaintiff's right to compensation depends. (Citations). Otherwise, this Court cannot determine whether an adequate basis exists, either in fact or in law, for the ultimate finding. . . ." *Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596.

When the findings are insufficient to enable the court to determine the rights of the parties, the case must be remanded to the Commission for proper findings. *Pardue v. Tire Co.*, 260 N.C. 413, 132 S.E. 2d 747.

Here the findings of fact are insufficient for a proper determination of the questions raised, and the judge of superior court correctly remanded the cause to the Industrial Commission. However, we note that this order provides:

> ". . . that this cause is herewith remanded to the North Carolina Industrial Commission for such rehearing as may be necessary to conform the findings of fact and conclusions of law previously determined with the evidence presently of record, and to make such additional findings of fact and conclusions of law as may be deemed necessary by any additional evidence heard upon rehearing."

Ordinarily, the limited authority of the reviewing court does not permit the trial judge to order remand of the cause for the taking of additional evidence. However, the judge of superior court may remand a cause to the Industrial Commission on ground of newly discovered evidence *in a proper case*, and such *proper case* is made out only when it appears by affidavits:

> "(1) That the witness will give the newly discovered evidence; (2) that it is probably true; (3) that it is competent, material, and relevant; (4) that due diligence has been used

and the means employed, or that there has been no laches, in procuring the testimony at the trial; (5) that it is not merely cumulative; (6) that it does not tend only to contradict a former witness or to impeach or discredit him; (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail." *McCulloh v. Catawba College,* 266 N.C. 513, 146 S.E. 2d 467; *Johnson v. R. R.*, 163 N.C. 431, 453, 79 S.E. 690, 699.

This discretionary power can be invoked only upon the showing of the above requirements, and without such showing the court is without jurisdiction to remand for rehearing on ground of newly discovered evidence. *McCulloh v. Catawba College, supra.* Further, the Industrial Commission, *in a proper case,* may grant a rehearing and hear additional evidence. This is true even though this Court recognizes that a party to a compensation case is not entitled to try his case "piecemeal." (For a full discussion of the power of the Industrial Commission relative to rehearings, see *Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E. 2d 857). In the instant case the Court, *ex mero motu,* without motion or affidavit showing any of the listed requirements, remanded the case and erroneously ordered a rehearing "to make such additional findings of fact and conclusions of law as may be deemed necessary *by any additional evidence heard upon rehearing.*" (Emphasis ours.)

The judge of superior court also exceeded his authority when he concluded: "That the Chairman and the Full Commission erred, as a matter of law, in failing to find that Dr. William Frierson was present and administered the shock treatment to the plaintiff on December 3, 1963; . . ."

Again, the judge did not confine himself to considering whether there was evidence to support a finding or whether the finding justified a legal conclusion. Rather, he entered an ultimate finding and, in effect, ordered the Commission to so find. This is error. *Henry v. Leather Co., supra.*

The judgment is vacated and the cause is remanded to the Superior Court of Wake County with direction that it be remanded to the North Carolina Industrial Commission for further consideration, to the end that the Commission may proceed with findings of fact and a determination of the rights of the parties in accord with the principles herein enunciated.

Error and remanded.

STATE OF NORTH CAROLINA v. LAWRENCE REDMAN BURTON AND JOSEPH SAMUEL MILLER.

(Filed 2 February, 1968.)

1. Criminal Law § 106—

Motion to nonsuit should be denied if there is substantial evidence tending to prove each essential element of the offense charged. This rule applies whether the evidence is direct or circumstantial, or a combination of both.

2. Safecracking § 2—

Evidence of the State tending to show that the safe of a corporation was forced open by a crowbar and other tools, that money was taken therefrom, and that three days later defendants were found in possession of burglary tools, including a crowbar which was identified by expert testimony as the one used to open the safe, *held* insufficient to be submitted to the jury on the issue of defendants' guilt of safecracking, since the evidence left the identity of the perpetrators a matter of speculation and conjecture.

APPEAL by defendants from *Braswell, J.,* 2 March 1967 Regular Criminal Session of WAKE.

Defendants were jointly indicted and tried for safecracking at the General Electric Supply Company on 17 January 1967. Both defendants pleaded not guilty.

Material portions of the evidence offered by witnesses for the State are as follows:

Henry James Clupper, operating manager of General Electric Supply Company, located at 18 Seaboard Avenue, Raleigh, N. C., testified that he had locked the doors and the safe and had secured the windows when he closed about 5:30 P.M. on 16 January 1967. When he returned to the business at about 6:15 the following morning he observed that the window at the front of the building had been broken and the locking device broken off. He found the door to the safe pried open and approximately $300 missing therefrom.

Detective Sgt. M. L. Stephenson of the Raleigh Police Department testified that he participated in the investigation of the break-in at the General Electric Supply Company. He observed that the inner part of the safe door was completely out and the outer flange portion of the door still intact. He identified State's Exhibit 1 as being the outer door to the General Electric Supply Company safe; State's Exhibits 2, 3, and 4 as being a crowbar, sledge hammer, and punch, respectively, turned over to him on 20 January 1967 by police officer C. C. Heath, and State's Exhibits 5 and 6 as being two 15-inch screwdrivers. State's Exhibit 1, the safe door, together with the crowbar, were sent to the Federal Bureau of Investigation crime laboratory.

Police officer Calvin C. Heath testified that he went to the Commercial Bonded Warehouse, located at 1525 South Blount Street,

Raleigh, N. C., about 2:30 A.M. on 20 January 1967 as instructed by the radio operator at the Raleigh Police Station. He observed that a slide door had been raised about ten inches. He also observed the defendants inside the building and inside a crater made of boxes. Burton had gloves on both hands, whereas Miller had a glove on his left hand only. Heath further observed a crowbar, sledgehammer, punch, screwdriver and a glove lying on the boxes and within a foot of the hole where defendants were found. He identified State's Exhibits 2 through 5 as being the tools which he observed in the Commercial Bonded Warehouse that night. Heath took into his possession the items marked for identification as State's Exhibits 2 through 6 and turned them over to Sgt. Stephenson on the morning of 20 January 1967.

K. H. Lehto, President of Commercial Bonded Warehouse, testified that he went to the warehouse between midnight and 4:00 A.M., 20 January 1967. A group of police officers were present when he arrived. Lehto stated that the tools marked as State's Exhibits 2 through 5 were not the property of the warehouse and that he had nothing similar to them in the warehouse.

The testimony of police officer C. A. Watson tended to corroborate the testimony given by officer Heath.

Robert A. Frazier, Special Agent of the F. B. I., assigned to the F. B. I. Laboratory in Washington, D. C., testified at length as to his qualifications and experience relative to the examination of tools for the purpose of determining whether a certain tool was used to make a certain tool mark. He then testified in detail as to how he arrived at the conclusion that the crowbar (State's Exhibit 2) was the particular tool used to make the pry bar marks appearing on State's Exhibits 1A, 1B and 1C, which were three pieces sawed out from the front panel of the door to the safe that was broken into at General Electric Supply Company on 17 January 1967.

All objections by defendants to the evidence relating to the 20 January 1967 incident were overruled.

At the conclusion of the State's evidence, both defendants moved for judgment as of nonsuit, which motions were denied. Neither defendant presented evidence in his own behalf. The jury returned a verdict against each defendant of guilty of safecracking as charged. Both defendants made motions to set aside the verdict and for a new trial. The motions were denied. Judgment was thereafter entered on the verdicts.

Defendants appealed.

Attorney General Bruton and Staff Attorney Vanore for the State.
L. Bruce McDaniel and Garland B. Daniel for defendants.

BRANCH, J. The principal question presented for decision is whether the possession by defendants, under the conditions stated, of the identical instrument used in the safecracking was sufficient to repel their motions for nonsuit.

Our research does not reveal a case in this jurisdiction where possession of tools used to effect a burglary or a safecracking was the sole evidence relied upon by the State.

There is ample evidence that someone "did, by the use of a crowbar and other tools force open a safe of General Electric Supply Company, 18 Seaboard Ave., Raleigh, N. C." on 17 January 1967, and that three days later defendants were found in possession of burglary tools, one being identified as that which was used to pry open the safe. All of the elements of the crime were clearly proven except the identity of the person or persons who committed the crime.

The State relies on circumstantial evidence to carry the case to the jury. The rule in respect to the sufficiency of circumstantial evidence to carry the case to the jury has been clearly stated by this Court in the case of *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431, where Higgins, J., speaking for the Court, stated:

> "'. . . If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.' The above is another way of saying there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both. To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury. *S. v. Simpson, ante,* 325; *S. v. Duncan, ante,* 374; *S. v. Simmons, supra; S. v. Grainger,* 238 N.C. 739, 78 S.E. 2d 769; *S. v. Fulk,* 232 N.C. 118, 59 S.E. 2d 617; *S. v. Frye,* 229 N.C. 581, 50 S.E. 2d 895; *S. v. Strickland,*

229 N.C. 201, 49 S.E. 2d 469; *S. v. Minton,* 228 N.C. 518, 46 S.E. 2d 296; *S. v. Coffey,* 228 N.C. 119, 44 S.E. 2d 886; *S. v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472; *S. v. Ewing,* 227 N.C. 535, 42 S.E. 2d 676; *S. v. Stiwinter,* 211 N.C. 278, 189 S.E. 868; *S. v. Johnson, supra.*"

Although the rule is clearly stated and fully recognized, it is often, as here, difficult in its application.

In the case of *State v. Wooten,* 239 N.C. 117, 79 S.E. 2d 254, there was evidence tending to show that defendant's house and a church faced each other across a paved street, and non-taxpaid liquor was found in a field between the rear of the church and the paved highway. The Court held that the trial judge should have allowed defendant's motion for nonsuit, and stated:

"The testimony for the State is ample to show that some person violated the statutes relating to the possession of intoxicating liquor. It leaves to mere conjecture, however, the all-important question whether the culprit was the defendant or somebody else."

The Court considered whether the State's evidence was of sufficient probative force to warrant its submission to the jury in the case of *State v. Shu,* 218 N.C. 387, 11 S.E. 2d 155, where the State's evidence tended to show that at about 2:30 on the night of 24 April 1940 a cafe in Mooresville was broken and entered, goods stolen therefrom and a small safe thrown out nearby, unopened. Entrance was effected by breaking the glass of the front door. Blood was on the safe and on the cafe floor, apparently from someone cut by the broken glass. A witness testified that he saw an automobile in front of the cafe at 2:30 A.M. The automobile was registered in the name of defendant's father and was customarily driven by defendant. The witness saw two unidentified men leave the cafe, get in the automobile and drive away rapidly. The defendant lived with his father, two and a half miles from the cafe and had a service station about a mile and a half away, where the automobile was seen at 2:00 the same night. The next morning the automobile was found in the yard at the home of defendant's father. "There was blood in the automobile, *and also a piece of automobile spring, usable as a tire tool, which correspond to marks on the door of the cafe where it had apparently been used in effecting entrance.* (Emphasis ours.) There was no evidence that the defendant was seen at all on the night in question." When arrested the next day, defendant was thoroughly examined and no cut or scratch was found on him. The Court, holding that the motion for nonsuit should have been allowed, stated:

"This evidence tends to show that the automobile of Wade Shu, which the defendant habitually drove, was used by those who committed the offense charged in the bill of indictment, but it fails to connect the defendant personally with the crime. The fact of the unexplained use of the car by two unidentified persons affords no more than a suspicion or conjecture that defendant was present or actively participated in the offense.

"From *S. v. Goodson,* 107 N.C. 798, 12 S.E. 329, where the evidence was held insufficient to sustain a conviction for murder, we quote the apt language of Chief Justice Merrimon: 'Thus full summary of the incriminating facts, taken in the strongest view of them adverse to the prisoner, excite suspicion in the just mind that he is guilty, but such view is far from excluding the rational conclusion that some other unknown person may be the guilty party.' *S. v. Montague,* 195 N.C. 21, 141 S.E. 285; *S. v. Woodell,* 211 N.C. 635, 191 S.E. 334; *S. v. Madden,* 212 N.C. 56, 192 S.E. 859; *S. v. English,* 214 N.C. 564, 199 S.E. 920. 'It all comes to this, that there must be legal evidence of the fact in issue and not merely such as raises a suspicion or conjecture in regard to it.' *S. v. Prince,* 182 N.C. 788, 108 S.E. 330; *S. v. Patterson,* 78 N.C. 470; *S. v. Martin,* 191 N.C. 404, 132 S.E. 16; *S. v. Epps,* 214 N.C. 577, 200 S.E. 20; *S. v. Norggins,* 215 N.C. 220, 1 S.E. 2d 533.

"The motion for nonsuit should have been allowed, and the judgment is reversed."

In the instant case the State fails to place defendants at or near the scene of the crime on the date the crime was committed; fails to show any of the "fruits of the crime" in the possession of either defendant, and relies solely upon possession of a crowbar used by someone in the commission of the crime to show "substantial evidence of all material elements of the offense." True, the evidence is sufficient to put the instrument used at the scene of the crime, but whether one of the defendants, or both of the defendants, or either of the defendants was the person or persons who on or about 17 January 1967 "unlawfully and wilfully and feloniously did, by the use of a crowbar and other tools force open a safe of General Electric Supply Company, 18 Seaboard Ave., Raleigh, N. C., used for storing chattels, money and other valuables," remains in the realm of speculation and conjecture.

In the case of *State v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472, Chief Justice Stacy spoke words which are apposite to the facts of the instant case. We quote:

"True it is, the evidence seems to point an accusing finger at the defendant as the perpetrator of the crime, and to excite suspicion, somewhat strongly perhaps, of his guilt, but it apparently leaves too much to surmise or assumption to support a conviction."

Taking all the State's evidence to be entirely true, the identity of the perpetrator or perpetrators of the crime remains a matter of speculation and conjecture.

Defendants' motions for judgment as of nonsuit, introduced at the close of the State's evidence, should have been allowed.

We deem it unnecessary to consider defendants' other assignments of error.

Reversed.

ROSE B. THRIFT v. FREDERICK HARDING TRETHEWEY.

(Filed 2 February, 1968.)

1. Torts § 7—

Since there can be only one recovery by the injured party for a single tort, a release of one tort-feasor releases all.

2. Same—

A covenant not to sue does not extinguish a cause of action for tortious injury, and therefore a covenant not to sue one joint tort-feasor does not release the others, although the others are entitled to a credit for the amount paid as consideration for the covenant on any judgment thereafter obtained against them by the injured party.

3. Same— Agreement to distribute funds of one tort-feasor held not to bar action against other tort-feasor.

Pursuant to a covenant not to sue executed in favor of one tort-feasor, plaintiff, her employer and its insurance carrier applied to the Industrial Commission for an order distributing the funds received by plaintiff in consideration for her covenant not to sue. The order of the Commission recited in part that the sum of money paid to plaintiff is in full satisfaction of all her rights against the named tort-feasor. *Held:* The order of the Commission is ineffectual to extinguish the tort-feasor's liability to plaintiff or to bar the plaintiff from maintaining the present action against the other tort-feasor, since the agreement underlying the order relates solely to rights and liabilities as between plaintiff and her employer and its carrier.

APPEAL by defendant from *Hasty, J.*, May 8, 1967 Schedule D Non-Jury Session of MECKLENBURG.

This appeal is from an order striking from defendant's pleading the portion thereof filed April 11, 1967, entitled "Further Amendment to Answer," relating to matters alleged by defendant as a *third* further answer and defense and as a bar to plaintiff's right to recover.

The pleadings disclose these undisputed facts: On January 29, 1965, between 9:00 and 9:30 a.m., plaintiff, an employee of "Five Point Cleaners," was at work in the building on the northwest corner at the intersection of East Boulevard and Scott Avenue in Charlotte, North Carolina. Two automobiles, one operated by defendant (Trethewey) and the other by George P. Canipe, collided within said intersection; and following the collision the Trethewey car struck and entered said building and thereby injured plaintiff.

Plaintiff alleged her injuries were proximately caused by the negligence of Trethewey. Trethewey, answering, denied plaintiff's injuries were proximately caused by any negligence on his part, and alleged *two* further answers and defenses.

As a *first* further answer and defense, defendant alleged that the negligence of Canipe was the sole proximate cause of plaintiff's injuries.

As a *second* further answer and defense, defendant alleged, *inter alia*, that plaintiff, prior to her institution of this action, had entered into a "written agreement" with Canipe whereby plaintiff had settled her claim against Canipe for "a substantial sum of money," which was paid to her by Canipe or on his behalf.

Pursuant to plaintiff's motion therefor, Riddle, J., then presiding, conducted a hearing, without a jury, to consider the legal significance of the "written agreement" referred to in defendant's *second* further answer and defense. The "written agreement," which was produced at the hearing before Judge Riddle, was executed by plaintiff and by Everett A. Thrift. Therein, the Thrifts acknowledged the receipt of $2,650.00 and, in consideration thereof, covenanted they would assert no further claim against Canipe on account of said collision of January 29, 1965.

Judge Riddle ruled said written agreement "is, as a matter of fact and as a matter of law, a COVENANT NOT TO SUE and is not a release." Defendant was granted leave to amend his *second* further answer and defense "so as to plead the aforesaid COVENANT NOT TO SUE and to delete from his said Second Further Answer and Defense any reference thereto that said agreement is in fact a release rather than a COVENANT NOT TO SUE."

Defendant did not except to Judge Riddle's order. On September 16, 1966, defendant filed an "Amendment to Answer" in which he al-

leged, as a *second* further answer and defense, that plaintiff had received $2,650.00 "in settlement of her claim against the said George P. Canipe and in consideration of her agreement not to file suit against the said George P. Canipe"; that this payment constituted full compensation for plaintiff's injuries; and that, if plaintiff should recover from defendant in this action, the $2,650.00 paid to plaintiff by Canipe should be credited on plaintiff's judgment against defendant.

On April 11, 1967, pursuant to leave granted by Clarkson, J., defendant filed a "Further Amendment to Answer," this being the pleading stricken by the order of Hasty, J., from which defendant prosecutes this appeal.

In said "Further Amendment to Answer," defendant alleged in substance, as a *third* further answer and defense, the following: Plaintiff received from Canipe, in settlement of her claim against him, the sum of $2,650.00, and applied to the North Carolina Industrial Commission for an order providing for the distribution thereof. Pursuant to such application, the Commission entered an order on February 23, 1966, in the proceeding entitled *"Rose B. Thrift, Employee, Plaintiff, v. Five Point Cleaners, Employer; Shelby Mutual Insurance Co., Carrier; Defendants. — George P. Canipe, Third Party Tort-Feasor,"* referred to below. On or about February 4, 1966, plaintiff entered into an agreement entitled, "Clincher Agreement and Request for Distribution of Third Party Recovery," referred to below, which bars any right of plaintiff to recover herein.

The parties to the "Clincher Agreement and Request for Distribution of Third Party Recovery" are Rose B. Thrift, Employee, Five Points Cleaners, Employer, and Shelby Mutual Insurance Company, Carrier. It contains general recitals as to the circumstances under which plaintiff sustained injuries on January 29, 1965, and as to the nature and extent of her injuries and the treatment therefor. It recites that plaintiff, on January 27, 1966, less than one year from the date of accident, had accepted $2,650.00 by way of compromise with the insurance carrier of one of the vehicles involved in the collision. It recites that "(t)his compromise was effected by execution of a Covenant Not to Sue and on January 28, 1966, suit was instituted against the other party involved in the collision through the employee's attorneys . . ." It recites the carrier, in order to facilitate the compromise, had waived a portion of its subrogation rights. By the terms of the agreement, the $2,650.00 is to be disbursed as thereafter provided in the Commission's order of February 23, 1966. The employee waived her rights, if any, against her employer and its carrier for additional compensation in the event of changed

conditions; and the carrier waived any and all rights it might have under the Workmen's Compensation Act for subrogation as to a recovery by plaintiff "against any and all third party tort-feasors arising out of the accident of January 29, 1965, . . ."

The order of February 23, 1966, *recites:* Plaintiff's employer and its carrier admitted the injuries sustained by plaintiff on January 29, 1965, were compensable; and that the carrier had paid, as compensation and medical expenses, the sum of $951.43. Plaintiff and Canipe, pursuant to negotiations, had settled all matters in dispute between them for $2,650.00. "A release embodying the terms of said agreement ha(d) been properly executed by all parties concerned and submitted to the Industrial Commission."

The order of February 23, 1966, *provides* that the $2,650.00 be distributed as follows: (1) $713.57 to the carrier, which agreed to accept this amount in full satisfaction of its subrogation rights; and (2) $1,936.43 to plaintiff in full satisfaction of all her rights against Canipe. It *provides* that the attorney fee is to be paid by plaintiff and by the carrier in proportion to the amount each received out of said recovery, "not to exceed 33⅓% thereof."

The court, allowing plaintiff's motion, entered an order striking the "Further Amendment to Answer" filed by defendant on April 11, 1967. Defendant excepted and appealed.

Wardlow, Knox, Caudle & Wade for plaintiff appellee.

Grier, Parker, Poe & Thompson and Gaston H. Gage for defendant appellant.

BOBBITT, J. Legal principles pertinent to decision on this appeal are summarized by Moore, J., in *McNair v. Goodwin,* 262 N.C. 1, 136 S.E. 2d 218, as follows: "A valid release of one of several joint tort-feasors releases all and is a bar to a suit against any of them for the same injury. This is true for the reason that the injured party is entitled to but one satisfaction, the cause of action is indivisible, and the release operates to extinguish the cause of action. *Simpson v. Plyler,* 258 N.C. 390, 128 S.E. 843; *King v. Powell,* 220 N.C. 511, 17 S.E. 2d 659; *Howard v. Plumbing Co.,* 154 N.C. 224, 70 S.E. 285. But a covenant not to sue does not release and extinguish the cause of action, and the cause of action may be maintained against the remaining tort-feasors notwithstanding the covenant. *Simpson v. Plyler, supra; Slade v. Sherrod,* 175 N.C. 346, 95 S.E. 557. The remaining tort-feasors are entitled, however, to have the amount paid for the covenant credited on any judgment thereafter obtained against them by the injured party. *Ramsey v. Camp,* 254 N.C. 443, 119 S.E. 2d 209; *Holland v. Utilities Co.,* 208 N.C. 289, 180 S.E. 592."

The "written agreement" between plaintiff and Canipe, originally pleaded by defendant as a bar to recovery, is in the record before us. After a hearing, Judge Riddle held this "written agreement" to be a covenant not to sue, not a release. Upon application of legal principles set forth in *Simpson v. Plyler,* 258 N.C. 390, 128 S.E. 2d 843, the ruling was correct. Be that as it may, defendant did not except to Judge Riddle's ruling and order. On the contrary, in the "Amendment to Answer" filed by defendant on September 16, 1966, relating to his *second* further answer and defense, defendant alleged the consideration for Canipe's payment to plaintiff was "her agreement not to file suit against . . . Canipe." The said "written agreement," being a covenant not to sue, did not release and extinguish plaintiff's cause of action against Canipe and does not constitute a bar to plaintiff's right to maintain this action against defendant.

The said "written agreement," a covenant not to sue, is the only agreement between plaintiff and Canipe referred to in defendant's pleadings.

The "Clincher Agreement and Request for Distribution of Third Party Recovery," referred to in defendant's "Further Amendment to Answer," is an agreement between plaintiff, her employer and its insurance carrier. It relates to the distribution as between plaintiff and said carrier of the $2,650.00 plaintiff had received from Canipe in consideration of her covenant not to sue Canipe. Canipe is not a party to this agreement. It does not affect the rights of plaintiff and Canipe *inter se.*

The Commission's order of February 23, 1966, which merely implements the "Clincher Agreement," has no bearing upon the rights of plaintiff and Canipe *inter se.* Although the name, "George P. Canipe, Third Party Tort-Feasor," appears in the caption, Canipe was not a party to the proceeding. When considered in context, the provision in the Commission's order that $1,936.43 be paid to plaintiff "in full satisfaction of all her rights against the above named third party tort-feasor by reason of the injury to said plaintiff on January 29, 1965," refers to plaintiff's share of the $2,650.00 paid by Canipe as consideration for plaintiff's covenant not to sue. See G.S. 97-10.2(f)(1)(d). The Commission had no jurisdiction to extinguish Canipe's liability to plaintiff or to bar plaintiff from maintaining an action against defendant. The fact Canipe had paid $2,650.00 to plaintiff in consideration of her covenant not to sue is the only circumstance that relates Canipe in any way to the proceeding before the Commission.

The "Clincher Agreement" and the Commission's order of February 23, 1966, relate solely to rights and liabilities as between plain-

tiff and her employer and its carrier. The allegations in defendant's "Further Amendment to Answer," purporting to allege a *third* further answer and defense, do not affect the rights of plaintiff and Canipe *inter se* which are defined in and established by plaintiff's covenant not to sue. The facts set forth therein are irrelevant and do not constitute a bar to plaintiff's right of action against defendant. Hence, the order of Judge Hasty is in all respects affirmed.

Affirmed.

RACHEL D. JACKSON, WIDOW AND NEXT FRIEND OF KENON ELTON JACKSON, CARLTON EDSELL JACKSON AND KAREN ELACO JACKSON, KENON JACKSON, DECEASED EMPLOYEE, v. NORTH CAROLINA STATE HIGHWAY COMMISSION, EMPLOYER, SELF-INSURER.

(Filed 2 February, 1968.)

1. Master and Servant § 93—

The findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, but the Commission's legal conclusions are reviewable.

2. Master and Servant § 53—

To be compensable under the Workmen's Compensation Act the injury must have resulted from accident.

3. Master and Servant § 65—

Where the evidence discloses that the employee was carrying on his usual work in the usual and customary way, his death as the result of a heart attack is not the result of an accident within the meaning of the North Carolina Workmen's Compensation Act.

PARKER, C.J., dissents.

APPEAL by plaintiffs from *Mallard, J.*, January, 1967 Civil Session, JOHNSTON Superior Court.

This proceeding originated before the North Carolina Industrial Commission as a compensation claim for death benefits filed by the widow, Rachel D. Jackson, and Kenon Elton Jackson, Carlton Edsell Jackson and Karen Elaco Jackson, minor children of the deceased employee, Kenon Jackson. The parties stipulated: (1) The Employee-employer relationship existed between the deceased employee and the North Carolina Highway Commission, the self-insured employer; (2) The parties were subject to and bound by the North Carolina Workmen's Compensation Act; and (3) The employee's average weekly wage was $89.07.

The evidence on behalf of the claimants disclosed that Kenon

Jackson, at the time of his death, was 48 years of age. He had been employed by the defendant for more than 20 years and had operated a motor grader for 18 or 19 years. In October, 1961 he had a myocardial infarction, was treated by Dr. Thomas Cheek, and after a good recovery, returned to his former employment with the defendant in March, 1962. Dr. Cheek testified he had advised regular hours and rest. Mr. Jackson, in the opinion of the witness, was able to go back to work. He expressed the opinion that Mr. Jackson's work for a 9 hour day, and then for additional periods at night, could have caused the coronary thrombosis which produced death.

Dr. George Kokiko performed an autopsy and testified as a witness for the Highway Commission that he found evidence there was a hypertrophy, a large diseased heart, further complicated by a cardiac condition which was on the way to producing what is known as a myocardial aneurysm. Dr. Kokiko expressed the opinion the condition of the heart was such that death could have occurred "anywhere at any time." The cause of death was, in layman's terminology, a cardiac stroke, meaning a heart attack. He had a diseased heart and eventually that heart was going to cause his death. With regard to whether certain activities over a period of time on the part of a person with a heart condition would be more likely to bring on a heart attack than other activities, Dr. Kokiko testified: "I don't think you can say that. I do not know whether some activities are more likely to bring on a heart attack than other activities. This depends on the individual and his past medical history. In this case I would say that there is a possibility that any number of activities, including those about which defendant has asked me, could bring on a heart attack. This is a diseased heart. We don't know what could have caused it. We are dealing in terms of possibilities."

Hearing Commissioner Thomas made, among others, these findings:

> "3. Deceased was born on September 22, 1915, and prior to his death on February 27, 1963, had been employed by defendant for 20 years or more, and had operated a motor grader for the past 18 or 19 years. In October, 1961, deceased had a myocardial infarction, was treated by Dr. Thomas Cheek of Smithfield, was hospitalized for a while, and was out of work until March, 1962. Deceased made a good recovery from his heart attack.
>
> 4. Deceased was assigned to a crew in the northwest corner of Johnston County. On February 26, 1963, a heavy snow fell. Deceased kept the motor grader he operated at his home and de-

parted from his home about 7:00 A.M. on February 26, 1963. Deceased operated the motor grader for a while and as it began raining, deceased and other employees 'stood by' at a store for some time.

5. Deceased then returned to operating the motor grader and at 4:00 or 5:00 P.M. was observed at the intersection of Highway 70 and N.C. 42 near Clayton, where deceased pulled a truck operated by Wilson Jones out of a ditch. About 5:00 P.M. deceased was told to go home and eat by his foreman, M. D. Wallace, and deceased then went home, ate and rested. At about 8:00 P.M., Wallace called deceased on the telephone and told him to return to scraping snow.

6. Deceased was observed by some of his co-workers operating the grader at about 11:00 P.M. and again at midnight, and at 12:10 A.M. on February 27, 1963. Wallace talked to deceased and advised him to change the blade to push the snow into the median. The blade change was made hydraulically. Deceased was then headed west on Highway 70 about one mile west of Smithfield. Wallace again observed deceased in the motor grader near the same place but headed east. The motor grader was stopped on the right shoulder with the right front wheel in a shallow ditch and a 4" by 4" pine post had been knocked down by the motor grader.

7. Wallace observed that deceased was in the cab of the motor grader, slumped over to the right, and the heater running, and headlights and flasher lights burning, and the motor choked down. Wallace determined that deceased had no pulse and that he was dead. Wallace observed no cuts or blood on the deceased and neither did J. P. Walters, maintenance supervisor for defendant in Johnston County, who saw deceased shortly after he was found by Wallace.

8. Autopsy performed on the body of the deceased at 3:00 P.M. on February 27, 1963, by Dr. G. V. Kokiko revealed, among other things, that deceased's heart was markedly enlarged, that deceased had had a large, old myocardial infarction involving the left ventricle, apex and posterior wall, with fibrosis and aneurysmal dilitation, severe atheroscleorsis and acute coronary occlusion. Cause of death was acute occlusion of the left coronary artery. Supplementary autopsy performed on March 14, 1963, revealed that deceased's brain was within normal limits. No external lesions were noted on deceased's body upon autopsy.

9. Deceased did not sustain an injury by accident arising out of and in the course of his employment with defendant."

Hearing Commissioner Thomas concluded that the claim for compensation should be denied. The claimants appealed to the Full Commission, which adopted the findings and conclusions of the Hearing Commissioner and affirmed the award. The claimants filed detailed exceptions and asked for a review by the Superior Court. Judge Mallard overruled the exceptions and assignments of error and entered judgment affirming the Commission's award, denying compensation. The claimants excepted and appealed.

Thomas Wade Bruton, Attorney General; Harrison Lewis, Deputy Attorney General; Henry T. Rosser, Assistant Attorney General; Fred P. Parker, III, Staff Attorney, for defendant appellee.

Teague, Johnson, Patterson, Dilthey & Clay by G. S. Patterson, Jr., for plaintiff appellants.

HIGGINS, J. Under the Workmen's Compensation Act, the North Carolina Industrial Commission is constituted the agency to hear evidence, resolve conflicts therein, make findings of fact, and state its conclusions. If the findings are supported by competent evidence, they are conclusive on the courts. *Osborne v. Ice Co.*, 249 N.C. 387, 106 S.E. 2d 573; *Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173; *Riddick v. Cedar Works*, 227 N.C. 647, 43 S.E. 2d 850. However, the Commission's legal conclusions are subject to court review. *Ballenger Paving Co. v. Highway Comm.*, 258 N.C. 691, 129 S.E. 2d 245; *Brice v. Salvage Co.*, 249 N.C. 74, 105 S.E. 2d 439. In order to support the claim, the death must result from accident. " 'Death from injury by accident implies a result produced by fortuitous cause. . . . There must be an accident followed by an injury by such accident which results in harm to the employee before it is compensable under our statute.' 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. Land Clearing Corp.*, 261 N.C. 508, 135 S.E. 2d 193; *Slade v. Hosiery Mills*, 209 N.C. 823, 184 S.E. 844. "The language used as well as the conclusions reached have supported the interpretation that an injury and accident are separate and that there must be an accident which produced the injury before the employee can be awarded compensation." *Hensley v. Cooperative*, 246 N.C. 274, 98 S.E. 2d 289; *Buchanan v. State Highway Comm.*, 217 N.C. 173, 7 S.E. 2d 382.

This Court has held that extra exertion by the employee, resulting in injury, may qualify as an injury by accident. *Gabriel v. New-*

ton, 227 N.C. 314, 42 S.E. 2d 96. But this holding allowed compensation because the extra and unusual exertion was accidental and had produced the original heart attack by placing an extra strain on the heart. Some of the cases in which the unusual strain theory was determinative are: *Wyatt v. Sharp,* 239 N.C. 655, 80 S.E. 2d 762; *Anderson v. Northwestern Motor Co.,* 233 N.C. 372, 64 S.E. 2d 265; *Gabriel v. Newton, supra; Doggett v. Warehouse Co.,* 212 N.C. 599, 194 S.E. 111. These cases on which the claimants rely do not fit the condition of Mr. Jackson as shown by the evidence and as found by the Commission. The controlling cases hold that death from heart attacks which occur in the usual course of employment are not compensable. *Andrews v. County of Pitt,* 269 N.C. 577, 153 S.E. 2d 67; *Ferrell v. Sales Co.,* 262 N.C. 76, 136 S.E. 2d 227; *Bellamy v. Stevedoring Co.,* 258 N.C. 327, 128 S.E. 2d 395; *Lewter v. Enterprises, Inc.,* 240 N.C. 399, 82 S.E. 2d 410.

When one is carrying on his usual work in the usual way and suffers a heart attack, the injury does not arise by accident out of and in the course of employment. In this case, Mr. Jackson was operating a motor grader removing snow from the highway. The evidence and findings are that he was by himself; that the motor grader stopped and a considerable time thereafter he was found slumped over in the cab of the grader. Death had resulted from what proved to be a massive coronary occlusion. He was on call for extra hours, but had had periods of rest. The extra hours on call were customary when, by weather conditions, there was need for the use of the machine he operated. The operation of the machine was not exacting physically. The hours during which Mr. Jackson was on duty were usual and customary when the conditions required the use of the scraper to open the section of the highway assigned to him. Mr. Jackson had been performing this same service for 18 years except for the time he was recovering from a prior heart attack.

The evidence in this case was sufficient to justify the Commission in findings of fact and concluding therefrom that Mr. Jackson's death was not caused by accident arising out of and in the course of his employment. The judgment entered in the Superior Court is

Affirmed.

PARKER, C.J., dissents.

FIRST NATIONAL LIFE INSURANCE COMPANY v. CAESAR FREDERICK FALCONER.

(Filed 2 February, 1968.)

1. Pleadings § 8—

The purpose of G.S. 1-137(1) is to permit the trial in one action of all causes of action arising out of any one contract or transaction.

2. Pleadings § 12—

Upon demurrer, the allegations of a counterclaim must be taken as true for the purpose of testing its validity.

3. Pleadings § 8—

In an action *ex contractu* defendant may assert a counterclaim in tort if the claim and the counterclaim arise out of the same contract or the same transaction.

4. Same; Insurance § 2—

In an insurance company's action to recover advancements made to its general agent pursuant to a contract of agency, defendant's counterclaim alleging that he was unjustly deprived of commissions as a result of plaintiff's negligence in processing and in servicing applications from insurable persons, *held* to constitute a counterclaim permissible under G.S. 1-137(1).

APPEAL by defendant from *Farthing, J.*, June 1967 Civil Session, ORANGE Superior Court.

The plaintiff, First National Life Insurance Company, is a corporation organized under the laws of Arizona and licensed to do business in North Carolina. The plaintiff instituted this civil action on January 20, 1967 to recover from the defendant, Caesar Frederick Falconer, its former general agent, the sum of $35,139.49, balance due for money advanced during the life of the contract of agency between the plaintiff and the defendant. The plaintiff attached to its complaint a copy of the contract and made the same a part of the complaint.

The contract provided the general agent should receive as compensation a fixed rate of commissions on the premiums paid on the insurance written or procured by the general agent. The general agent was authorized to employ agents, to obtain applicants for insurance, and to receive and to deliver the policies to the insureds. The general agent was authorized to collect the first premium and account for the amount collected, less his commission. Subsequent payments were to be made directly to the plaintiff. The general agent, however, was to receive a fixed percentage of the subsequent premiums on the policies he had procured for the company. The contract of employment contained this provision: "In the event the Company advances any sums to the Agents of the General Agent or said Agents

become financially responsible to the Company for any reason whatsoever, the General Agent shall be liable to the Company for one-half of said financial responsibility and the company is hereby authorized to withhold said sum from any compensation due the General Agent, but said Company shall notify the General Agent when said sums are being withheld."

The plaintiff alleged it had advanced the defendant the sum of $89,588.00 and the agent's commissions which the plaintiff had retained had reduced the balance due to the sum of $35,139.49, for which the plaintiff demanded judgment.

The defendant filed answer denying that any amount was due and set up two further answers and defenses. The first is not material to this appeal. The second is here quoted in part.

"AS A SECOND FURTHER ANSWER AND DEFENSE AND COUNTERCLAIM to the plaintiff's Complaint, the defendant alleges and says:

1. That on or about June 22, 1959, the plaintiff and the defendant entered into a written contractual agreement whereby the defendant agreed to sell life insurance on behalf of the plaintiff and the plaintiff agreed to service and process said applications submitted by the plaintiff [*sic*] and after the initial collection of premiums by the agent, the *defendant* was to collect the premiums and remit to the *plaintiff* the earned commissions. (The words plaintiff and defendant are as certified.)

2. That the defendant did in fact sell life insurance for the plaintiff submitting his applications to the office of the plaintiff but the plaintiff was negligent in the handling of many of these applications and policies to such an extent that the policyholders complained to the defendant and cancelled the policies as a direct result of the negligent services on these policies and applications provided by the plaintiff.

3. That the plaintiff had a duty to the defendant and to the policyholders solicited by the defendant and his agents to provide reasonable service for said policyholders, but the plaintiff breached his duty to the policyholders and the defendant causing cancellation of said policies and loss of commissions to the defendant.

4. That the plaintiff was negligent in the handling of the applications and policies submitted by the defendant among other ways in the following ways:

(a) The plaintiff would submit two (2) drafts to the insured's bank for the payment for the insured's premium each month rather than the one (1) draft as provided for in the agreement between the plaintiff, the defendant, and the insured.

(b) That the plaintiff would withhold the dividend checks payable to the policyholders solicited by the defendant long after the agreed date that the said dividends were due causing much dissatisfaction with the policy and causing many policyholders to cancel the policies.

(c) That the plaintiff failed to send out to the defendant lapsed notices of policyholders secured by the defendant thereby preventing the defendant from reinstating the policies before the grace period had expired.

(d) That by the negligence enumerated in (a), (b), and (c) and by other administrative mishandlings and negligence the plaintiff negligently permitted the defendant to secure a bad business reputation in the communities where the defendant sold said policies for the plaintiff.

5. That by the negligence enumerated in (a), (b), (c), and (d) set out above among others too numerous to enumerate, the plaintiff caused the defendant to lose many of his agents who had been trained by the defendant at a great expense of time and money.

* * *

8. That as a result of the many acts of negligence by the plaintiff set out herein, the defendant has suffered damages in the sum of twenty five thousand dollars ($25,000.00)."

The plaintiff filed a demurrer to the second further defense and counterclaim for that the counterclaim constituted a misjoinder of causes. The Court sustained the demurrer and dismissed the counterclaim.

The defendant, by his only exception and assignment of error, challenges the order sustaining the demurrer to his counterclaim and appealed.

Blackwell M. Brogden, Rudolph R. Edwards for defendant appellant.

McCoy, Weaver, Wiggins, Cleveland & Raper by Alfred E. Cleveland for plaintiff appellee.

HIGGINS, J. The plaintiff, by demurrer, has challenged the defendant's second further defense and counterclaim upon the sole ground the counterclaim constitutes a misjoinder of causes. G.S. 1-135 provides: "The answer of defendant must contain . . . 2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition." G.S. 1-137 provides: "The counterclaim mentioned in this article must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action: 1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. 2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

The purpose and intent of G.S. 1-137(1) is to permit the trial in one action of all causes of action arising out of any one contract or transaction. *Burton v. Dixon,* 259 N.C. 473, 131 S.E. 2d 27; *Amusement Co. v. Tarkington,* 247 N.C. 444, 101 S.E. 2d 398; *Rubber Co. v. Distributors, Inc.,* 251 N.C. 406, 111 S.E. 2d 614; *Hancammon v. Carr,* 229 N.C. 52, 47 S.E. 2d 614.

The allegations of the counterclaim challenged on demurrer must be taken as true for the purpose of testing validity. *Burns v. Gulf Oil Corp.,* 246 N.C. 266, 98 S.E. 2d 339. A counterclaim in tort may be asserted in an action on contract if the claim and the counterclaim arise out of the same contract or the same transaction. *King v. Libbey,* 253 N.C. 188, 116 S.E. 2d 339.

The plaintiff and the defendant were the only parties to the contract. The plaintiff sets it out and makes it a part of its complaint and relies on it as authority for its advancements and its right to apply commissions due the defendant as credits on these advancements. The defendant, in his counterclaim, says he procured many applications from insurable persons and that the plaintiff, by double billing, unreasonable delay in processing the applications, and by the negligent and careless manner in which the plaintiff treated the prospects, caused many withdrawals, cancellations, and failures to renew their policies. As a result, the defendant was unjustly deprived of commissions in an amount sufficient to discharge his obligations to the plaintiff and to entitle him to a judgment of $25,000. The plaintiff's demurrer challenges the counterclaim only for misjoinder of causes. It appears from the pleadings that the claim and counterclaim arise out of one and the same contract and one and the same transaction.

The counterclaim did not constitute a misjoinder. The judgment sustaining the demurrer is

Reversed.

IN THE MATTER OF THE WILL OF MAMIE E. CAUBLE, DECEASED.

(Filed 2 February, 1968.)

1. **Wills § 21—**

A nonexpert witness, in a caveat proceeding, may give his opinion in evidence upon the issue of the mental capacity of another person where it is shown that he has observed such other person and has had a reasonable opportunity to form an opinion as to the mental condition of such person.

2. **Wills § 22—**

A charge instructing the jury to answer the issue of mental capacity in the negative if the caveator has established by the greater weight of the evidence the lack of any one element of mental capacity *is held* without error.

APPEAL by Caveators from judgment entered by *Johnston, J.*, May 8, 1967 Civil Session, STANLY Superior Court.

On December 15, 1964, Max A. Cauble presented to the Clerk of the Superior Court for probate a paper writing dated March 21, 1964 purporting to be the last will and testament of Mamie E. Cauble. The writing, attested by three witnesses, was probated in common form and letters testamentary were issued to Max A. Cauble, Executor.

On July 12, 1965, Melvin E. Cauble filed a caveat challenging the validity of the script on two grounds: (a) The execution of the writing by Mamie E. Cauble was obtained by Eugene Cauble and Max A. Cauble ". . . through undue and improper influence and duress upon the said Mamie E. Cauble;" and (b) . . . (T)he said Mamie E. Cauble, was by reason of her old age, disease and both physical and mental weakness and infirmity not capable of executing a last will and testament. . . ." The Caveator filed the required bond. The Clerk issued the proper citations and notices and ordered the cause transferred to the Superior Court for trial, in term, upon the issue *devisavit vel non.*

The evidence at the trial in the Superior Court disclosed that Mamie E. Cauble died on December 7, 1964 at the age of 78 years. Her heirs at law and next of kin were: Melvin E. Cauble, Eugene Cauble and Max A. Cauble, sons, and Jack Monroe Cauble and Trill Elaine Cauble, minor children of a deceased son, Fred Cauble.

Through their guardian *ad litem* the minors filed answer and joined in the caveat.

By Item II, the Testatrix devised a tract of land containing 54.5 acres to Max A. Cauble. By Item III she devised a tract of land containing 108.2 acres to Eugene Cauble. By Item IV she devised a tract of land containing 6.6 acres to Melvin Cauble. By Item V she gave and devised to Max A. Cauble and Eugene Cauble ". . . all other property of which I may die seized and possessed. . . ."

The evidence disclosed that Mr. Hobart Morton, attorney of Albemarle, drafted the will. When Mr. Morton was told by Max Cauble that his mother wanted him to prepare her will, he went to the home, conferred at length with Mrs. Cauble, and later prepared her will according to her instructions. Mr. Morton, testifying as a witness for the Propounders, was asked this question: "Now, Mr. Morton, from your association with Mamie E. Cauble, did you form or do you now have an opinion satisfactory to yourself as to whether or not at the time she executed the paper writing on March 21, 1964, now offered for probate as her Last Will and Testament, she had sufficient mental capacity to know and understand the nature and extent of her property, to know who were the natural objects of her bounty, and to realize the full force and effect of the disposition of her property by will, do you have such an opinion? He answered "That she did have."

The three witnesses to the will, James V. Lowder, Joe W. Lippard and Lester A. Moose, each testified he saw Mrs. Cauble execute the writing and each witness gave an affirmative answer to a question of the same substance as that answered by Mr. Morton and above quoted. A number of close neighbors testified as witnesses, reciting their opportunities to observe and converse with Mrs. Cauble, likewise gave affirmative answers to a similar question.

Martha Roland, who lived next door, testified that she saw the Testatrix every day and that she did her own work. "(S)he was interested in current events and in the war, things like that. . . . She read the daily paper; she read magazines. . . . (W)e took the Greensboro, . . . and I delivered all mine to her. . . . Yes, sir, she could read them papers more competent than a young person." The foregoing was challenged by Exception No. 4.

Grover Teeter, a Notary Public, was called as a witness for the Propounder. He "notarized the will" at the time of its execution and testified he was in the presence of the Testatrix for 45 minutes and heard the discussion about the will. He had not known her before. He gave an affirmative answer to the same question submitted to and answered by Mr. Morton with respect to the mental capacity of

Mrs. Cauble. The evidence of Mr. Teeter was challenged by Exceptions No. 7 and 8.

The Caveator, Melvin Cauble, testified: "Based upon my observation and knowledge of my mother, I have an opinion satisfactory to myself whether or not she possessed sufficient mental capacity on March 21, 1964 to know what property she had, who her relatives were, what claims they had upon her, and if she had wanted to dispose of her property, to whom she intended to give it. My opinion is that she didn't have." Other witnesses gave similar testimony. One witness testified in his opinion the Cauble farm was worth $60,000.

The Court submitted these issues:

"1. Was the paper writing propounded, dated March 21, 1964, executed by Mamie E. Cauble, according to the formalities of the law required to make a valid last will and testament?

ANSWER:

2. At the time of signing and executing said paper writing did said Mamie E. Cauble have sufficient mental capacity to make and execute a valid last will and testament?

ANSWER:

3. Was the execution of the paper writing, propounded in this cause, procured by undue influence, as alleged?

ANSWER:

4. Is the said paper writing referred to in Issue No. 1, propounded in this cause, and every part thereof, the last will and testament of Mamie E. Cauble, deceased?

ANSWER:"

By consent, the first issue was answered "Yes". The jury answered the second issue "Yes", the third issue "No" and the fourth issue "Yes". Upon the jury's verdict, the Court entered judgment that the paper writing dated March 21, 1964, and every part thereof, was the last will and testament of Mamie E. Cauble. The suspension order issued by the Clerk upon the filing of the caveat was revoked. The Caveators excepted and appealed.

Patterson & Doby by Henry C. Doby, Jr., Staton P. Williams for Caveators.

Eugene S. Tanner, Jr., Guardian Ad Litem for Jack Monroe Cauble and Trill Elaine Cauble.

D. D. Smith for Propounders.

HIGGINS, J. The Caveators discuss three questions in their brief as arising on this appeal. First, they assign as error the failure of the Court to sustain their objections to the evidence, especially of

the witnesses Roland and Teeter, Exceptions No. 4, 7 and 8. Their evidence had bearing on the mental capacity of Mrs. Cauble at the very time she executed the will. The form of the questions asked these and other witnesses, and their answers, have been approved by this Court. *In Re Will of Jones,* 267 N.C. 48, 147 S.E. 2d 607; *In Re Will of Tatum,* 233 N.C. 723, 65 S.E. 2d 351. This Court said, in *In Re Will of Brown,* 203 N.C. 347, at 350:

> "Anyone who has observed another, or conversed with him, or had dealings with him, and a reasonable opportunity, based thereon, of forming an opinion, satisfactory to himself, as to the mental condition of such person, is permitted to give his opinion in evidence upon the issue of mental capacity, although the witness be not a psychiatrist or expert in mental disorders. *White v. Hines,* 182 N.C. 275, 109 S.E. 31."

Second, the appellants object to the charge on the ground the Court did not make clear that if, at the time she signed the writing on March 21, 1964, the jury should find that Mrs. Cauble was lacking in any essential requirement of mental capacity, the jury in that event should answer the second issue no. The Court actually charged:

> "Now, members of the jury, the court instructs you on this second issue that it is the Propounders contention that you should answer this second issue 'Yes.' It is the Caveators contention that you should answer it 'No.' And the Court instructs you that if the Caveators have satisfied you by the greater weight of the evidence that Mamie E. Cauble on the 21st day of March, 1964, did not have mental capacity to know and comprehend the nature and extent of her property, or did not have mental capacity to know and comprehend the natural objects of her bounty, or did not have mental capacity to know and comprehend and realize the full force and effect of the disposition of her property by will, then it will be your duty to answer the second issue 'No.' Otherwise, it will be your duty to answer the second issue 'Yes.'"

The charge as given was as favorable to the Caveators as the law permitted. The appellants' challenge on the ground stated is not sustained. *In Re Will of Knight,* 250 N.C. 634, 109 S.E. 2d 470; *In Re Will of Crawford,* 246 N.C. 322, 98 S.E. 2d 29; *In Re Will of Efird,* 195 N.C. 76, 141 S.E. 460.

By the third objection, the appellants challenge as error the failure of the Court to set aside the verdict as against the greater weight of the evidence. This objection is formal and is not sustained.

No error.

STATE v. ROBERT FRANKLIN HARTSELL.

(Filed 2 February, 1968.)

1. Indictment and Warrant § 1—

A preliminary hearing is not an essential prerequisite to the finding of an indictment in this State.

2. Indictment and Warrant § 4—

An indictment is not subject to quashal on the ground that the testimony of the witnesses who appeared before the grand jury was based upon hearsay.

3. Rape § 17—

In a prosecution for assault on a female under the age of consent, it is not required that defendant intend to force sexual relations notwithstanding any resistance the child might make, and there is no requirement of force, an intent on the part of defendant to commit rape being sufficient.

4. Rape § 18—

Evidence in this case *held* sufficient to be submitted to the jury on the issue of defendant's guilt of assault with intent to commit rape.

5. Criminal Law § 104—

On motion to nonsuit, contradictions and discrepancies in the State's evidence are for the jury to resolve and do not warrant nonsuit.

6. Rape § 17—

In an indictment charging each element of the offense of assault with intent to commit rape upon a female child below the age of consent, the use in the indictment of the words "by force and against her will" will be treated as surplusage.

7. Rape § 18—

In a prosecution for assault with intent to commit rape upon a female child, testimony of the prosecutrix that defendant had previously attacked her at unspecified times cannot be considered incompetent on grounds of remoteness when it appears that the child was eight years old.

8. Criminal Law § 85—

When the defendant takes the stand and offers evidence as to his good character, the State may cross-examine defendant as to prior acts of misconduct for the purpose of impeachment.

APPEAL by defendant from *Crissman, J.*, 30 January 1967 Criminal Session of GUILFORD — Greensboro Division.

Criminal prosecution on an indictment charging that defendant on 3 December 1966 "unlawfully, wilfully, and feloniously did assault one Cynthia Paulette Goins, a female the age of 8 years, and her the said Cynthia Paulette Goins, with the intent, unlawfully and feloniously, by force and against her will to ravish and carnally

know, against the form of the statute in such case made and provided and against the peace and dignity of the State."

Defendant, an indigent who was represented by his court-appointed counsel, Robert A. Merritt, pleaded not guilty. Verdict: Guilty of an assault on a female with intent to commit rape as charged in the indictment.

From a judgment of imprisonment in the State's prison for a term of not less than three years nor more than five years, defendant appeals.

Attorney General T. W. Bruton and Deputy Attorney General Ralph Moody for the State.

Robert A. Merritt for defendant appellant.

PARKER, C.J. The trial court appointed defendant's trial attorney to appear for him in the Supreme Court. At the expense of Guilford County a transcript of the trial was furnished to defendant, and further at the expense of Guilford County the case on appeal and defendant's brief on appeal were mimeographed as is done for solvent defendants.

After the verdict defendant assigns as error that the "findings of the Municipal-County Court of Greensboro, purporting to bind defendant over to Superior Court are not sufficient, and do not show defendant, an indigent, represented by counsel, and do not show the findings with sufficient clarity," in that the records in that court state, "The Court, after hearing all the evidence in the case adjudges the defendant P C. . . ." This assignment of error is overruled.

Defendant here was tried on an indictment found a true bill by the grand jury. This is said in *S. v. Hackney,* 240 N.C. 230, 81 S.E. 2d 778:

> "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. 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 addition, in the trial no reference was made to the preliminary hearing.

After the verdict defendant challenges the validity of the indictment on the following grounds: (1) The only witnesses before the grand jury were Raymond Goins and F. D. Redmond, a deputy sheriff, whose knowledge of the offense was based on hearsay; and (2) that the indictment was not clear and definite. Defendant does not contend that Raymond Goins and Deputy Sheriff Redmond were disqualified, as a matter of law, from giving any testimony against him in respect to the case. The contention that the grand jury found the indictment a true bill on the testimony alone of Raymond Goins and F. D. Redmond is overruled on authority of *S. v. Turner*, 268 N.C. 225, 150 S.E. 2d 406; *S. v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334. The second contention that the indictment is not clear and definite merits no discussion. This assignment of error is overruled.

Both the State and defendant offered evidence. Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of all the evidence.

The State's evidence shows that Cynthia Paulette Goins was eight years old on 3 December 1966. Defendant is the brother of Cynthia's mother, and, according to his testimony, on 3 December 1966 he was twenty-four years old. In the instant case the indictment charges that Cynthia Paulette Goins was "a female the age of 8 years." In *S. v. Lucas*, 267 N.C. 304, 148 S.E. 2d 130, the Court said:

> "Upon a charge of assault with intent to commit rape of a female person above the age of twelve years, the State is required to show that the defendant actually committed an assault with intent to force the female to have sexual relations with him, notwithstanding any resistance she might make; however, since a child under the age of twelve years cannot give her consent, the requirement of force is not necessary to constitute the offense. The vast majority of the states subscribe to the doctrine that an assault upon a female under the age of consent with intent to have intercourse, constitutes the crime of assault with intent to commit rape. This is well stated in 75 C.J.S., Rape, § 28, p. 493 as follows:
>
> " 'Where one touches or handles or takes hold of the person of a female under the age of consent with the present intent of having sexual intercourse with her then and there, he commits the offense of assault with intent to rape; and, when nothing but actual intercourse remains to follow acts done with intent to have intercourse with a girl under the age of consent, the crime is committed. Neither penetration nor an attempt thereof is necessary to constitute the crime of assault with intent to rape a female under the age of consent.'

"In 44 Am. Jur., Rape, § 23, p. 916 it is said:

"'Where a connection with a female child under the age of consent is considered as rape, it is almost universally held that an attempt to have such connection is an assault with intent to commit rape, the consent of the child being wholly immaterial; since the consent of such an infant is void as to the principal crime, it is equally so in respect to the incipient advances of the offender.'

"A full annotation on the subject may be found in 81 A.L.R., p. 599.

"We do not have to leave North Carolina for citations in support of the above position for as early as 1880, when the age of consent was ten years, our Court said in *State v. Dancy,* 83 N.C. 608:

"The elements of '(f)orce and want of consent must be satisfactorily shown in the case of carnal knowledge of a female of the age of ten or more, but they are conclusively presumed in the case of such knowledge of a female child under that age, and no proof will be received to repel such presumption.'

"It had previously said that in order to convict the defendant, 'the sufferer being under ten years of age, it was sufficient to show that he attempted to do the act; to carnally know and abuse the child, who was incapable of consenting.' . . . The charge 'is supported by proof of an assault with intent to unlawfully and carnally know and abuse a female child under the age of ten years.' *S. v. Johnston,* 76 N.C. 209."

Considering the State's evidence in the light most favorable to it, and giving it the benefit of every reasonable inference to be drawn therefrom (2 Strong, N. C. Index 2d, Criminal Law, § 104), the testimony of the eight-year old prosecutrix was sufficient to carry the case to the jury and, if believed, to warrant a conviction of the felony charged in the indictment. Prosecutrix did not tell anyone immediately after her uncle had committed the offense upon her. Several days later she told her father she was sore and hurting in her private parts, and her father told her mother to take her into a bedroom and examine her. After her mother examined her, she told prosecutrix she would whip her if she did not tell who did it. Prosecutrix replied that Uncle Robert did it, and that he told her not to tell. This would not justify a nonsuit. It simply would affect Cynthia's credibility as a witness which was a matter for the trial jury to consider. It is hornbook law that contradictions and discrepancies,

even in the State's evidence, are for the jury to resolve and do not warrant a nonsuit. 2 Strong, N. C. Index, Criminal Law, § 104.

S. v. Carter, 265 N.C. 626, 144 S.E. 2d 826, is distinguishable in that in that case the indictment did not charge that the victim was a child under twelve years of age. The indictment merely charged that the victim was a female. Hence in the *Carter* case the element of force and resistance had to be considered. In the instant case the eight-year-old victim could not have consented. The law resisted for her. The indictment in the instant case charges every element of the felony of an assault with intent to commit rape upon a female child eight years of age, and the use in the indictment here of the words "by force and against her will" was unnecessary and will be considered as surplusage.

Defendant, while admitting that he was at his parents' home with the prosecutrix, her mother, and the other children of her family at the time, denied any knowledge of the offense and testified that he did not have any "relations" with Cynthia.

Defendant assigns as error that Cynthia was permitted by the court, over his objections and exceptions, to testify that defendant had "done to her" before at the home of her grandparents and at her home in Greensboro what he "had done to her" on the date charged in the indictment. While she did not testify as to the date of the alleged prior intimacies, considering her age of eight years we do not think that they were too remote. This assignment of error is overruled on authority of *S. v. Browder,* 252 N.C. 35, 112 S.E. 2d 728; *S. v. Leak,* 156 N.C. 643, 72 S.E. 567; *State v. Nicks,* 134 Mont. 341, 332 P. 2d 904, 77 A.L.R. 2d 836, and annotation in A.L.R., *ibid,* at 852 *et seq.*

Defendant went on the stand at his own request. He assigns as error that on cross-examination the court overruled his objections to being asked if he had assaulted Susie, an older sister of Cynthia, about four years ago in the same manner that he has been charged with assaulting Cynthia, and if he had not told an officer about it and her parents about it. In response to such questions, over his objection and exception he testified that about four years ago he had assaulted Susie, Cynthia's older sister, in the same manner that he is charged with assaulting Cynthia in this case, and that he had told an officer about it, and that when Susie's parents asked him about it he told them about it. This assignment of error is overruled. The defendant having become a witness in his own behalf and also having offered evidence that he was a man of good character, it was proper for the State on cross-examination to ask him questions to impeach his character and for the court to compel him to answer the ques-

tions. The evidence elicited on cross-examination of defendant was competent. *S. v. Robinson,* 272 N.C. 271, 158 S.E. 2d 23; *S. v. King,* 224 N.C. 329, 30 S.E. 2d 230.

There are several assignments of error to the charge of the court. The court correctly instructed the jury that they could return one of three verdicts as they found the facts to be from the evidence under the charge of the court, to wit, either guilty of an assault with intent to commit rape as charged in the indictment, guilty of an assault upon a female, or not guilty. We have read the charge of the court in its entirety and it was fair to the State and fair to the defendant and applied the applicable law to the facts of the case. Reading the charge as a whole, error is not shown which would justify upsetting the verdict and judgment below.

All defendant's assignments of error have been considered and all are overruled. In the trial below we find

No error.

IN RE: APPLICATION OF REA CONSTRUCTION COMPANY FOR PERMIT TO BUILD ASPHALT MIXING PLANT IN THE CITY OF STATESVILLE.

(Filed 2 February, 1968.)

1. Municipal Corporations § 25—

A municipal board of adjustment is an administrative agency which acts in a *quasi*-judicial capacity and not as a law making body, and it has no authority to prohibit the construction of a building permitted by a zoning ordinance. G.S. 160-178.

2. Same—

Zoning ordinances are in derogation of the rights of private property and should be liberally construed in favor of freedom of use.

3. Same—

Where a zoning ordinance permits in a zoned district any use not inherently dangerous to urban areas and then further provides that mixing plants for concrete or paving materials are permitted in the district, the board of adjustment is without authority to deny an application for the construction of an asphalt mixing plant in the zoned district.

APPEAL by petitioner from *Gambill, J.,* at the 5 September 1967 Civil Session of IREDELL.

It is stipulated that this matter was properly before the superior court on a writ of *certiorari* issued by it for the review by that court of an order of the Board of Adjustment of the City of Statesville. The

order of the board revoked a permit issued by the city building inspector for the construction by Rea Construction Company of an asphalt mixing plant upon property owned by that company in an area of the city designated as an "M-1 General Industrial District."

It is further stipulated that the zoning ordinance provides as to such district:

> "This district provides a place for the location of industrial and other uses which would be inimical or incompatible with general business areas. It is intended to permit in this district any use which is not inherently obnoxious to urban areas because of noise, odors, smoke, light, dust, or the use of dangerous materials.
>
> "Within the M-1 districts as shown on the zoning map, incorporated by reference in section 22-17, the following regulation shall apply:
>
> "(A) PERMITTED USES.
>
> * * *
>
> "(6) Mixing plants for concrete or paving materials * * *."

It is further stipulated that the Board of Adjustment was duly created and appointed pursuant to G.S. 160-178 and pursuant to an ordinance of the city. This ordinance provides that an appeal may be taken to the board from a decision of the building inspector by any person aggrieved thereby, such appeal to be taken "within a reasonable time as provided by the rules of the board by filing * * * a notice of appeal specifying the grounds therefor." The ordinance further provides that the board shall have the power "to hear and decide appeals where it is alleged that there is error in any order, requirement, decision, or determination made by the building inspector."

The record certified by the Board of Adjustment to the superior court pursuant to the writ of *certiorari* shows:

On 25 May 1967, the applicant applied for a permit. Such permit was granted 7 June 1967 by the city building inspector. On 23 June 1967, certain citizens and property owners of the city, for themselves and for all other citizens and property owners, gave notice of appeal to the Board of Adjustment, in which notice they assert that the decision of the building inspector to grant the permit was "erroneous and illegal and contrary to the public interest in that the building as proposed and the business of processing or fabrication of asphalt paving material is one which is inherently obnoxious to urban areas because of noise, odors, smoke and a type of acid dust fall-

out * * * all of which is in violation of Section 22-29 of the City Code." The Board of Adjustment on 3 July 1967 met and heard the parties. It adopted unanimously a motion that the grant of the building permit be revoked "on the basis that the operation of this plant in this zone would be, upon completion, inherently obnoxious to this urban area because of dust and noise." Prior to the hearing, there were filed with the board petitions of numerous property owners in the city asserting their opinion that "this type industry would lower property values by the noise and residue from such a plant and trucks going into and coming from the location would spread asphalt particles on a road which even now is a problem for the city to keep clean." Also filed with the board prior to the hearing were affidavits from residents of the City of Salisbury stating, in substance, that the Rea Construction Company has an asphalt plant in that city, the noise, dust and odors from which are obnoxious and have damaged the values of the properties owned by these affiants.

In its petition for the writ of *certiorari,* the Rea Construction Company alleged that the decision of the Board of Adjustment was illegal because: (1) G.S. 160-178 provides that appeals to such a board shall be taken by filing a notice of appeal "within such time as shall be prescribed by the Board of Adjustment by general rule," and the ordinance of the city provides that such appeal shall be taken by filing a notice of appeal "within a reasonable time as provided by the rules of the board," and, no rule having been adopted by the Board of Adjustment, this notice of appeal was filed too late, the petitioner having, in good faith, completed its purchase of the property in question and paid the purchase price 15 days after the issuance of the permit (the day the notice of appeal was filed), without knowledge of any appeal therefrom; (2) the proposed use of the property is expressly permitted by the zoning ordinance above quoted and the petitioner is therefore entitled, as a matter of right, to build and operate the proposed plant subject to valid regulations for the prevention of nuisances by undue smoke, dust, noise or other disturbances.

The superior court affirmed the action of the Board of Adjustment, holding that the board was acting within its sound discretion in revoking the issuance of the permit and that its finding of fact, supported by evidence and made in good faith, is final.

Fleming, Robinson & Bradshaw for petitioner appellant.
L. Hugh West, Jr., for respondent appellee.

LAKE, J. In the issuance of building permits, a city building

inspector acts as an administrative agent and must follow the provisions of the zoning ordinance. *Lee v. Board of Adjustment,* 226 N.C. 107, 37 S.E. 2d 128. Where the applicant meets all the requirements of the ordinance he is entitled to the issuance of a permit as a matter of right and it may not lawfully be withheld. *Mitchell v. Barfield,* 232 N.C. 325, 59 S.E. 2d 810. A board of adjustment, authorized by G.S. 160-178, is also an administrative agency which acts in a *quasi*-judicial capacity, its principal function being to issue variance permits so as to prevent injustice by a strict application of the ordinance. *Lee v. Board of Adjustment, supra.* The board is not a law making body and has no power to amend the zoning ordinance either to permit the construction of a building prohibited by the ordinance or to prohibit the construction of one permitted by the ordinance. *In Re Markham,* 259 N.C. 566, 131 S.E. 2d 329; *Bryan v. Wilson,* 259 N.C. 107, 130 S.E. 2d 68; *Chambers v. Board of Adjustment,* 250 N.C. 194, 108 S.E. 2d 211; *In Re O'Neal,* 243 N.C. 714, 91 S.E. 2d 189; *James v. Sutton,* 229 N.C. 515, 50 S.E. 2d 300; *Lee v. Board of Adjustment, supra.* Thus, if the ordinance of the City of Statesville permits the construction in an M-1 general industrial district of the proposed asphalt plant, the building inspector acted properly in the issuance of the building permit in this instance and the Board of Adjustment had no authority to revoke the permit. We turn, therefore, to the ordinance to see whether such a building is authorized in such district.

A zoning ordinance, like any other legislative enactment, must be construed so as to ascertain and effectuate the intent of the legislative body. *Bryan v. Wilson, supra.* A zoning ordinance, however, is in derogation of the right of private property and provisions therein granting exemptions or permissions are to be liberally construed in favor of freedom of use. *In Re Couch,* 258 N.C. 345, 128 S.E. 2d 409; *In Re Appeal of Supply Co.,* 202 N.C. 496, 163 S.E. 462.

The ordinance in question first states, in general terms, that it is intended to permit in an M-1 general industrial district any use which is not "*inherently* obnoxious to urban areas because of noise, odors, smoke, light, dust or the use of dangerous materials." (Emphasis added.) It does not, however, stop with this declaration of intent. It goes further and expressly provides that "mixing plants for concrete or paving materials" are permitted in such districts. Asphalt is obviously a paving material. Whether this provision in the ordinance be regarded as a legislative provision for an exception to the general prohibition of a use which is inherently obnoxious to urban areas because of noise, odors, smoke, light, dust, or the use of dangerous materials, or be regarded as a declaration by the legislative

body that an asphalt mixing plant is not inherently obnoxious, the ordinance expressly permits the construction and use of an asphalt plant in an M-1 general industrial district. The Board of Adjustment has no authority to prohibit that which the city council has expressly permitted in the ordinance. Its order directing the revocation of the permit issued by the building inspector was, therefore, in excess of its authority.

This is not to say that an asphalt plant constructed and operated in an M-1 general industrial district is not subject to regulations, otherwise valid, designed to prevent its operation in such a manner as to produce obnoxious noise, odors, smoke, or dust. The question is not before us in the present case. See *Mitchell v. Barfield, supra.*

It is also unnecessary for us to consider the contention of the appellant that the protestants' notice of appeal to the Board of Adjustment was not filed within the time allowed therefor, or its contention that, having purchased the property in good faith without knowledge of the contemplated appeal and after waiting 15 days to see if such appeal would be taken, the appellant acquired a right to the permit which it would not otherwise have.

The order of the superior court is hereby reversed. The superior court will remand this proceeding to the proper city authorities with direction that a permit issue, unless cause for denial of such permit has arisen since the order entered by the Board of Adjustment.

Reversed.

ODIS FLETCHER KENDRICK, ADMINISTRATOR OF THE ESTATE OF JIMMY RAY KENDRICK, v. GLENN WINFRED CAIN AND GEORGE E. HADDOCK.

(Filed 2 February, 1968.)

1. Death § 3—

The wrongful death statute, G.S. 28-173, gives but one cause of action for damages for the death of a person and contemplates that damages be recoverable as one compensation in a lump sum.

2. Torts § 7—

A release of one joint tort-feasor releases all.

3. Appeal and Error § 9—

The Supreme Court will not hear an appeal when the subject matter of the litigation between the parties has been settled or has ceased to exist.

4. Death § 3; Torts § 6—

Where plaintiff administrator in an action for wrongful death accepts the sum of money paid over to the clerk of court by one joint tort-feasor

in satisfaction of the judgment rendered against him, plaintiff's action against the other joint tort-feasor is thereby extinguished, and plaintiff may not thereafter appeal from a judgment of nonsuit granted in favor of the other tort-feasor.

5. Judgments § 47—

Payment to the clerk by the party liable on a judgment discharges the judgment even though the clerk fails to enter the satisfaction thereof upon the judgment index, the judgment debtor being under no duty to require the clerk to make the entries of payment and the clerk being in effect the statutory agent of the owner of the judgment. G.S. 1-239.

APPEAL by plaintiff from *McConnell, J.*, 3 April 1967 Civil Session of RANDOLPH.

Civil action instituted by the duly qualified administrator of the estate of Jimmy Ray Kendrick to recover damages for wrongful death resulting from a collision between the vehicles operated by defendants Glenn Cain and George Haddock. Plaintiffs' intestate was a passenger in the Haddock vehicle.

Plaintiff's action against defendants, as joint tort-feasors, alleged actionable negligence on the part of each defendant proximately causing the death of plaintiff's intestate.

We do not deem it necessary to recite the evidence.

At the close of plaintiff's evidence, defendant Cain's motion for judgment as of nonsuit was allowed.

The issues submitted to the jury and the verdict thereon are as follows:

"1. Was the death of plaintiff's intestate caused by the negligence of defendant George E. Haddock, as alleged in the Complaint?

Answer: Yes.

2. What amount, if any, is plaintiff entitled to recover?

Answer: $10,000.00 (Ten Thousand and No/100)."

Judgment was entered on the verdict, and the judgment roll, which is on file in the office of the clerk of superior court of Randolph County and which was made a part of this record on appeal, shows that defendant George E. Haddock caused to be paid into the office of the clerk superior court of Randolph County the sum of $10,000.00, the full amount of the judgment against him, and that thereafter the plaintiff, through his attorney, acknowledged receipt of said funds, and the said judgment roll further shows that the costs of this action, which were charged against defendant Haddock, were paid in full.

Plaintiff apeals as to defendant Cain.

John Randolph Ingram for plaintiff-appellant.
Jordan, Wright, Henson & Nichols for defendant-appellee.

BRANCH, J. Plaintiff's action is brought under the wrongful death statute, G.S. 28-173, *et seq.*, against defendants as joint tort-feasors.

Appellee Cain contends that plaintiff can have only one recovery and that when plaintiff accepted the full amount of the judgment entered against defendant Haddock, plaintiff's appeal became moot. The statute (G.S. 28-173, *et seq.*) contemplates only one cause of action, and when the action is brought by the personal representative, the judgment is conclusive on other persons, and the right given by the statute is exhausted. 16 Am. Jur., Death, § 161, p. 103.

Clearly, the statute contemplates that if plaintiff be entitled to recover at all, he is entitled to recover as damages one compensation in a lump sum. *Ledford v. Lumber Co.*, 183 N.C. 614, 112 S.E. 421; *Bell v. Hankins*, 249 N.C. 199, 105 S.E. 2d 642. He is not entitled to recover the whole sum from each of the joint tort-feasors. *Watson v. Hilton*, 203 N.C. 574, 166 S.E. 589.

Although a covenant not to sue, procured by one tort-feasor, does not release the other from liability, *Ramsey v. Camp*, 254 N.C. 443, 119 S.E. 2d 209, it is a well settled doctrine of the law that a release of one joint tort-feasor ordinarily releases them all. *MacFarlane v. Wildlife Resources Com.*, 244 N.C. 385, 93 S.E. 2d 557; *King v. Powell*, 220 N.C. 511, 17 S.E. 2d 659.

In the case of *Sircey v. Rees' Sons*, 155 N.C. 296, 71 S.E. 310, plaintiff, employee of Southern Railway Company, was injured when employer's train was being backed onto defendant's siding. Plaintiff alleged defendant was negligent in placing tan bark so near the track as to cause his injury. The complaint stated facts sufficient to show joint negligence of defendant and the railway company. At the trial, defendant relied on a release given by plaintiff to Southern Railway Company. The trial court dismissed the action. Affirming the decision of the trial court, this Court quoted with approval from Cooley, J., on Torts as follows:

> " 'It is to be observed in respect to the point above considered, where the bar accrues in favor of some of the wrongdoers by reason of what has been received from or done in respect to one or more others, that the bar arises, not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent. Therefore, if he accepts the satisfaction voluntarily made by one, that is a bar to all. And so a release

> of one releases all, . . . It is immaterial whether the satisfaction is obtained by judgment and final process in execution of it, or by amicable adjustment without any litigation of the claim for damages. The essential thing is satisfaction. . . ."

Further, as a general rule this Court will not hear an appeal when the subject matter of the litigation has been settled between the parties or has ceased to exist. *Cochran v. Rowe,* 225 N.C. 645, 36 S.E. 2d 75; *In re Estate of Thomas,* 243 N.C. 783, 92 S.E. 2d 201; *Simmons v. Simmons,* 223 N.C. 841, 28 S.E. 2d 489.

In 4 Am. Jur. 2d, Appeal and Error, (3) Acceptance of Benefits of Judgment or Decree, § 250, p. 745, it is stated:

> "A party who accepts an award or legal advantage under an order, judgment, or decree ordinarily waives his right to any such review of the adjudication as may again put in issue his right to the benefit which he has accepted. This is so even though the judgment, decree, or order may have been generally unfavorable to the appellant."

Appellant contends that his acceptance of the full amount of the judgment against defendant Haddock did not affect his right to appeal, since the word "satisfied" was not entered upon the judgment index. There is no merit to this contention, since the effect of G.S. 1-239 is to make the clerk the statutory agent of the owner of a judgment, and it is the clerk's duty to pay money received thereunder to the party entitled thereto. The clerk and his surety would be liable to the owner of the judgment for any loss which he might suffer because of the clerk's failure to perform his statutory duty. There is no duty on the party making payment to require the clerk to make an entry on the judgment docket. *Dalton v. Strickland,* 208 N.C. 27, 179 S.E. 20.

In the instant case, the record shows that defendant Haddock paid the sum necessary to satisfy the judgment to the clerk, and the clerk duly paid the sum to the party entitled to it. Thus the plaintiff is not aggrieved by the failure of the clerk to enter the word "satisfied" on the judgment docket.

Here, the subject of the litigation has been disposed of by entry of judgment and satisfaction has been obtained by plaintiff by acceptance of the amount awarded by the judgment. Upon acceptance of the "fruits of the judgment" plaintiff's action against defendant Cain was extinguished.

Appeal dismissed.

MARGARET ANN DUNNING BY HER NEXT FRIEND, WALTER F. SOWERS, v. FORSYTH WAREHOUSE CO., T/A STAR WAREHOUSE.

(Filed 2 February, 1968.)

1. Negligence § 1—

Negligence is the failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances in which they are placed, and the breach of duty may be by a negligent act or by a negligent failure to act.

2. Municipal Corporations § 12; Negligence § 34—

While a municipality is ordinarily responsible for the condition of its sidewalks, G.S. 160-54, the owner or occupant of abutting property may be held liable for injuries resulting from a defect in the sidewalk created by it.

3. Negligence § 34—

Evidence that defendant constructed a drainage culvert under a sidewalk adjoining its warehouse, that defendant placed over the excavation a covering of concrete supported by a thin metal sheet, that the concrete had become broken but that the metal sheet was intact, although corroded, and that plaintiff's heel was injured when the sheet gave way under plaintiff's weight, *held* sufficient to be submitted to the jury on the issue of defendant's negligence and insufficient to show that plaintiff was contributorily negligent as a matter of law.

APPEAL by plaintiff from *Gambill, J.*, February 13, 1967 Session, FORSYTH Superior Court.

The plaintiff, Margaret Ann Dunning, by her next friend, instituted a civil action on December 15, 1959 to recover damages for injuries allegedly caused by the negligence of Forsyth Warehouse Co., t/a Star Warehouse. The plaintiff alleged that on May 30, 1959 she was seriously injured when a metal covering over a drainage culvert broke under her foot as she walked along the sidewalk on which the defendant's property abutted. The jagged edge of the broken metal severed her Achilles tendon, causing serious and permanent injury.

In particular, the plaintiff alleged the Star Warehouse (without a permit required by the Winston-Salem city ordinance) cut through and removed a narrow cross-section of the city's concrete sidewalk for the purpose of constructing a drainage culvert to carry surface water from its building under the sidewalk and into the city's drainage system. After the excavation the defendant placed over the culvert a thin metal sheet, and on top of this metel sheet poured a covering of concrete sufficient to make the surface conform to the undisturbed portion of the sidewalk. This concrete covering had a thickness of 1 to 1½". The metal sheet, weakened by corrosion, gave way when plaintiff stepped on it.

The plaintiff and two companions were walking along the sidewalk adjacent to the defendant's building. The plaintiff was nearest the curb when she stepped on the metal covering partially concealed by weeds or grass. Her weight caused the metal cover to give way. The City of Winston-Salem was made an additional defendant.

At the trial of the cause in January, 1961, Judge Crissman sustained motions for nonsuit and dismissed the action. This Court, on January 12, 1962, affirmed the judgment. The evidence and pleadings are analyzed and discussed in this Court's opinion which is reported in 256 N.C. 190.

The plaintiff instituted the present action on February 13, 1962. In addition to the evidence produced at the former trial, the plaintiff's new evidence disclosed that Blum Construction Co., as contractors for the defendant, installed the culvert in the manner heretofore disclosed, and according to the defendant's plans and specifications.

At the conclusion of the plaintiff's evidence, Judge Gambill entered judgment of involuntary nonsuit stating as grounds therefor: (1) the plaintiff's failure to show negligence on the part of the defendant, and (2) the evidence shows contributory negligence on the part of the plaintiff.

The plaintiff excepted and appealed.

John F. Montsinger; Deal, Hutchins and Minor by Roy L. Deal for plaintiff appellant.

Hudson, Ferrell, Petree, Stockton, Stockton & Robinson by Norwood Robinson for defendant appellee.

HIGGINS, J. On the former appeal, this Court affirmed the judgment of nonsuit and dismissed the action against the City of Winston-Salem upon the ground the plaintiff had failed to give the notice required as a condition precedent to a suit against the city. This Court also affirmed the nonsuit of the action against the present defendant upon the ground the evidence failed to show the defendant created or was responsible for the dangerous condition of the sidewalk. The evidence did not disclose who constructed the dangerous culvert, placed a thin metal sheet over the top, then added enough concrete over the metal to make the surface even with the sidewalk.

However, the allegation and evidence against the defendant permit a finding that at the time the defendant constructed its warehouse, the city ordinance required a permit for the construction of the drainage culvert. The contractor for the warehouse actually cut the concrete surface of the sidewalk and constructed the culvert. At the time the plaintiff received her injuries, the concrete covering

over the metal sheet near the street where the plaintiff was walking had been broken, but the metal strip was intact. The plaintiff, walking nearest the street, stepped on this metal sheet which, because of rust and corrosion, gave way under her weight. The jagged edge of the metal severed the Achilles tendon, causing serious and permanent injuries.

The plaintiff's right to recover must have its foundation in negligence. "Negligence is the failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them. *Mattingly v. R. R.*, 253 N.C. 746, 117 S.E. 2d 844. The breach of duty may be by negligent act or a negligent failure to act. *Williams v. Kirkman*, 246 N.C. 510, 98 S.E. 2d 922." *Moore v. Moore*, 268 N.C. 110, 150 S.E. 2d 75.

Ordinarily, a municipality is responsible for the condition of its sidewalks. G.S. 160-54; *Hester v. Traction Co.*, 138 N.C. 288, 50 S.E. 711. However, one other than the municipality may be held liable for injuries caused by a defect in the sidewalk if he created the defect. *Seagraves v. Winston (and Crawford Plumbing Co.)*, 170 N.C. 618, 87 S.E. 507; *Childress v. Lawrence*, 220 N.C. 195, 16 S.E. 2d 842; *Hedrick v. Akers*, 244 N.C. 274, 93 S.E. 2d 160. ". . . (I)nsofar as pedestrians are concerned, any liability of owner, or of occupant of abutting property for hazardous condition existent upon adjacent sidewalk is limited to conditions created or maintained by him, and must be predicated upon his negligence in that respect." *Klassette v. Drug Co.*, 227 N.C. 353, 42 S.E. 2d 411; *McCarthy v. Shaheen*, 264 Mass. 90, 161 N.E. 878; *Rupp v. Burgess*, 70 N.J.L. 7, 56 A. 166, 88 A.L.R. 2d 363; *Hughes v. City of New York*, 236 N.Y.S. 2d 446; *Boetsch v. Kennedy*, 9 N.J. Misc. 390, 154 A. 194, 88 A.L.R. 2d 363.

The evidence at the trial was sufficient to permit the jury to find the defendant created the defective condition which resulted in plaintiff's injuries. The Court's judgment of nonsuit because of failure to show defendant's negligence was error. However, defendant having pleaded plaintiff's contributory negligence, the judgment of nonsuit may be sustained if plaintiff's contributory negligence appears as a matter of law. *Hedrick v. Akers, supra,* citing many cases.

Did the plaintiff prove herself out of court by showing her own contributory negligence as a matter of law? The evidence permits the inference that a 1½" covering of concrete over the metal was broken, but the evidence also discloses, or at least permits the inference, that the metal covering was unbroken, its defective condition not ordinarily observable until it gave way under the plaintiff's weight. *Bailey v. Asheville*, 180 N.C. 645, 105 S.E. 326. The new evi-

dence that defendant was responsible for the defective condition supplied the deficiency in the evidence as determined by our former opinion. The evidence presented jury questions. The nonsuit was improvidently granted.

Reversed.

JOHN ROBERT TAYLOR AND WIFE, JULIA E. TAYLOR, v. H. F. BOWEN, BUILDING INSPECTOR FOR THE CITY OF FAYETTEVILLE; MONROE E. EVANS, MAYOR OF THE CITY OF FAYETTEVILLE; CHARLES HOLT, HARRY SHAW, JOHNNY JOYCE AND GENE PLUMMER, COUNCILMEN OF THE CITY OF FAYETTEVILLE, AND THE CITY OF FAYETTEVILLE, A MUNICIPAL CORPORATION.

(Filed 2 February, 1968.)

1. Municipal Corporations § 2—

When a municipal corporation is established it takes control of the territory and affairs over which it is given authority to the exclusion of other governmental agencies.

2. Municipal Corporations § 25—

In enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State.

3. Constitutional Law § 11—

The police power of the State cannot be bartered away by contract or lost by any other mode.

4. Municipal Corporations § 25—

Where property within the zoning authority of one municipal corporation is lawfully annexed by another municipal corporation, the zoning authority of the prior municipality becomes ineffectual immediately upon the annexation.

APPEAL by plaintiffs from *Nimocks, E.J.*, February 13, 1967 Civil Session, CUMBERLAND Superior Court.

By Chapter 1455, Session Laws of 1957, the General Assembly authorized the Board of Commissioners of Cumberland County to exercise zoning powers over a tract of land adjoining the northern boundary of Fayetteville. The area embraced in the Act is rectangular in shape. The eastern and western lines are 300 feet long. The northern and southern lines are 600 feet long, plus the width of the U. S. Highway 401 right of way. The Act, after giving the specific calls of the above boundary, contains this additional description: ". . . (P)lus all of the acreage belonging to Methodist College, Inc."

The facts are not in dispute. The plaintiffs own a parcel of land in the above described rectangular area. On June 5, 1961 the Cumberland County Commissioners adopted a zoning ordinance according to the plans of its "College Community Planning Board", zoning as R-15 "Residential" that part of the area which includes plaintiffs' land. Effective September 25, 1961 the City of Fayetteville extended its corporate limits northward to include that portion of the area in which the plaintiffs' land is located. The city authorities thereupon zoned the area as residential.

On May 3, 1966 the College Community Planning Board attempted to rezone plaintiffs' property as C-1 "Commercial". On September 19, 1966 the Cumberland County Board of Commissioners attempted, by resolution, to approve the action of the Planning Board.

On September 27, 1966 the plaintiffs applied to the defendant Bowen, City Building Inspector, for a permit to erect a commercial building on this land. The Building Inspector refused to issue a permit for a commercial structure. The plaintiffs brought this action for *mandamus* to compel the authorities to issue the requested permit. The parties waived a jury trial. Judge Nimocks found the facts, in substance as heretofore summarized, and thereupon concluded: ". . . (A)s a matter of law that the plaintiffs are not entitled to the relief prayed for in their Complaint" and dismissed the action. The plaintiffs excepted and appealed.

Williford, Person & Canady by N. H. Person for plaintiff appellants.

Harry B. Stein for defendant appellees.

HIGGINS, J. The question of law presented by this appeal is simple. Did the Community College Planning Board and the Cumberland County Board of Commissioners lose zoning jurisdiction and did the City of Fayetteville acquire that jurisdiction when the area became a part of the city by annexation? The general rule is stated by Barnhill, J. (later C.J.) in *Parsons v. Wright,* 223 N.C. 520, 27 S.E. 2d 534: "When a municipal corporation is established it takes control of the territory and affairs over which it is given authority to the exclusion of other governmental agencies." See also *Schloss v. Jamison,* 262 N.C. 108, 136 S.E. 2d 691.

"In enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State. *Kinney v. Sutton,* 230 N.C. 404, 53 S.E. 2d 306; *Elizabeth City v. Aydlett,* 201 N.C. 602, 161 S.E. 78. . . . In the very nature of

things, the police power of the State cannot be bartered away by contract, or lost by any other mode." *Raleigh v. Fisher,* 232 N.C. 629, 61 S.E. 2d 897; G.S. 160-172-181.2, inclusive.

Cities and towns have statutory authority to extend their boundaries to include adjacent areas. ". . . (T)he territory and its citizens and property shall be subject to all debts, laws, ordinances and regulations in force in said city or town and shall be entitled to the same privileges and benefits as other parts of said city or town. . . ." G.S. 160-445; *Power Co. v. Membership Corp.,* 253 N.C. 596, 117 S.E. 2d 812.

The prior zoning of the plaintiffs' property by the Cumberland County Board of Commissioners and its College Community Planning Board did not carry over and bind the zoning authorities of Fayetteville after the annexation. "Where the land was previously zoned as a part of the municipality . . . in which it lay, the prior zoning becomes ineffective immediately upon such incorporation or annexation since it is a well recognized rule that two municipal corporations do not have co-extensive powers of government over the same area and that municipal power may only be exercised within the limits of the municipality." 1 Rathkoph, *The Law of Zoning and Planning,* 3d Ed., Chapt. 25, § 3; *Beshore v. Bel Air,* 237 Md. 398, 206 A. 2d 678; *Schneider v. Lazarov,* 216 Tenn. 1, 390 S.W. 2d 197; *City of Highland Park v. Calder,* 269 Ill. App. 255.

The amendment to G.S. 160-176 passed in 1965 providing a 60 days transition period between annexation and the effective date of the city zoning ordinances has no application to this proceeding. Neither is it necessary for us to pass on the constitutionality of Chapter 1455, Session Laws of 1957, although discussed in both briefs. The zoning power of the County Board of Commissioners over the land annexed by the city did not survive the annexation. The order of Judge Nimocks denying *mandamus* is

Affirmed.

STATE OF NORTH CAROLINA v. WILLIAM McIVER COOK.

(Filed 2 February, 1968.)

1. Indictment and Warrant § 9—

A warrant or 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, but if the statutory words fail to charge the offense they must be supplemented by other allegations supplying the deficiency.

2. Automobiles § 3—

A warrant charging that defendant operated a motor vehicle while his license was revoked fails to charge the offense defined in G.S. 20-28(a), it being necessary to charge that defendant operated the vehicle on a public highway.

3. Indictment and Warrant § 9—

A warrant which is fatally defective because of its failure to charge a criminal offense is not cured by a reference in the warrant to the statute.

4. Criminal Law § 127—

Arrest of judgment for a fatally defective warrant does not bar further prosecution upon a valid warrant.

APPEAL by defendant from *Bundy, J.*, May 1967 Criminal Session of DURHAM.

Defendant was tried in the General Court of Justice, District Criminal Court Division. He appealed from the judgment of that court and was tried *de novo* in the superior court.

Defendant was tried on a warrant in the superior court which charged that

> ". . . at and in the County named above (Durham) and on or about the 23rd day of December, 19 , the defendant named above did unlawfully, wilfully and driving while his license were revoked. Having been convicted in Raleigh Court for driving under the influence on April 12, 1966. License revoked from April 12th 1966 to April 12th, 1967.
>
> "The offense charged here was committed against the peace and dignity of the State and in violation of law G.S. 20-28."

The warrant was sworn to and subscribed by complainant on 11 January 1967.

Prior to empaneling the jury, defendant moved to quash the warrant. The motion was denied. Defendant entered a plea of not guilty. At the close of the State's evidence, defendant moved for judgment as of nonsuit and renewed the motion to quash. The motions were denied. The jury returned a verdict of guilty as charged. Defendant's motion to set aside the verdict as being contrary to the greater weight of the evidence was denied. Defendant moved in arrest of judgment. Motion was denied.

Defendant appealed.

Attorney General Bruton, Assistant Attorney General Melvin, and Staff Attorney Costen for the State.

Blackwell M. Brogden for defendant.

BRANCH, J. G.S. 20-28(a) in pertinent part provides:

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

The Court considered the validity of a warrant which purported to charge a violation of G.S. 2-28(a) in *State v. Sossamon,* 259 N.C. 374, 130 S.E. 2d 638. There the warrant charged:

> ". . . that defendant on March 26, 1961, in No. 4 Township, Cabarrus County, 'did unlawfully, willfully, operate a motor vehicle upon the public highways of North Carolina after his license had been revoked or suspended by the Department of Motor Vehicles in violation of 20-28 of the Motor Vehicles Laws of North Carolina, this being the defendant's second offense of the aforesaid crime, the same offender, D. H. Sossamon, Jr., having been convicted theretofore on or about the 29th day of February 1960, in the Cabarrus County Recorders Court of the offense of driving after his license was suspended,' . . ."

Upon trial in Superior Court the jury returned a verdict of "Guilty of operating a motor vehicle on the public highways during and while his license was revoked." Defendant's motion in arrest of judgment was denied. From judgment entered on the verdict, defendant appealed. Holding that failure to allege the operation occurred *while* such license was suspended or revoked was a fatal defect, the Court arrested judgment and, speaking through Bobbitt, J., stated:

> "A warrant or 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; *S. v. Eason,* 242 N.C. 59, 86 S.E. 2d 774. 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 offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged.' *S. v. Cox, supra,* and cases cited.
>
> "The reference in the amended warrant to G.S. 20-28 discloses an intent to charge a violation of the offense defined therein. However, '(m)erely charging in general terms a breach of the statute and referring to it in the indictment is not sufficient.' *S. v. Ballangee,* 191 N.C. 700, 702, 132 S.E. 795, and cases cited."

To constitute a violation of G.S. 20-28(a) there must be (1) operation of a motor vehicle by a person (2) on a public highway (3) while his operator's license is suspended or revoked. *State v. Blacknell,* 270 N.C. 103, 153 S.E. 2d 789.

In the instant case the warrant does not charge that defendant operated a motor vehicle on a public highway. Thus the warrant fails to allege an essential element of the offense as defined in G.S. 20-28(a). This defect is not cured by reference in the warrant to the statute. The reference shows intent to charge a violation of the statute, but "merely charging in general terms a breach of the statute and referring to it in the indictment is not sufficient." *State v. Sossamon, supra.*

Since it appears on the face of the warrant that an essential element of the offense defined in G.S. 20-28(a) has not been alleged, we hold the warrant to be fatally defective. The judgment must be arrested, but this does not bar further prosecution on a valid warrant. *State v. Sossamon, supra.*

Judgment arrested.

RAND ALGERNON WALL, AND RAND ALGERNON WALL, JR., BY HIS NEXT FRIEND, RAND ALGERNON WALL, v. EDWARD LEE TIMBERLAKE.

(Filed 2 February, 1968.)

Trial § 56; Appeal and Error § 57—

Where trial is had in the inferior court without a jury, the resolution of conflicting evidence is a matter for the court, and where the evidence is sufficient to support the findings and when error of law does not appear upon the face of the record proper, the judgment will not be disturbed on appeal.

APPEAL by defendant from *Carr, J.,* May 15, 1967 Civil Session, DURHAM Superior Court.

The plaintiff, Rand Algernon Wall, individually and as next friend of his minor son, Rand Algernon Wall, Jr., instituted this civil action against Edward Lee Timberlake in the Durham County Civil Court on January 18, 1966 for the purpose of recovering damage to the automobile owned by the plaintiff and personal injuries to the minor plaintiff as a result of an automobile collision at the intersection of Mallard Avenue and Elizabeth Avenue in the City of Durham. The collision occurred on December 19, 1964 at approximately 6:43 p.m. as Wall, Jr. was driving his father's 1960 Ford

westwardly along Mallard Avenue at its intersection with Elizabeth Avenue. The defendant, driving a 1956 Chrysler south on Elizabeth Avenue collided with the Wall Ford, causing property damage in the alleged amount of $900 and personal injuries for which the plaintiff claims $250 for pain and suffering and $107.35 for medical expenses.

According to the plaintiffs' pleadings and evidence, Wall, Jr. entered and had almost completed passage through the intersection when the defendant, driving south on Elizabeth Avenue, struck the right rear of the Wall Ford, causing the damage and the personal injuries.

The defendant filed answer denying any negligence on his part, alleging that he was on the right and that the two vehicles entered the intersection at or near the same time, and that he, having the right of way, was free of negligence and that the plaintiff, Wall, Jr., was negligent in entering and attempting to pass through the intersection in violation of the traffic laws. The defendant filed a counterclaim alleging that Wall, Jr. was entirely at fault in causing the collision and damage of $375 to the Chrysler. The plaintiffs filed a reply denying the counter-claim.

After the filing of the pleadings and before trial, the case was transferred to the newly created District Court of Durham County and came on for trial and was heard by District Judge Moore who made detailed findings of fact, among them the following:

"6. Before the plaintiff Rand Algernon Wall, Jr. entered the said intersection, he slowed down and looked in both directions and not seeing any vehicles proceeding north or south on Elizabeth Avenue, he carefully proceeded across the intersection at a speed of approximately 20 miles per hour.

* * *

8. The plaintiff Rand Algernon Wall, Jr. had entered the intersection first before the defendant and had established his right of way therein and the defendant failed to yield the right of way to the plaintiff's automobile, which was already in the intersection.

* * *

11. The defendant's failure to yield the right of way to the plaintiff's automobile, his failure to decrease the speed of his vehicle to avoid a collision, and his driving without keeping a proper lookout, was the sole and proximate cause of the personal injuries to Rand Algernon Wall, Jr. and of the damages to the automobile owned by the plaintiff Rand Algernon Wall."

The Court answered issues of negligence, contributory negligence and damages in favor of the plaintiffs and entered judgment for $857.35 for the property damage and costs of hospital bills, and $150 for the benefit of the minor plaintiff on account of his pain and suffering. The Court awarded $50 for plaintiffs' attorney.

The defendant filed exceptions to the findings and judgment and appealed to the Superior Court. The cause came on for hearing before Judge Carr who, after review, affirmed the judgment of the District Court. The defendant appealed to the Supreme Court.

Bryant, Lipton, Bryant and Battle by Alfred S. Bryant for defendant appellant.

Watkins & Jarvis by Jerry L. Jarvis for plaintiff appellees.

HIGGINS, J. The trial in the District Court was without a jury. Judge Moore heard the evidence, found and recorded the pertinent facts upon the basis of which he answered issues in favor of the plaintiffs, fixed the amount of damages resulting from the defendant's negligence and entered judgment in favor of the plaintiffs. The defendant appealed to the Superior Court, assigning as error: (1) The finding of negligence on the part of the defendant, and (2) The failure to find the plaintiff was contributorily negligent.

Judge Carr reviewed the record and properly determined the evidence before the District Court was sufficient to support the findings and the judgment. The resolution of the conflicts in the evidence was the function of the District Court. The appellate courts approve when the evidence is sufficient to warrant the findings and when error of law does not appear on the face of the record. *MacKay v. McIntosh,* 270 N.C. 69, 153 S.E. 2d 800; *Jenkins v. Castelloe,* 208 N.C. 406, 181 S.E. 266.

The judgment entered in the Superior Court is

Affirmed.

STATE v. CRAVEN LEACH.

(Filed 2 February, 1968.)

1. Searches and Seizures § 1—

Where officers approaching defendant's automobile find three jars of nontax-paid whiskey within two feet of the front right wheel, and upon shining his light upon the front of the car one officer sees two jars of liquor in the grille of the car, the officers have a right to seize the

liquor without a search warrant and the evidence obtained thereby is competent.

2. Intoxicating Liquor § 15—

Evidence of the State that two jars of nontax-paid whiskey were found in the grille of defendant's automobile and that defendant was seen in the immediate vicinity of the automobile at the time of discovery, *held* sufficient to show a constructive possession of the liquor, and defendant's motion for judgment as of nonsuit is properly denied.

3. Criminal Law § 168—

An exception to the charge will not be sustained when the charge, considered contextually, is free from prejudicial error.

APPEAL by defendant from *Canaday, J.*, Second February 1967 Regular Criminal Session of WAKE.

Defendant was charged under bill of indictment and tried for (1) possession of nontax-paid alcoholic beverages in violation of N. C. G.S. 18-48, and (2) possession of illicit liquors for the purpose of sale, in violation of N. C. G.S. 18-50. Defendant pleaded not guilty to both charges.

The State offered as a witness E. D. Whitley of the Detective Bureau, Raleigh Police Department, who testified that he knew defendant and that he had occasion to see him on 27 July 1966. At this point counsel for defendant objected and moved to suppress any further evidence as to where the officer saw defendant. Whereupon the jury was excused and a *voir dire* examination held. On *voir dire* Whitley testified, in substance, that he and other officers went to the residence of Carrie Stallings with a search warrant to search her premises. The search warrant had been issued by a desk officer. As they approached the house, defendant, who did not reside there, came to the front door. After being told that the officers wanted to speak to Carrie Stallings, he left. Shortly thereafter, the officers observed a 1955 Oldsmobile parked in the driveway outside a fence, which fence partially enclosed the yard to the residence of Carrie Stallings. Three half-gallon jars of nontax-paid whiskey were found in grass about two feet from the right front wheel of the 1955 Oldsmobile. Upon shining a flashlight on the car, they saw two jars of liquor in the grille of the car. The whiskey and the car were seized, and it was determined that the automobile belonged to defendant. Defendant later came to the police station and claimed possessions taken from the automobile. At that time he stated he knew nothing about the liquor; that he had gone to a movie, and that when he returned to the place where he had parked the car, it was gone. Defendant offered no evidence, and at the conclusion of the *voir dire* hearing the trial judge, *inter alia*, found: ". . . that said liquor was

in plain view and that a search to discover said liquor was not necessary nor required and that a search warrant as authority to search for said liquor was not required; whereupon the motion to suppress the evidence is denied."

Over defendant's objection and motion to suppress the evidence on the ground of illegal search and seizure, Whitley's testimony was essentially the same as was elicited from him on *voir dire* examination. Additionally, he identified State's Exhibit 1 as nontax-paid whiskey found in the grille of defendant's automobile, and further stated: "The first thing I did when I saw the car, I walked between the car and the bushes which were right beside of the car and when I approached the front fender and the edge of the bushes and I looked down and that is where I saw three jars of nontax-paid whiskey. . . ."

"After I picked one of the jars up and examined it, I smelled it, took the top off and smelled it. At that time, I sit the jar back down. Then I looked around the area some more and then looked in the grille of the car and saw it in the grille of the car. . . . The first time I saw the whiskey behind the grille and near the grille of the car, I was standing in front of the car. I was standing up looking down. I was not stooped over or anything."

The State offered evidence that a latent fingerprint was lifted from one of the jars seized and that this fingerprint and the right thumbprint of defendant, taken after his arrest, were turned over to W. M. Parker, Sr., supervisor of the Identification Bureau, City-County Bureau of Records and Identification for Wake County and the City of Raleigh.

Mr. Parker testified that in his opinion the right thumbprint and the latent fingerprint were identical to those that appeared on the fingerprint card in the files of the City-County Bureau of Identification for Craven Leach.

Defendant's motions for nonsuit made at the conclusion of the State's evidence and again after defendant offered no evidence, were denied. The jury found defendant guilty of possession of nontax-paid whiskey and not guilty of possession of nontax-paid whiskey for the purpose of sale. Defendant's motions in arrest of judgment, to set aside the verdict as being against the greater weight of the evidence, and for a new trial, were denied. Judgment was entered on the verdict.

Defendant appealed.

Attorney General Bruton and Staff Attorney Ralph A. White, Jr., for the State.

Carl C. Churchill, Jr., for defendant.

PER CURIAM. Defendant contends that the trial court erred in admitting into evidence the nontax-paid liquor and the testimony concerning the finding and seizing of the liquor.

> "In *S. v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736, the Court, after quoting the second sentence of G.S. 15-27.1, said:
>
> " 'To render evidence incompetent under the foregoing section, it must have been obtained (1) "in the course of . . . search," (2) "under conditions requiring a search warrant," and (3) without a legal search warrant. The purpose of this and similar enactments (G.S. 15-27) was "to change the law of evidence in North Carolina, and not the substantive law as to what constitutes legal or illegal search." Therefore a search that was legal without a warrant before these enactments is still legal, and evidence so obtained still competent. 30 N. C. Law Review 421. It will be noted that the statutes use the phrase "under conditions requiring a search warrant." No search warrant is required where the officer "sees or has absolute personal knowledge" that there is intoxicating liquor in an automobile. . . .' *State v. Stevens,* 264 N.C. 737, 142 S.E. 2d 588. See also *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741.

In the case of *State v. Giles,* 254 N.C. 499, 119 S.E. 2d 394, officers were pursuing a speeding automobile in the nighttime. After apprehending defendant, who had stopped the car and fled on foot, they shone a light in the back of the car and saw cases of liquor between the back seat and the "boot." The Court, holding that the officers had the right to seize the liquor without a warrant and that the evidence obtained thereby was competent, stated:

> " 'Where no search is required, the constitutional guaranty is not applicable. The guaranty applies only in those instances where the seizure is assisted by a necessary search. It does not prohibit a seizure without a warrant where there is no need of a search, and where the contraband subject matter is fully disclosed and open to the eye and hand.' "

In the instant case, upon objection to admission of the nontax-paid liquor and the evidence relating thereto, the trial court conducted a lengthy *voir dire* examination, found facts, and denied the motion to suppress. This was proper, as the officer saw and had absolute personal knowledge that there was intoxicating liquor in the automobile, and no search warrant was required to make the search and seizure legal.

The trial judge correctly denied defendant's motions for nonsuit.

"Possession of nontax-paid whiskey in any quantity anywhere in the State is unlawful. G.S. 18-48. *S. v. Barnhardt,* 230 N.C. 223, 52 S.E. 2d 904; *S. v. Parker,* 234 N.C. 236, 66 S.E. 2d 907. And possession, within the meaning of the statute, may be either actual or constructive. . . ." *State v. Brown,* 238 N.C. 260, 77 S.E. 2d 627.

The evidence here was sufficient to carry the case to the jury on the question of constructive possession of nontax-paid whiskey and to support the verdict of the jury.

The defendant assigned numerous errors to the charge of the court. However, reading the charge contextually, we find no reasonable cause to believe that the jury was misinformed or misled by the manner in which the law of the case was presented to the jury. *State v. Taft,* 256 N.C. 441, 124 S.E. 2d 169.

In the trial below we find no error sufficiently prejudicial to warrant a new trial.

No error.

EUGENE F. RHINER v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION.

(Filed 2 February, 1968.)

1. Insurance § 57—

In this State coverage of a driver under the "omnibus clause" in an automobile liability policy extends only to use of an automobile by the driver with the express or implied permission of the owner, and while a slight deviation from the permission given is not sufficient to exclude the driver from coverage, a material deviation is a use without permission.

2. Same—

Evidence that the owner of an automobile agreed to allow the bailee to use his automobile to go to a store less than ten blocks away, that the bailee was instructed to return and bring the owner a bottle of liquor, but that the bailee left the city and drove a distance of some twenty miles where he was involved in an accident some two hours later, *held* insufficient to show that the use of the automobile was with the permission, express or implied, of the owner.

APPEAL by plaintiff from *Mallard, J.,* June 1967 Civil Session of HARNETT.

Civil action to recover the amount of $10,000.00 fixed by judgment for personal injuries sustained by plaintiff on 3 January 1964.

In a prior action, plaintiff recovered judgment against Jack H.

Thompson, Jr., for injuries sustained in an automobile collision. That judgment remains unsatisfied. The automobile driven by Thompson at the time of the collision was owned by Dennis Earl Dickerson and was insured by State Farm Mutual Automobile Insurance Company. Plaintiff brings the present action to recover the amount of the judgment from the insurance company under the terms of the omnibus clause in the insurance contract issued to Dickerson, which provided:

> "Persons Insured. The following are insureds under Part 1:
> (A) With respect to the owned automobile,
> (1) the named insured and any resident of the same household,
> (2) any other person using such automobile, provided the actual use thereof is with the permission of the named insured; . . ."

Plaintiff's evidence tended to show that Thompson and Dickerson had worked together and had roomed together in Raleigh, N. C. The evidence, when taken in the light most favorable to plaintiff, tends to show that Thompson had been seen operating Dickerson's automobile on as many as four different occasions, on some of which Dickerson was not present in the car. Thompson's deposition relating to his use of Dickerson's car on the night of the accident contained the following:

> "Well, at first I asked him to take me up town to the Market House to pick up my clothes; but he said, 'No, I'm not going. . . . You take the car and go up there if you want to, . . . I want you to be careful and come back and bring me a bottle of liquor.' "

Thompson further stated in his deposition that the Market House was less than ten blocks from where he and Dickerson roomed; that he left in the car about 8:45 P.M. and was involved in the collision with plaintiff on N. C. Highway 55 about one mile north of the Harnett-Wake County Line at about 10:30 P.M. He stated that he had driven Dickerson's car only twice prior to that night.

At the conclusion of plaintiff's evidence, defendant's motion for judgment as of nonsuit was allowed.

Plaintiff appealed.

Everett L. Doffermyre and James F. Penny for plaintiff.

Smith, Leach, Anderson & Dorsett for defendant.

PER CURIAM. The case of *Hawley v. Insurance Co.*, 257 N.C. 381, 126 S.E. 2d 161, contains a full discussion of the rules governing permission which will effectuate coverage under the usual omnibus clauses in liability insurance policies. This jurisdiction has thus far adopted the moderate or "minor deviation" rule, *i.e.*, "A material deviation from the permission given constitutes a use without permission, but a slight deviation is not sufficient to exclude the employee from the coverage under the omnibus clause." This permission may be either express or implied. *Hawley v. Insurance Co., supra.*

In the case of *Bailey v. Insurance Co.*, 265 N.C. 675, 144 S.E. 2d 898, the Court in considering permission as used in an omnibus clause of a liability insurance policy, stated:

> " 'Where express permission is relied upon it must be of an affirmative character, directly and distinctly stated, clear and outspoken, and not merely implied or left to inference. On the other hand, implied permission involves an inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or lack of objection under circumstances signifying assent.' *Hawley v. Ins. Co.*, 257 N.C. 381, 126 S.E. 2d 161."

The evidence in this case shows that the owner of the automobile agreed that Thompson should use his vehicle for the purpose of going to the Market House in the City of Raleigh, located less than ten city blocks away, to pick up some clothes. The owner further stated: "I want you to be careful and come back and bring me a bottle of liquor." Whereupon, the driver left the City of Raleigh and proceeded to drive a distance of approximately twenty miles, where he was involved, about two hours later, in the wreck complained of. Considering these facts under the express permission rule, the evidence shows a major deviation from the express permitted use.

However, appellant contends that because of the social relationship and the showing that Thompson had driven the automobile on three or four other occasions, an inference was raised sufficient to show a course of conduct resulting in an implied permission.

Plaintiff's theory of implied permission is strongly negated by the fact that all the evidence shows Thompson had use of the automobile by virtue of a restricted express permission, and when all the evidence is considered in the light most favorable to the plaintiff, we do not think the evidence shows a course of conduct sufficient to show permissive use by the owner at the time of the accident.

We hold that Thompson's use of the automobile was without the

permission of the owner. Thus, plaintiff's injury is not covered by defendant's policy, and the trial judge correctly allowed defendant's motion for judgment as of nonsuit.

Affirmed.

STATE v. THURMAN BROWER.

(Filed 2 February, 1968.)

1. Constitutional Law § 28—

Where there has been no trial in the inferior court having jurisdiction of the offense charged in the warrant and the cause is transferred to the Superior Court upon defendant's demand for jury trial, trial in the Superior Court upon the original warrant is a nullity.

2. Criminal Law § 127—

Where a fatal defect appears on the face of the record, the Supreme Court will, *ex mero motu*, arrest judgment.

APPEAL by defendant from *Armstrong, J.*, September 1967 Criminal Session of RANDOLPH.

Defendant was charged in a warrant with operating a motor vehicle while under the influence of intoxicating liquor. The warrant was returnable to the Recorder's Court of Randolph County. When the case was called for trial, defendant waived trial and moved that the case be transferred to the Superior Court of Randolph County. The motion was allowed. Defendant was tried upon the original warrant in Randolph Superior Court at the September 1967 Session, and the jury returned a verdict of guilty as charged. Upon imposition of sentence, defendant moved in arrest of judgment. This motion was denied, and defendant appealed.

Defendant filed no brief in this Court but filed a motion in arrest of judgment because of defect in the warrant. On 17 October 1967 the Court in Conference denied this motion. The disposition of the case in Recorder's Court was not shown in the record until an addendum to the record was filed on 19 October 1967.

Attorney General Bruton, Assistant Attorney General Melvin, and Staff Attorney Costen for the State.

No counsel contra.

PER CURIAM. The Recorder's Court of Randolph County had final jurisdiction of the offense charged, subject to defendant's right

of appeal, and no local act authorized transfer from Recorder's Court to Superior Court.

When there has been no trial in the court below of an offense of which it has final jurisdiction (subject to right of appeal to Superior Court), and the cause is transferred to the Superior Court upon waiver of trial and motion for transfer to Superior Court by defendant, trial in Superior Court upon the original warrant is a nullity. *State v. Thomas,* 236 N.C. 454, 73 S.E. 2d 283.

Although defendant did not file a brief with this Court, it appears from the face of the record proper that the conviction and sentence are void, and in such case this Court will, of its own motion, arrest judgment. *State v. Lucas,* 244 N.C. 53, 92 S.E. 2d 401. However, the State may proceed to try defendant for the offense in the proper court.

Judgment arrested.

APPENDIX.

THE SUPREME COURT OF NORTH CAROLINA.

RULE

There shall be two terms of the Supreme Court each year — a Spring Term commencing on the first Monday in February, and a Fall Term commencing on the last Monday in August.

Adopted this 1st day of July, 1967.

/s/ R. HUNT PARKER, *Chief Justice*
For the Court.

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ADMINISTRATIVE LAW.

§ 5. Appeal, Certiorari and Review as to Administrative Orders.

The record in the present case *held* not to disclose that the Board of Medical Examiners permitted any incompetent prejudicial evidence in its hearing to determine whether respondent physician's license should be revoked, and it was error for the Superior Court to order the cause remanded to the Board for another hearing on the ground that the Board had considered prejudicial incompetent evidence in reaching its findings. *In re Kincheloe*, 116.

ADVERSE POSSESSION.

§ 17. What Constitutes Color of Title.

A deed obtained from the purchase of land at the mortgage foreclosure sale constitutes color of title, even though the foreclosure sale was defective or void. *Poultry Co. v. Oil Co.*, 16.

APPEAL AND ERROR.

§ 1. Jurisdiction in General.

Where only two of five additional defendants appeal from plaintiff's motion that the order making them additional defendants be revoked and the counterclaims against them be stricken, the Supreme Court is limited to a determination of the rights of the two appealing defendants and must render judgment to which appealing defendants are entitled, even though the decision has the effect of terminating the action against such appealing defendants without disturbing the counterclaims against the other three additional defendants. *Quenby Corp. v. Conner Co.*, 208.

§ 3. Review of Constitutional Questions.

The Supreme Court will not pass upon a constitutional question when such question was not raised and was not passed upon in the court below. *S. v. Dorsett*, 227.

§ 4. Theory of Trial in Lower Court.

An appeal, of necessity, follows the theory of trial in the lower court, and where a cause has been tried on one theory in the court below, appelant will not be permitted to urge a different theory on appeal. *Lawson v. Benton*, 627.

§ 6. Judgments and Orders Appealable.

Although the verdict of the jury should not be set aside without material consideration, the trial court has the power to set aside a verdict in whole or in part in the exercise of his sound discretion, G.S. 1-207, and his

APPEAL AND ERROR—*Continued.*

order doing so is not reviewable on appeal in the absence of abuse of discretion. *Goldston v. Chambers*, 53.

§ 9. Moot and Academic Questions and Advisory Opinions.

The Supreme Court will not hear an appeal when the subject matter of the litigation between the parties has been settled or has ceased to exist. *Kendrick v. Cain*, 719.

§ 26. Exceptions and Assignments of Error to Judgment or to Signing of Judgment.

An exception to the judgment presents for review whether error of law appears on the face of the record, and this includes whether the facts found and admitted are sufficient to support the judgment. *Highway Commission v. Reynolds Co.*, 618.

§ 31. Exceptions and Assignments of Error to the Charge.

An assignment of error to an excerpt from the charge containing a number of legal propositions, without pointing out any specific particulars of the charge as erroneous, must fail if any one of the propositions is correctly stated. *Jenkins v. Gaines*, 81.

An exception to the entire charge of the court is a broadside exception and cannot be sustained. *Emanuel v. Clewis*, 505.

§ 41. Form and Requisites of the Transcript.

Where there are separate appeals in four separate cases, but in all four the pleadings, evidence, charge of the court, the issues and the order are substantially the same, it is necessary to have only one statement of case on appeal. *Goldston v. Chambers*, 53.

§ 48. Harmless and Prejudicial Error in Admission of Evidence.

Where a physician himself injects into the hearing of charges for the revocation of his license previous misconduct which had resulted in the suspension of his license, he may not object that evidence, relating to the prior suspension was introduced in evidence, even though such evidence be incompetent, since error in the admission of evidence is cured when evidence of substantially the same import is theretofore admitted without objection. Further, the admission of such evidence could not be prejudicial in view of the record disclosing that the members of the Board already had knowledge of the previous proceedings. *In re Kincheloe*, 116.

The admission in evidence of printed documents, incompetent as hearsay, will not be disturbed where no objection is interposed to their introduction. *Koury v. Follo*, 366.

§ 49. Harmless and Prejudicial Error in Exclusion of Evidence.

The exclusion of testimony cannot be held prejudicial when the same witness is thereafter allowed to testify to the same import. *Wilson v. Indemnity Corp.*, 183; *Reeves v. Hill*, 352.

§ 50. Harmless and Prejudicial Error in Instructions.

A party may not complain of an asserted error in the charge when the instruction complained of is embodied in almost the identical language in his own request for instructions. *King v. Higgins*, 267.

APPEAL AND ERROR—*Continued.*

§ 53. Error Cured by Verdict.

Even though the evidence is insufficient to raise the issue of contributory negligence, the submission of such issue cannot be prejudicial when the jury answers such issue in the negative. *McCall v. Warehousing, Inc.*, 190.

§ 57. Review of Findings or Judgments on Findings.

Where the court makes no detailed findings in support of its order vacating a prior order for support of the minor child of the marriage in a divorce action, and the evidence of record is insufficient to disclose a change of condition warranting a modification of the order, the cause must be remanded for specific findings. *Crosby v. Crosby*, 235.

An exception to a finding of fact not supported by evidence must be sustained. *Harrelson v. Insurance Co.*, 603.

Upon appeal, the reviewing court may refer to the evidence in the record to interpret the findings of fact of the trial court. *Ibid.*

The trial court's findings of fact supported by competent evidence are conclusive upon appeal, but the trial court's conclusions drawn from the findings are subject to review. *Ibid.*

Where trial is had in the inferior court without a jury, the resolution of conflicting evidence is a matter for the court, and where the evidence is sufficient to support the findings and when error of law does not appear upon the face of the record proper, the judgment will not be disturbed on appeal. *Wall v. Timberlake*, 731.

§ 58. Review of Injunctions and Other Equity Proceedings.

While the Supreme Court, upon an appeal from the granting or denial of a temporary injunction, is not bound by the findings of fact in the court below and may review the evidence and make its own findings of fact, the burden is upon the appellant to show error by the lower court. *Huggins v. Board of Education*, 33.

Even though the findings of the trial court will be presumed correct and supported by evidence when there are no specific findings of fact and no request therefor, nevertheless in injunction proceedings the Supreme Court may review and weigh the evidence submitted to the hearing judge and find the facts for itself. *Realty Corp. v. Kalman*, 201.

§ 59. Review of Judgments on Motion to Nonsuit.

In passing upon an exception to the refusal to nonsuit, the Supreme Court will give plaintiff the full benefit of all relevant evidence introduced, even though some evidence was improperly admitted over objection. *Koury v. Follo*, 366.

ASSAULT AND BATTERY.

§ 5. Criminal Prosecution for Assault with a Deadly Weapon.

In a prosecution for assault with a deadly weapon with intent to kill, an instruction that the jury might find an intent to kill of the defendant intended either to kill or inflict great bodily harm, *held* prejudicial error, since a finding by the jury that the defendant intended only to inflict bodily harm would be insufficient to sustain a conviction under the felony indictment. *S. v. Parker*, 142.

The offense of felonious assault under G.S. 14-32 consists of an assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death. *S. v. Meadows*, 327.

ASSAULT AND BATTERY—*Continued.*

§ 8. Defense of Self, Home, or Property.

Where the evidence discloses that defendant was an employee of a dance hall, that a dispute arose between another employee and a patron, that defendant went to the scene and, only after the patron had fired one shot and was attempting to fire another, did defendant hit the patron with a baseball bat, it is error for the court to charge the jury that it is the duty of a person assaulted other than in his home to retreat as far as he can with reference to his own safety before acting in self-defense, since on the evidence, viewed in the light favorable to defendant, defendant is entitled to a charge that if defendant did not bring on the difficulty and was assaulted with a deadly weapon he was entitled to repel the assault, provided he did not use excessive force. *S. v. Strater*, 276.

§ 14. Sufficiency of Evidence and Nonsuit.

Evidence in this case held sufficient to sustain verdicts of defendant's guilt of assault with a deadly weapon and murder in the first degree. *S. v. Old*, 42.

Evidence tending to show that the defendant shot the prosecuting witness in the leg as he was walking away, unarmed, from the defendant's house, *held* sufficient to be submitted to the jury on the issue of defendant's guilt of assault with a deadly weapon with intent to kill resulting in serious injury, and especially so when defendant's own testimony revealed that he saw no weapon and was not in fear of harm at the time. *S. v. Frankum*, 253.

Evidence in this case *held* sufficient to support conviction of defendant of assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death. *S. v. Williams*, 273; *S. v. Strater*, 276.

§ 15. Instructions in Criminal Prosecutions.

In a prosecution for assault with a deadly weapon with intent to kill, an instruction that the jury might find an intent to kill if the defendant intended either to kill or inflict great bodily harm, *held* prejudicial error, since a finding by the jury that the defendant intended only to inflict bodily harm would be insufficient to sustain a conviction under the felony indictment. *S. v. Parker*, 142.

§ 17. Verdict and Punishment.

A judgment imposing a prison sentence of five years upon a conviction of felonious assault is authorized by G.S. 14-32. *S. v. Meadows*, 327.

ATTORNEY AND CLIENT.

§ 5. Representation of Client and Liabilities to Client.

The professional obligation of court-appointed counsel to his client and to the court is no less than that of privately retained counsel, and the failure of such counsel to comply with the Rules of the Supreme Court subjects him to removal and censure. *S. v. Aycoth*, 48.

AUTOMOBILES.

§ 3. Driving Without License or After Revocation or Suspension of License.

A warrant charging that defendant operated a motor vehicle while his license was revoked fails to charge the offense defined in G.S. 20-28(a), it being

necessary to charge that defendant operated the vehicle on a public highway. *S. v. Cook*, 728.

§ 8. Attention to Road, Lookout and Due Care in General.

The duty to keep a proper lookout requires increased vigilance when the danger is increased by conditions obstructing the motorist's view. *Almond v. Bolton*, 78.

The driver of a motor vehicle must exercise the care which a reasonable man would use in like circumstances to avoid injury to persons or property, regardless of whether the vehicle is being operated on a public highway or elsewhere. *McCall v. Warehousing, Inc.*, 140.

Whether a motorist, at a given time, is keeping a reasonably careful lookout to avoid danger is ordinarily an issue of fact to be determined by a jury. *Mims v. Dixon*, 256.

A motorist upon the highway owes a duty to all other persons using the highway, including its shoulders, to maintain a lookout in the direction in which he is traveling. *Exum v. Boyles*, 567; *Miller v. Wright*, 667.

§ 10. Stopping and Parking; Signals and Flares.

Failure to set the emergency brake on a motor vehicle parked on an incline where its unattended movement may involve danger to persons or property, is or may be evidence of negligence, depending upon the circumstances. *McCall v. Warehousing*, 190.

The fact that a motorist, in driving her vehicle onto the highway from a driveway with the intention of crossing the first lane and turning left, has her vehicle stall so as to block the first lane, that she then releases the gears in hopes that the vehicle would roll across the highway and attempts to restart the motor, both without avail, does not constitute a violation of the law against parking or obstructing the highway, and such motorist has only the duty to give passing motorists such notice of the danger created by her vehicle as the occasion permits. *Blanton v. Frye*, 231.

Evidence that intestate undertook to change the left rear tire of his automobile while it was parked on the right shoulder of a highway some 10 inches from the pavement, that his body projected over the edge of the pavement as he worked on the tire, and that defendant, traveling in intestate's lane of traffic, observed intestate's disabled vehicle with its taillights on, but that defendant did not put his lights on high beam, nor steer toward the center line, nor reduce his speed, *is held* sufficient to take the case to the jury on the issue of last clear chance, and the granting of nonsuit was error. *Exum v. Boyles*, 567.

In an action for wrongful death arising out of an automobile accident, an instruction that plaintiff's intestate would be guilty of contributory negligence if the jury should find that he failed to set out flares or lanterns to the front and rear of his disabled automobile *held* error, since the provisions of G.S. 20-161 requiring such warning devices apply only to disabled trucks or trailers. *Ibid.*

§ 13. Lights.

The function of a headlight is to produce a driving light sufficient, under normal atmospheric conditions, to enable the operator to see a person 200 feet ahead. *Miller v. Wright*, 666.

AUTOMOBILES—*Continued.*

§ 17. Traveling on Right Side of Road and Passing Vehicles Traveling in Opposite Direction.

A violation of G.S. 20-148 and G.S. 20-146 is negligence *per se* and, when proximate cause of injury or damage is shown such violation constitutes actionable negligence. *Reeves v. Hill*, 352; *Lassiter v. Williams*, 473.

§ 19. Right of Way at Intersections.

An instruction in this case to the effect that if plaintiff had the green light when she entered the intersection she had the right to proceed unless defendant, approaching along the intersecting street, had the green light and had already entered and was in the intersection, in which event it would be plaintiff's duty to yield the right of way, *held* without error, and the court's further charge on the question of proximate cause as related to the variant factual situations presented by the evidence is correct. *Jenkins v. Gaines*, 81.

A motorist faced with a blinking yellow light has the right to enter the intersection with caution. *Hamilton v. Josey*, 105.

An accident occurring when plaintiff's vehicle, traveling east, turned right into an intersection and, just as the turn was being completed, was struck by defendant's vehicle, which had approached from the opposite direction and was making a left turn into the same street, occurs within an intersection, G.S. 20-38(12), notwithstanding that the extension of the street upon which plaintiff was traveling was a number of feet southeast of the intersecting street. *Mims v. Dixon*, 256.

A pedestrian crossing a highway or street at an intersection not controlled by traffic signals must yield the right of way to vehicles upon the highway unless he is crossing within a marked or an unmarked crosswalk. *Anderson v. Carter*, 426.

An unmarked crosswalk at an intersection, as that term is used in G.S. 20-173(a) and G.S. 20-174(a), is the area within an intersection which also lies within the lateral boundaries of a sidewalk projected across the intersection. *Ibid.*

A motorist intending to go through an intersection is entitled to assume that all other motorists will observe traffic signs at the intersection requiring them to yield the right of way. *Parkins v. Cook*, 477.

§ 40. Pedestrians.

Evidence that plaintiff pedestrian crossed a T-intersection from the east in a line of travel approximating the projected center line of the intersecting street discloses that he was not walking within an unmarked crosswalk and was therefore required to yield the right of way to vehicular traffic. *Anderson v. Carter*, 426.

Ordinary care requires that a pedestrian crossing a street or highway do more for his safety than merely walk at the same pace when he sees that an oncoming car is approaching him at a high rate of speed. *Ibid.*

A pedestrian crossing a highway may not assume that motorists thereon will comply with the traffic laws, including speed regulations, when he observes that the motorists are exceeding the speed limit. *Ibid.*

§ 43. Pleadings and Parties in Actions for Negligent Operation of Motor Vehicles.

Where one has sued a principal for damages alleged to have been caused by the negligent acts and omissions of an agent in the operation of a motor vehicle, and judgment has been rendered in favor of the principal on the ground that plaintiff had failed to establish the negligence of the agent, such plaintiff

AUTOMOBILES—*Continued.*

is not prevented from thereafter suing and recovering from the agent upon identical allegations of damages and negligence, since the former judgment is not a bar, the agent not having been a party to the former action. *Sumner v. Marion*, 92.

Answer negating allegations of the complaint held not to raise the issue of contributory negligence. *Dennis v. Voncannon*, 446.

§ 45. Relevancy and Competency of Evidence in General.

Testimony as to the manner in which defendant operated his car and changed lanes at some unknown town at an unstated time prior to the accident in suit and while some undetermined distance from the scene of the collision, is too remote to allow the jury to consider the matter in inferring his physical condition at the time and place of the collision. *Reeves v. Hill*, 352.

§ 46. Opinion Testimony as to Speed.

A fourteen year old boy of superior scholastic ability is competent to give his opinion as to the speed of a motor vehicle in which he is a passenger. *Emanuel v. Clewis*, 505.

§ 53. Sufficiency of Evidence and Nonsuit on Issue of Negligence in Failing to Stay on Right Side of Highway in Passing Vehicles Traveling in Opposite Direction.

Physical facts at scene held sufficient for jury on the issue of defendant's negligence in failing to yield one-half of highway to vehicle approaching from opposite direction. *Reeves v. Hill*, 352.

Plaintiff's evidence held sufficient to go to the jury on the issue of defendant's negligence in causing the collision. *Dennis v. Voncannon*, 446.

In an action to recover damages for wrongful death resulting from a headon collision between two vehicles traveling in opposite directions, evidence that defendant's car came to rest entirely on plaintiff's intestate's side of the highway, that the two vehicles were locked together by force of the collision, that there was debris under and about each car, but that no skid marks from either car were visible, *is held* sufficient to support the inference that the defendant was traveling in the deceased's lane of travel when the collision occurred, and the issue of negligence was properly submitted to the jury. *Lassiter v. Williams*, 473.

§ 56. Nonsuit on Issue of Negligence in Following too Closely; Hitting Vehicle Stopped or Parked on Highway.

Evidence tending to show that plaintiff's car was stationary on the highway behind another car whose lights were blinking indicating a left turn, that the car immediately behind plaintiff passed both cars on the right shoulder, and that appealing defendant's car, which was the second car behind plaintiff ran into the rear of plaintiff's car, *held* sufficient to be submitted to the jury and overrule appealing defendants' motion to nonsuit, and appealing defendants may not complain that the verdict of the jury in their favor was set aside by the trial court in the exercise of his discretion on motion of the other defendants, the owner and driver of the third car behind plaintiff's car, against whom the jury returned an adverse verdict. *Goldston v. Chambers*, 53.

§ 57. Sufficiency of Evidence and Nonsuit in Exceeding Reasonable Speed at Intersections and Failing to Yield Right of Way.

Plaintiff's evidence tending to show that he approached an intersection along a dominant highway, that he observed defendant's automobile approach-

AUTOMOBILES—*Continued.*

ing the intersection from a street to his left and assumed from defendant's conduct that she would yield the right of way in compliance with a traffic sign erected for the servient street, but that defendant continued across the intersection without stopping and collided with plaintiff's vehicle, *is held* sufficient to take the issue of defendant's negligence to the jury and insufficient to establish contributory negligence on the part of plaintiff. *Perkins v. Cook*, 477.

§ 69. Striking Bicyclist.

Evidence in this case held insufficient to show that defendant motorist failed to keep a proper lookout or that bicyclist was exercising due care at the time of the accident. *Miller v. Wright*, 666.

§ 75. Nonsuit on Ground of Contributory Negligence in Stopping or Parking.

Evidence of negligence in leaving tractor on incline without setting hand brake or chocking wheels held for jury. *McCall v. Warehousing*, 190.

Evidence in this case held insufficient to show negligence on part of motorist having car stall on highway. *Blanton v. Frye*, 231.

§ 78. Nonsuit on Ground of Contributory Negligence in Passing Vehicle Traveling in Opposite Direction.

In an action for damages for wrongful death resulting from a headon collision, the physical evidence was to the effect that defendant's car came to rest entirely in the deceased's lane of travel, and that deceased's vehicle extended partially across the center line into defendant's lane. *Held:* The evidence is insufficient to support a finding of contributory negligence on the part of the deceased as a matter of law. *Lassiter v. Williams*, 473.

§ 79. Nonsuit on Ground of Contributory Negligence in Intersectional Accidents.

Evidence held to disclose contributory negligence in passing stationary truck on its right side at intersection. *Almond v. Bolton*, 78.

Plaintiff's evidence tending to show that he made a right turn into an intersecting street and that after he was in the intersection defendant's car, which had approached from the opposite direction, made a left turn into the intersecting street and collided with plaintiff's car, *held* to take the issue of negligence to the jury. *Mims v. Dixon*, 256.

Plaintiff made a right turn into an intersecting street and defendant, who had approached from the opposite direction, made a left turn into the same street and collided with plaintiff's car after plaintiff's car was in the intersection and was just completing the right turn. *Held:* Plaintiff's evidence does not disclose contributory negligence on his part as a matter of law. *Ibid.*

Plaintiff's evidence tending to show that he approached an intersection along a dominant highway, that he observed defendant's automobile approaching the intersection from a street to his left and assumed from defendant's conduct that she would yield the right of way in compliance with a traffic sign erected for the servient street, but that defendant continued across the intersection without stopping and collided with plaintiff's vehicle, *is held* sufficient to take the issue of defendant's negligence to the jury and insufficient to establish contributory negligence on the part of plaintiff. *Perkins v. Cook*, 477.

§ 81. Nonsuit on Ground of Contributory Negligence — Dangerous Position in or on Vehicle.

Allegations and evidence to the effect that intestate took a position on the

AUTOMOBILES—*Continued.*

fender of a truck which was pushing a stationwagon in order to keep one bumper from overriding the other, that when the engine of the stationwagon ignited and it moved ahead under its own power, the driver of the truck applied his brakes, causing intestate to fall from the fender and be run over by the truck, resulting in fatal injury, *held* to establish contributory negligence as a matter of law. *Presnell v. Payne*, 11.

§ 83. Nonsuit on Ground of Pedestrian's Contributory Negligence.

Plaintiff pedestrian's evidence to the effect that he was crossing a T-intersection from the middle of a street running south which had no crosswalks, that he saw defendant's car, traveling south, approaching him a block away at a speed of 50 to 55 miles per hour, that he kept his eyes on the car at all times but continued to walk at the same pace, and that he was struck by defendant's car within three feet of the boundary line of the southbound traffic lane, *is held* to disclose contributory negligence on the part of the pedestrian barring recovery as a matter of law. *Anderson v. Carter*, 426.

§ 85. Contributory Negligence of Persons on Bicycles.

Evidence in this case held insufficient to show that defendant motorist failed to keep a proper lookout or that bicyclist was exercising due care at the time of the accident. *Miller v. Wright*, 666.

§ 88. Sufficiency of Evidence to Require Submission of Issue of Contributory Negligence to Jury.

The evidence tended to show that defendant, traveling south and faced with a blinking red light, entered the intersection without stopping, and that plaintiff, traveling east and faced with a blinking yellow light, entered the intersection without stopping, and struck defendant's vehicle on the right side near the rear wheels, in the southwest quadrant of the intersection. *Held:* It was not error for the court to submit the issue of plaintiff's contributory negligence. *Hamilton v. Josey*, 105.

§ 89. Sufficiency of Evidence to Require Submission of Issue of Last Clear Chance to Jury.

Allegations and evidence to the effect that intestate took a position on the fender of a truck which was pushing a stationwagon, that when the engine of the stationwagon ignited and it moved ahead under its own power, the driver of the truck applied his brakes, causing intestate to fall from the fender and be run over by the truck, resulting in fatal injury, *held* insufficient to support the submission of the issue of last clear chance, and therefore nonsuit was properly entered. *Presnell v. Payne*, 11.

§ 90. Instructions in Automobile Accident Case.

The court's instruction in this automobile intersection accident case *held* properly to have charged the jury on the questions arising on the evidence in regard to negligence, contributory negligence, the burden of proof, proximate cause and sudden emergency. *Hamilton v. Josey*, 105.

An instruction in an automobile accident case which charges that if the jury should find defendant negligent in any one of the specific acts of negligence alleged in the complaint and supported by evidence, to answer the issue of negligence in the affirmative, *held* without error when no prejudicial error appears therein when the charge is read contextually. *McCall v. Warehousing*, 190.

The crucial contention of the parties in this automobile accident case was

AUTOMOBILES—*Continued.*

which of two vehicles traveling in opposite directions was to the left of its center of the highway when they collided, while the question of excessive speed was of secondary importance in determining their respective liabilities. *Held:* The fact that the court charged on one section of a speed statute which was not properly pleaded could not mislead or confuse the jury, and, under the facts of this case, such charge cannot be held prejudicial. *Reeves v. Hill*, 352.

§ 92. Liabilities of Driver to Guests and Passengers in General.

Evidence of a fourteen year old boy that defendant had invited him and other small children to ride in the bed of a truck, that defendant started the truck before plaintiff could find a suitable place to sit down, and that within 100 to 150 feet from the starting point defendant reached a speed of from 18 to 20 miles an hour on a bumpy road frequently traveled by defendant, and that the truck struck a deep hole, causing plaintiff to be thrown over the side of the truck, with resultant head injuries, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence. *Emanuel v. Clewis*, 505.

§ 94. Contributory Negligence of Guest or Passenger.

In the absence of appropriate allegations in the answer as to the negligence of plaintiff's intestate in riding in an automobile operated by defendant while defendant was in a state of intoxication, the trial court was not required to submit that issue of intestate's contributory negligence to the jury. *Lawson v. Benton*, 627.

Evidence that defendant was operating his automobile within the permissible speed limit until he attempted to overtake and pass two automobiles in front of him on a sweeping curve, that plaintiff's intestate then told him to "mash it," and that the defendant accelerated to a speed of 110 miles per hour and that the car went out of control and overturned, *held* insufficient to be submitted to the jury on the issue of intestate's contributory negligence, since the sole reasonable inference permissible from the evidence is that intestate merely urged defendant to return quickly to the proper lane for the safety of the passengers. *Ibid.*

A passenger in an automobile is not held to a duty of remonstrating with the driver as to his reckless conduct in the overtaking and passing of another vehicle when to do so would increase the hazard of passing. *Ibid.*

§ 105. Sufficiency of Evidence on Issue of Respondeat Superior; G.S. 20-71.1.

Admission by a *feme* defendant that title to the car driven by the other defendant was registered in her name is *prima facie* proof of ownership and that the driver was the owner's agent, G.S. 20-71.1, and the issue is properly submitted to the jury despite testimony tending to rebut the presumption of agency. *Perkins v. Cook*, 477.

Where there is sufficient evidence of negligence of the operator of a motor vehicle to be submitted to the jury on that issue, evidence that the vehicle was registered in the name of another defendant takes the issue of such other defendant's liability to the jury. *Ibid.*

§ 112. Competency and Relevancy of Evidence on Issue of Culpable Negligence.

It is competent in a homicide prosecution for a person of ordinary intelligence to testify as to his opinion of the speed of a vehicle when he has had a reasonable opportunity to observe the vehicle in motion. *S. v. Clayton*, 377.

AUTOMOBILES—*Continued.*

Where it affirmatively appears that a witness had sufficient opportunity to observe a moving vehicle, discrepancies in his testimony appearing on cross-examination, together with his statement that he was "guessing at all those speeds and distances," do not render incompetent his opinion as to the speed of the vehicle, but go instead to the credibility and the weight of his testimony. *Ibid.*

In this homicide prosecution arising out of the operation of a motor vehicle, there was no error in admitting the testimony of a witness that the defendant was under the influence of intoxicants when the evidence supports a reasonable inference that the witness saw the defendant some 15 minutes or less after the homicide. *Ibid.*

§ 113. Sufficiency of Evidence of Culpable Negligence and Nonsuit.

Evidence of culpable negligence in striking boy held for the jury. *S. v. Clayton*, 377.

In this prosecution for manslaughter arising from the operation of an automobile, evidence of the State to the effect that the defendant was intoxicated at the time of the collision, together with an inference of high speed arising from the physical facts, *held* sufficient to be submitted to the jury on the issue of defendant's culpable negligence. *S. v. Howard*, 519.

§ 129. Instructions in Prosecutions for Driving Under the Influence of Intoxicants.

In this prosecution for driving on a public highway while under the influence of intoxicating liquor, there was evidence that defendant, at the time of his arrest, had empty beer cans in his car, that his breath smelled of alcohol, and that the patrolman had to help defendant out of his car and into the patrol car. *Held:* Defendant may not complain of the failure of the court to instruct the jury that defendant should be acquitted if the jury should find that defendant was under the influence of anything other than an alcoholic beverage, notwithstanding defendant's testimony that on a trip terminating some two hours prior to the occasion in question he had taken a few pills to keep him awake. *S. v. Owens*, 100.

BANKS AND BANKING.

§ 4. Joint Accounts.

The fact that a wife deposited in her individual bank account funds borrowed jointly by the husband and wife does not create the presumption that the husband intended the funds to be a gift to the wife, and a special instruction to that effect is properly refused by the trial court. *Overby v. Overby*, 636.

BASTARDS.

§ 7. Instructions.

In a prosecution for wilful refusal to support an illegitimate child, it is error for the court to state, even as a contention, that defendant had introduced evidence of good character, saying in effect that she had loved unwisely and had to pay the penalty, that he had used her to satisfy his sexual desires, but that the State contended she ought not to have to bear the penalty alone and that the defendant was as guilty as she and should pay for his part of the indiscretion. *S. v. Davis*, 102.

In a prosecution for wilful refusal to support an illegitimate child in which

BASTARDS—*Continued.*

no mention of a blood test had been made prior to the charge, it is error for the court to read the provisions of G.S. 8-50.1 to the jury and state that any request for a blood test had to come from defendant. *Ibid.*

BILLS AND NOTES.

§ 10. Holders in Due Course.

One who acquires a note as a mere assignee, without the paying of consideration therefor, is not a holder in due course. *Ridley v. Jim Walter Corp.*, 673.

BOUNDARIES.

§ 1. General and Specific Descriptions.

The rule that a specific description of land controls over a more general description in the same conveyance does not apply when the specific description is insufficient or ambiguous. *Root v. Insurance Co.*, 580.

BURGLARY AND UNLAWFUL BREAKINGS.

§ 1. Elements of Burglary.

There is a "forcible breaking" within the meaning of the statute when a person enters by unlocking or unlatching a door when the entry is with the requisite intent to commit a felony therein. *S. v. Craddock*, 160.

§ 2. Elements of Breaking and Entering Otherwise Than Burglariously.

G.S. 14-54, as amended, constitutes unlawful breaking or entering a building a felony when such breaking or entering is done with intent to commit a felony or other infamous crime therein and a misdemeanor in the absence of a felonious intent, and constitutes the misdemeanor a less degree of the offense. *S. v. Dickens*, 515.

§ 5. Sufficiency of Evidence and Nonsuit.

Evidence, together with confession, held sufficient to go to the jury on the issue of guilt of breaking and entering a storehouse. *S. v. Bishop*, 283.

Evidence held sufficient to go to jury on the issue of defendant's guilt of safecracking and breaking and entering. *S. v. Hill*, 439.

§ 6. Instructions.

In a prosecution under an indictment charging a felonious breaking and entering, an instruction to the effect that the breaking of a store window, with the intent to commit a felony, completes the offense even though the building is not actually entered, *held* without error. *S. v. Jones*, 108.

§ 10. Prosecution of the Offense of Possessing Housebreaking Implements.

In a prosecution under G.S. 14-55 the burden is upon the State to show that the person charged had in his possession implements of housebreaking within the purview of the statute and that the possession of such implements was without lawful excuse. *S. v. Craddock*, 160.

Evidence in this case held sufficient for jury on question of defendant's guilt of unlawful possession of burglary tools. *Ibid.*

Evidence of the State tending to show that the defendants were observed

BURGLARY AND UNLAWFUL BREAKINGS—*Continued.*

at midnight at the door of a post office, that the defendants ran at the approach of two officers, and that one defendant dropped at the rear of the building a brown bag containing two screwdrivers, a cold chisel of more than ordinary length, a punch and a wood chisel, *held* sufficient to be submitted to the jury on the issue of defendant's guilt of possessing implements of storebreaking without lawful excuse. *S. v. Davis*, 469.

In a prosecution under G.S. 14-55 the burden is upon the State to show that the accused had in his possession implements of housebreaking within the purview of the statute and that the possession of such implements was without lawful excuse. *Ibid.*

Evidence of the State tending to show that two defendants were observed at the entrance of a restaurant early one morning, that at the approach of officers one defendant tossed away a screwdriver and hammer, and that the door to the entrance of the restaurant showed evidence of tool marks around the lock, *held* sufficient to be submitted to the jury on the issue of defendants' guilt of possessing housebreaking implements without lawful excuse. *S. v. Lovelace*, 496.

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 9. Burden of Proof and Competency of Evidence.

Where one occupies a confidential relationship with another and benefits from a transaction with the other in such a way that the circumstances create a strong suspicion that an undue or fraudulent influence has been exerted, the burden is upon the grantee or beneficiary to remove the suspicion by offering proof that the transaction was the free and voluntary act of the grantor. *Hendricks v. Hendricks*, 340.

§ 10. Sufficiency of Evidence, Nonsuit and Directed Verdict.

Evidence held insufficient to show that deed from father was procured by undue influence. *Hendricks v. Hendricks*, 340.

CONSPIRACY.

§ 3. Nature and Elements of Criminal Conspiracy.

A criminal conspiracy is the unlawful concurrence of two or more persons in a scheme or agreement to do an unlawful act, or to do a lawful act in an unlawful way or by unlawful means, and the crime is complete when the agreement is made. *S. v. Gallimore*, 528.

§ 4. Warrant and Indictment.

An indictment for conspiracy need not name the co-conspirators, it being sufficient if it appears on the face of the indictment that there was another with whom defendant conspired, but the better practice would seem to require that the State disclose the name of other conspirators when their identity becomes known. *S. v. Gallimore*, 528.

§ 5. Relevancy and Competency of Evidence in Criminal Conspiracy.

During the existence of a conspiracy, the acts and declarations of each conspirator made in furtherance of the object of the conspiracy are admissible in evidence against all parties to the agreement. *S. v. Gallimore*, 528.

CONSTITUTIONAL LAW.

§ 11. The Police Power in General.

The police power of the State cannot be bartered away by contract or lost by any other mode. *Taylor v. Bowen*, 726.

§ 17. Personal and Civil Rights in General.

The purpose of the constitutional guaranty of the right to bear arms is to secure a well regulated militia, but the individual has the right, subject to reasonable regulation by the Legislature, to possess a weapon in order to exercise his common law right of self-defense. *S. v. Dawson*, 535.

The constitutional guaranty of the right to bear arms, N. C. Constitution, Art. I, § 24, does not abrogate the common law offense of going armed with unusual weapons to the terror of the people. *Ibid.*

§ 18. Rights of Free Press, Speech and Assemblage.

The State may impose reasonable restraints upon freedom of speech and movement in order to protect its paramount interests of educating its children. *S. v. Wiggins*, 147.

Neither the enactment of G.S. 14-273, proscribing the wilful disruption of a public or private school, nor its enforcement against certain defendants who picketed a public school to the detriment of the instruction of students therein, constitutes censorship of speech or protest in violation of the First Amendment, U. S. Constitution, since the State may unquestionably control the hours and place of public discussion in the protection of its legitimate interest in the efficient operation of the schools. *Ibid.*

§ 20. Equal Protection; Application and Enforcement of Laws, and Discrimination.

G.S. 14-273 is not discriminatory upon its face, since its penalty applies uniformly to all who violates its terms, and, since the statute does not confer upon any administrative official the discretionary authority to issue permits for demonstrations interrupting school programs, the question of discrimination does not arise. *S. v. Wiggins*, 147.

§ 28. Necessity for and Sufficiency of Indictment.

The statute, G.S. 15-140.1, providing for waiver of indictment by defendants in noncapital felony cases contemplates that the prosecution shall be upon an information signed by the solicitor, and the failure of the solicitor to sign the statement of accusation to which defendant pled guilty renders the plea void. *S. v. Bethea*, 521.

The practice of the solicitor in attempting to use a warrant in lieu of an information as required by G.S. 15-140.1 is expressly disapproved by the Supreme Court. *Ibid.*

Where there has been no trial in the inferior court having jurisdiction of the offense charged in the warrant and the cause is transferred to the Superior Court upon defendant's demand for jury trial, trial in the Superior Court upon the original warrant is a nullity. *S. v. Brower*, 740.

§ 29. Right to Indictment and Trial by Duly Constituted Jury.

While defendant, prior to pleading to the indictment, is ordinarily entitled to present evidence in support of a motion to quash on the ground that members of defendant's race were systematically excluded from the grand jury, the action of the trial court in declining to hear the evidence of defendant in this case *is held* without error when the court, after verdict, judgment and notice

CONSTITUTIONAL LAW—*Continued.*

of appeal had been given, offered defendant an opportunity, which he declined, to present evidence during the term in support of the motion. *S. v. Belk*, 517.

§ 32. Right to Counsel.

Where record discloses that defendant charged with capital offense was not represented by counsel, new trial must be ordered upon post-conviction hearing. *Carpenter v. State*, 84.

An indigent defendant, who has been fully advised by the court that an attorney would be appointed to represent him if he so desired, has the right to reject the offer of such appointment and to represent himself in the trial of his case. *S. v. Morgan*, 97.

It is not required that respondent be represented by counsel in a proceeding by the Board of Medical Examiners to determine whether his license should be revoked for unethical conduct. In the present case the physician waived counsel, saying he could not afford to employ counsel, but it appeared that his office had been so filled with patients that he had to decide whom he would see first, and it further appeared that he was represented by able counsel employed by him in the court proceedings without any showing of change of financial condition. *In re Kincheloe*, 116.

It is not required that the driver of a vehicle in giving consent to the search of the vehicle at the request of police officers be represented by counsel. *S. v. Craddock*, 160.

Where a defendant, after full explanation of his rights, repeatedly refuses the court's offer to appoint him counsel as an indigent, the court may not force counsel upon him, and defendant's own evidence in this case held to disclose that he had ample mental capacity to determine the matter for himself. *S. v. Alston*, 278.

The fact that defendant is not represented by counsel at the preliminary hearing is not a deprivation of defendant's rights, there being the introduction of no admissions made by defendant on such preliminary hearing, nor the admission of any evidence prejudicial to defendant at such preliminary hearing. *S. v. Clark*, 282.

§ 35. Ex Post Facto Laws.

An attempt by statute to increase the punishment for a criminal act committed before the enactment of the statute is invalid as *ex post facto* legislation. *S. v. Pardon*, 72.

Where the law under which a defendant was convicted is amended pending appeal so as to reduce the punishment that could be imposed under the prior law, the defendant is entitled to mitigation of sentence in conformity with the new law. *Ibid.*

§ 36. Cruel and Unusual Punishment.

Prior to the enactment of Chapter 1256, Session Laws of 1967, a sentence of eight months imprisonment, imposed upon a third conviction of public drunkenness within a twelve-month period, was within the two-year maximum sentence permitted for a misdemeanor, and did not constitute cruel and unusual punishment in the constitutional sense. *S. v. Pardon*, 72.

The fact that the trial court recommended that defendant be allowed to serve under the Work Release Program in a sentence imposed in one case but that it failed to make such recommendation in a sentence of imprisonment imposed the same day in another case, the two sentences to run consecutively, does not constitute cruel and unusual punishment, since G.S. 148-33.1 authorizes

but does not require the court to recommend that the prisoner be granted the privilege of the Work Release Program in each case. *S. v. Wright*, 264.

A defendant may not contend that consecutive sentences entered by the court in two separate cases constitute cruel and unusual punishment when the sentences are within the limits of the applicable statute, since the court has authority to provide that such sentences run consecutively. *Ibid.*

The policy-making power of the legislature is not within the province of the court, and it will not question the policy, adopted by the legislature in the early history of railroad building in this State, of granting to railroad corporations the right of liberal acquisition of properties. *Keziah v. R. R.*, 299.

Punishment within the statutory maximum cannot be cruel or unusual in the constitutional sense. *S. v. Bethea*, 521.

CONTRACTS.

§ 7. Contracts in Restraint of Trade.

A covenant that the seller of a business will not engage in the same business in competition with the purchaser is valid and enforceable (1) if it is reasonably necessary to protect the legitimate interests of the purchaser; (2) if it is reasonable in respect to time and to territory; and (3) if it does not interfere with the public interest. G.S. 75-4, G.S. 75-5(d). *Jewel Box Stores v. Morrow*, 659.

The reasonableness of a restraining covenant is a question of law for the court and depends upon the particular circumstances of each case. *Ibid.*

A covenant by the owner of a jewelry store not to engage in jewelry business competition with the purchaser within 10 miles of the city where the seller's jewelry store is located for a period of 10 years, *held* not void as being unreasonable as to time or territory. *Ibid.*

Where a person sells a business and agrees not to engage in the same business in the same place, the obvious intention is to sell the good will of the business, and the consideration for the sale of good will may be found in the general consideration for the sale of the business. *Ibid.*

A contract in restraint of trade must be supported by a consideration, but, unless the contract be a fraud upon the party sought to be restrained or *nudum pactum*, the court will not ordinarily inquire into the adequacy of the consideration, it being sufficient that a legal consideration appear on the face of the contract. *Ibid.*

§ 12. Construction and Operation of Contracts Generally.

A contract must be construed with regard to the intention expressed by the language of the parties, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time. *Kent Corporation v. Winston-Salem*, 395.

Where the terms are plain and explicit, the court will determine the legal effect of a contract and enforce it as written by the parties. *Ibid.*

When the language of a contract is clear and unambiguous, the court must interpret it as written. *Root v. Insurance Co.*, 580.

An ambiguity in a written contract is to be construed against the party who prepared the instrument. *Ibid.*

A contract must be construed with regard to the intention expressed by the language of the parties, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time. *Highway Commission v. Reynolds Co.*, 618.

CONTRACTS—*Continued.*

§ 26. Competency and Relevancy of Evidence in Actions Involving Contracts.

The mutual agreement of the parties is the contract, and evidence of the unexpressed intent of one party in entering the agreement is properly excluded. *Root v. Insurance Co.*, 580.

Where the words of a contract are susceptible of more than one interpretation, or where a latent ambiguity arises, evidence of prior negotiations of the parties to the written agreement may be competent for the purpose of throwing light on the intent of the parties. *Ibid.*

CORPORATIONS.

§ 12. Transactions Between Corporation and Its Officers or Agents.

An officer of a corporation may lend money to the corporation and take a deed of trust as security therefor where no unfair advantage is taken, and therefore has the right to purchase at the foreclosure of such deed of trust. *Poultry Co. v. Oil Co.*, 16.

COUNTIES.

§ 9. Liability for Torts.

Where a county is covered by a policy of liability insurance, the question of governmental immunity from suit from injuries caused by alleged negligence does not arise with reference to the validity of a judgment of nonsuit. *Cook v. Burke County*, 94.

The liability of a county for injuries sustained by a pedestrian falling on a public walk within the courthouse grounds is no more extensive than the liability of a city to a pedestrian falling upon a public sidewalk maintained by the city. *Ibid.*

Evidence in this case held insufficient to go to the jury on issue of county's negligence in allowing pigeon droppings to accumulate on courthouse walk. *Ibid.*

COURTS.

§ 9. Jurisdiction of Superior Court After Orders or Judgments of Another Superior Court Judge.

A Superior Court judge is without authority to vacate an order of another Superior Court judge to the effect that a defendant had abandoned his appeal, since any error in the first judgment could only be corrected by the Supreme Court. *S. v. Peeden*, 494.

CRIME AGAINST NATURE.

§ 2. Prosecutions.

Evidence in this case held sufficient to go to the jury on the issue of defendant's guilt of the offense of crime against nature with his stepson. *S. v. Cox*, 140.

CRIMINAL LAW.

§ 1. Nature and Elements of Crime in General.

It is a general rule that where a criminal statute is expressly and unqualifiedly repealed after a crime has been committed but before a final judgment has been entered upon conviction, no punishment can be imposed. *S. v. Pardon*, 72.

CRIMINAL LAW—*Continued.*

G.S. 14-273, making it unlawful wilfully to interrupt any school, held not void for vagueness. *S. v. Wiggins*, 147.

§ 2. Intent; Wilfulness.

A person who has reached the age of responsibility for his acts and who is not shown to be under mental disability is presumed to intend the natural consequences of his acts and conduct, and, nothing else appearing, the defendant's motive for wilfully doing an act forbidden by statute is no defense to the charge of violating such statute. *S. v. Wiggins*, 147.

§ 5. Mental Capacity in General.

Testimony of an expert that defendant is retarded to some extent but that he could relate his circumstances around the time of the crime in a logical and coherent manner, and that he knew right from wrong, is sufficient to disclose his legal responsibility for his criminal acts. *S. v. Johnson*, 239.

§ 8. Limitations.

The issuance of a void warrant in a misdemeanor prosecution does not toll the running of G.S. 15-1, and where on appeal from a conviction upon such warrant in an inferior court defendant is tried upon an identical indictment returned by the grand jury more than two years after the commission of the offense, he is entitled to quashal of the indictment. *S. v. Hundley*, 491.

§ 9. Principals in the First or Second Degree; Aiders and Abettors.

All who are present at the place of a crime and are either aiding, abetting, assisting, or advising in its commission, or are present for such purpose to the knowledge of the actual perpetrator, are principals and equally guilty. *S. v. Aycoth*, 48.

The mere presence of a person at the scene of a crime at the time of its commission does not make him a principal in the second degree, even though he makes no effort to prevent the crime, or even though he may silently approve, or even secretly intend to assist the perpetrator in case his aid becomes necessary, it being necessary to constitute him a principal in the second degree that he give active encouragement to the perpetrator by word or deed or make it known to the perpetrator in some way that he would lend assistance if it should become necessary. *Ibid.*

Where two or more persons aid and abet each other in the commission of a crime, all being present, each as a principal and equally guilty, regardless of any previous confederation or design. *S. v. McNair*, 130; *S. v. Craddock*, 160; *S. v. Davis*, 469.

Evidence in this case held sufficient to go to jury on issue of defendant's guilt in aiding and abetting other defendants in disturbing the classes of a public school. *S. v. Wiggins*, 147.

Evidence tending to show that four defendants agreed to assault a particular person and get his money, that three of them went into such person's house, and that the defendant, turning State's evidence, hit the deceased in the back of the head with an ax handle a number of times, inflicting mortal injury, that another of defendants stated he was going to finish defendant off and stomped him in the ribs four or five times, and that the three defendants took deceased's billfold containing a sum of money, *is held* sufficient to sustain a conviction of the two defendants pleading not guilty. *S. v. Johnson*, 239.

Evidence in this case held sufficient to sustain conviction of the defendant look-out as an aider and abettor in murder in the first degree. *Ibid.*

CRIMINAL LAW—*Continued.*

A defendant who enters into a common design for a criminal purpose is equally deemed in law a party to every act done by others in furtherance of such design. *S. v. Lovelace*, 496.

When two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty. *S. v. Dawson*, 535.

§ 10. Accessories Before the Fact.

An indictment charging defendant with being an accessory before the fact to an armed robbery committed by named persons on a specified date, without any factual averments as to the identity of the victim, the property taken or the manner or method in which defendant counseled, incited, induced or encouraged the principal felons, is fatally defective, since such indictment is too indefinite to protect defendant from a prosecution for any other armed robbery which might have been committed by the principal felons on the same day. *S. v. Partlow*, 60.

A defendant on trial upon an indictment charging him with being an accessory before the fact may not complain that the judge in the exercise of his discretion failed to sentence the principal felons upon their plea of guilty until the court had heard all of the evidence, including the evidence adduced upon the trial of defendant as an accessory before the fact, since during the term the judgment of the court remains *in fieri*, there being nothing to indicate that any threats or promises of reward were made to any of the witnesses. *Ibid.*

§ 21. Prelminary Proceedings.

Neither the service of a warrant of arrest on a capital charge nor a preliminary hearing upon the charge is a prerequisite to a valid trial upon a bill of indictment properly returned. *Carpenter v. State*, 84.

§ 23. Plea of Guilty.

A plea of guilty is equivalent to a conviction. *S. v. Meadows*, 327.

§ 24. Plea of Not Guilty.

When the solicitor announces upon defendant's arraignment, or thereafter in open court, that the State will not ask for a verdict of guilty of the maximum crime charged but will ask for a verdict of guilty of a designated and included less offense embraced in the bill, and the announcement is entered in the minutes of the court, such announcement is the equivalent of a verdict of not guilty on the charge or charges the solicitor has elected to abandon, and the State will not be permitted another prosecution on the charge or charges eliminated. *S. v. Miller*, 243.

§ 26. Plea of Former Jeopardy.

When the solicitor announces upon defendant's arraignment, or thereafter in open court, that the State will not ask for a verdict of guilty of the maximum crime charged but will ask for a verdict of guilty of a designated and included less offense embraced in the bill, and the announcement is entered in the minutes of the court, such announcement is the equivalent of a verdict of not guilty on the charge or charges the solicitor has elected to abandon, and the State will not be permitted another prosecution on the charge or charges eliminated. *S. v. Miller*, 243.

If, after a prosecution for an offense, a new fact supervenes for which the defendant is responsible and which changes the character of the offense and,

CRIMINAL LAW—*Continued.*

together with the previous facts, constitutes a new and distinct crime, a conviction of the first offense is no bar to an indictment for the other distinct crime. *S. v. Mcadows*, 327.

Defendant, prior to his victim's death, pleaded guilty to an indictment charging a felonious assault, G.S. 14-32, and was sentenced therefor. Subsequently, upon the victim's death, defendant was indicted for murder in the second degree, and defendant entered a plea of *autrefois convict* to the charge. *Held:* Defendant's plea in bar of "former conviction" was properly overruled, since at the time of his conviction for felonious assault the defendant could not have been placed in jeopardy for homicide. *Ibid.*

§ 29. Suggestion of Mental Incapacity to Plead.

Order by the resident judge committing defendant to a State hospital for the purpose of determining his mental capacity to stand trial is a precautionary measure and is specially authorized by G.S. 122-91. *S. v. Old*, 42.

§ 30. Pleas of the State.

An announcement in open court by the solicitor that the State will not ask for a verdict of guilty of the maximum crime charged is equivalent to a verdict of not guilty to the charges eliminated, and further prosecution on that charge is barred. *S. v. Miller*, 243.

A solicitor has the authority to prosecute a defendant for a lesser included offense. *S. v. Peeden*, 494.

§ 31. Judicial Notice.

The courts will take judicial notice that many coin telephone instruments are within buildings and some are on the street in telephone booths. *S. v. Craddock*, 160.

§ 41. Circumstantial Evidence in General.

In a criminal prosecution, evidence tending to establish any incident which, with evidence of other incidents, tends to form a composite picture identifying defendant as the perpetrator of the offense charged, is competent. *S. v. Old*, 42.

§ 43. Maps and Photographs in Evidence.

The introduction in evidence of photographs of the body of deceased will not be held for prejudicial error when the court categorically instructs the jury that the photographs were admitted solely for the purpose of illustrating the testimony of the witness if the jury should find they did so illustrate his testimony. *S. v. Feaganes*, 246.

Color slides taken of burn marks and blisters on the hands and arms of a defendant accused of safecracking by use of an acetylene torch are properly admitted into evidence to illustrate the testimony of witnesses. *S. v. Hill*, 439.

§ 53. Medical Expert Testimony in General.

It is competent for the county medical examiner to testify from his examination of the body of the deceased as to the wounds and as to his opinion that the wounds could have been caused by a bullet. *S. v. Feaganes*, 246.

§ 61. Evidence as to Shoe Prints and Tire Tracks.

Evidence of shoe print evidence is properly admissible for the purpose of identifying the accused as the guilty party when the attendant circumstances show that the prints were found at or near the place of the crime, were made

CRIMINAL LAW—*Continued.*

at the time of the commission of the crime, and correspond with the shoes worn by the accused at that time. *S. v. Pinyatello*, 312.

Evidence by an expert witness that a latent heel print on an envelope found near the scene of a safecracking possessed some 35 points of similar characteristics, and no points of dissimilarity, with the heel of a shoe worn by defendant at the time of his arrest four days after the offense is competent when there is evidence that the shoe was worn by defendant at the time of the commission of the crime. *Ibid.*

§ 71. "Short-hand" Statements of Fact.

Statement of a witness that an object which he saw on the floorboard of defendant's car in plain view was a "burglary lock pick" will not be held for prejudicial error, the statement being competent as a shorthand statement of collective fact, and a lock pick being denominated in the statute as a burglary tool. *S. v. Craddock*, 160.

§ 74. Confessions.

Testimony by a deputy sheriff as to statements made by the defendant, not amounting to a confession and exculpatory on their face, was not erroneously admitted into evidence, since there was uncontradicted evidence that defendant had been advised of his rights and had declined to consult a lawyer, although there may have been a possibility of prejudice in that the statements were at variance with the testimony of other witnesses for the State. *S. v. Edwards*, 89.

Where the court hears testimony on the *voir dire* and finds that defendant was amply advised of his constitutional rights and that his statement was voluntary and competent, order admitting the statement in evidence will not be disturbed when the record amply supports the court's findings. *S. v. Johnson*, 239.

§ 75. Tests of Voluntariness of Confessions; Admissibility in General.

The test of the admissibility of a confession is whether the statements made by the defendant were in fact voluntarily and understandingly made. *S. v. Bishop*, 283.

That the defendant was in the custody of police officers at the time of making the confession is but a circumstance to be considered in determining the voluntariness of the confession and does not of itself render the confession incompetent. *Ibid.*

It has been the rule in this State for over 140 years that a confession obtained by the slightest emotions of hope or fear ought to be rejected. *Ibid.*

The decision in *Miranda v. Arizona*, 384 U.S. 436, requires that a suspect in the custody of police officers must be warned, prior to interrogation, (1) that he has the right to remain silent, (2) that any statement made by him may be used as evidence against him in court, (3) that he has the right to counsel prior to and during the interrogation, and (4) that, if indigent, counsel will be appointed for him if he so desires. *Ibid.*

Confessions of defendants held voluntary and competent. *Ibid.*

Under the decision of *Miranda v. Arizona*, 384 U.S. 436, it is clear that an involuntary or not properly qualified confession may not be used to impeach a defendant who takes the stand in his own behalf. *S. v. Meadows*, 327.

Evidence of the State that the defendant, surrounded by family and friends in his yard, made inculpatory statements amounting to a confession to police officers immediately following the shooting of deceased by defendant,

held properly admitted in evidence to impeach the testimony of defendant on trial, although the officers failed to advise defendant of his rights as required by *Miranda v. Arizona,* it appearing that the statements were the result of a general police investigation to determine if a crime had been committed, and not the result of an in-custody interrogation. *Ibid.*

The admission, over objection, of inculpatory statements made by defendant to police officers without a hearing of evidence by the trial court to determine the voluntariness of the statements, and the admission, over objection, of a knife identified by the accused, while in the custody of police officers and without being advised of his rights, as the knife with which he stabbed the deceased, while ordinarily reversible error, *is held* not to warrant a new trial in this case, since the defendant testified in his own behalf that he intentionally stabbed the deceased with the knife. *S. v. McDaniel,* 556.

§ 76. Determination and Effect of Admissibility of Confessions.

Upon challenge of the competency of a confession, the trial judge should excuse the jury, hear the evidence of the State and the defendant upon the question of whether defendant voluntarily and understandingly made the confession, and then make findings of fact, if the evidence be conflicting, to show the basis of his ruling in admitting the confession, and the court's findings which are supported by evidence are conclusive, but its conclusion of law from the facts found is reviewable. *S. v. Bishop,* 283.

The admissibility of a confession is to be determined by the facts appearing in evidence when it is received or rejected, and not by the facts appearing in evidence at a later stage of the trial. *Ibid.*

The admission, over objection, of inculpatory statements made by defendant to police officers without a hearing of evidence by the trial court to determine the voluntariness of the statements, and the admission, over objection, of a knife identified by the accused, while in the custody of police officers and without being advised of his rights, as the knife with which he stabbed the deceased, while ordinarily reversible error, *is held* not to warrant a new trial in this case, since the defendant testified in his own behalf that he intentionally stabbed the deceased with the knife. *S. v. McDaniel,* 556.

The rule that a conviction based upon an incompetent confession cannot be saved by sufficient evidence *aliunde* the confession does not apply when the defendant testifies in his own behalf to the same facts stated in such confessions. *Ibid.*

When the State offers into evidence an alleged confession of the defendant, it is the duty of the trial court, in the absence of the jury, to hear the evidence of the State and of the defendant upon the question of the voluntariness of the confession and to make findings of fact thereon, and such findings are binding on appeal if supported by competent evidence. *S. v. Greenlee,* 651.

§ 77. Admissions and Declarations.

Evidence to the effect that as defendant and deceased were leaving the room immediately preceding the fatal shooting, the witness told defendant's wife to stop them that they were going to fight, *held* competent as a part of the *res gestæ. S. v. Feaganes,* 246.

§ 79. Acts and Declarations of Companions, Codefendants and Coconspirators.

Admission of evidence competent against one defendant only is prejudicial to the other when its admission is not restricted. *S. v. Squires,* 402.

CRIMINAL LAW—*Continued.*

Testimony in corroboration of an accomplice is admissible where the court correctly instructs the jury before its admission as to how such testimony is to be considered, reiterates such instruction in the charge to the jury, and further instructs the jury that the testimony of an accomplice should be carefully scrutinized. *S. v. Paige*, 417.

§ 82. Privileged Communications.

In a prosecution for homicide arising from the operation of an automobile, testimony of defendant's family physician that the defendant was intoxicated at the time of the collision, *held* competent upon a finding by the court that the evidence was necessary to a proper administration of justice, since such finding takes the evidence out of the privileged communications rule. *S. v. Howard*, 519.

§ 83. Competency of Wife to Testify Against Husband.

A wife is incompetent to testify against her husband unless the evidence comes within the exceptions of G.S. 8-57, and where the wife is allowed to testify as to matters incriminating to her husband, it is the duty of the court to exclude the testimony notwithstanding defendant's lack of objection, and its failure to do so is reversible error. *S. v. Porter*, 463.

§ 85. Character Evidence Relating to Defendant.

Where a defendant takes the stand as a witness, he is subject to cross-examination as to convictions for prior criminal offenses for the purpose of impeachment. *S. v. Robinson*, 271; *S. v. Hartsell*, 710.

Where defendant, on cross-examination, states positively that his criminal record consists of only two convictions, the State is not bound by the answer but may properly elicit from defendant, for purposes of impeachment, that he had also been convicted of other offenses, subject, however, to the qualification that had defendant denied the additional convictions the denial could not be contradicted. *S. v. Robinson*, 271.

Cross-examination of defendant in regard to previous offenses committed by him are competent solely for the purpose of impeaching his credibility as a witness, but where defendant does not request the court to instruct the jury to consider such testimony solely for the purpose for which it is competent, an exception thereto cannot be sustained. *S. v. Williams*, 273.

Where defendant takes the stand in his own behalf and introduces the details of his criminal record, including a conviction for assault, as substantive evidence of his innocence, the solicitor is entitled to cross-examine the defendant as to the nature of the weapon used by defendant in the prior assault. *S. v. McDaniel*, 556.

§ 86. Credibility of Defendant and Parties Interested.

Under the decision of *Miranda v. Arizona*, 384 U.S. 436, it is clear that an involuntary or not properly qualified confession may not be used to impeach a defendant who takes the stand in his own behalf. *S. v. Meadows*, 327.

Evidence of the State that the defendant, surrounded by family and friends in his yard, made inculpatory statements amounting to a confession to police officers immediately following the shooting of the deceased by defendant, *held* properly admitted in evidence to impeach the testimony of defendant on trial, although the officers failed to advise defendant of his rights as required by *Miranda v. Arizona*, it appearing that the statements were the result of a general police investigation to determine if a crime had been committed, and not the result of an in-custody interrogation. *Ibid.*

CRIMINAL LAW—*Continued.*

§ 87. Direct Examination of Witnesses.

It will not be held for error that the court permits the solicitor to ask leading questions which bring forth testimony that could have been otherwise obtained and the testimony brought forth is not objectionable or the import of the testimony is not subject to reasonable dispute but has only the effect of saving time, the matter being in the wide discretion of the trial court. *S. v. Johnson*, 239.

§ 89. Credibility of Witnesses; Corroboration and Impeachment.

Discrepancy in minor details between testimony of the prosecuting witness and testimony offered in corroboration thereof does not warrant a new trial. *S. v. Cox*, 140.

Testimony in corroboration of an accomplice is admissible where the court correctly instructs the jury before its admission as to how such testimony is to be considered, reiterates such instruction in the charge to the jury, and further instructs the jury that the testimony of an accomplice should be carefully scrutinized. *S. v. Paige*, 417.

§ 91. Time of Trial and Continuance.

A motion for continuance is ordinarily addressed to the sound discretion of the trial judge, and his ruling thereon is not subject to review absent an abuse of discretion. *S. v. Moses*, 509.

A motion for continuance on the ground that the defendant's cases were called for trial within a few minutes after return of the bills of indictment, *held* properly denied where it appears that the indictments were based upon warrants issued by the recorder's court and that the defendant had at least one week's notice that the cases were calendared for trial and where no affidavit was filed, pursuant to G.S. 1-176, detailing facts asserted as a basis for the motion. *Ibid.*

§ 92. Consolidation and Severance of Counts.

Ordinarily, an indictment for a minor offense should not be consolidated for trial with a capital charge. *S. v. Old*, 42.

Indictments for assault and for murder held properly consolidated under facts of this case. *Ibid.*

Each defendant was charged with possession, without lawful excuse, of implements of housebreaking and burglary discovered in a car, with out-of-state license plates, in which the four were riding. *Held:* Order consolidating the indictments was within the discretion of the trial court, G.S. 15-152, since the State's case rested upon the same set of facts at the same time and place against each defendant. *S. v. Craddock*, 160.

§ 95. Admission of Evidence Competent for Restricted Purpose.

Where evidence competent for a restricted purpose is offered generally, it is incumbent upon the opposing party to request the court to restrict its admission. *S. v. Williams*, 273.

§ 98. Presence of Defendant; Custody of Defendant or Witnesses.

A motion to sequester witnesses is addressed to the discretion of the trial court, and the court's refusal of a request for sequestration will not be disturbed in the absence of a showing of abuse. *S. v. Clayton*, 377.

§ 102. Argument and Conduct of Counsel or Solicitor.

Any inference in the solicitor's argument in regard to defendant's failure to testify in his own behalf *held* cured by the court's immediate instruction

CRIMINAL LAW—*Continued.*

upon objection that defendant had the right not to testify and that his failure to do so should not prejudice him, and by the court's instruction to the same effect in the charge to the jury. *S. v. Clayton*, 377.

§ 103. Function of Court and Jury in General.

Where police officers testify that the defendant made inculpatory statements to them, and the defendants deny the making of such statements, whether defendants made the statements and the weight, if any, to be given to such statements are solely for the determination of the jury. *S. v. Bishop*, 283.

The jury has the right to assume that all of the evidence admitted is competent unless the court effectively removes it from their consideration, since the competency of the evidence is the province of the court and its weight and credibility are for the jury. *S. v. Squires*, 402.

§ 104. Consideration of Evidence on Motion to Nonsuit.

Evidence of the State that the defendant had a fifty dollar bill and a one hundred dollar bill on his person when he was arrested and that the victim of the safecracking testified that the largest bill in his safe was a twenty dollar bill, but that there were other numerous bills of lesser denominations, does not, standing alone, justify a compulsory nonsuit. *S. v. Pinyatello*, 312.

On motion to nonsuit, the evidence must be considered in the light most favorable to the State, and the State is to be given the benefit of all inferences reasonably deducible therefrom. *S. v. Clayton*, 377; *S. v. Tilley*, 408; *S. v. Davis*, 469.

Contradictions and discrepancies in the State's evidence are for the jury to resolve and do not warrant nonsuit. *S. v. Greenlee*, 651; *S. v. Hartsell*, 710.

§ 106—Sufficiency of Evidence to Overrule Nonsuit.

The unsupported testimony of an accomplice is sufficient to support a conviction if it satisfies the jury of defendant's guilt beyond a reasonable doubt. *S. v. Partlow*, 60; *S. v. McNair*, 130.

Motion for nonsuit should be denied if there is substantial evidence tending to prove each essential element of the offense charged, and this rule applies whether the evidence is direct or circumstantial, or a combination of both. *S. v. Swann*, 215; *S. v. Pinyatello*, 312; *S. v. Burton*, 687.

The extra-judicial confession of guilt by a defendant must be supported by evidence *aliunde* the confession which establishes the *corpus delicti*, and such evidence may be circumstantial or direct. *S. v. Bishop*, 283.

If there is evidence, circumstantial, direct, or a combination of both, amounting to substantial evidence of each element of the offense charged, motion to nonsuit should be denied, it being in the province of the jury to determine whether the circumstantial evidence excludes every reasonable hypothesis of innocence. *S. v. Hill*, 439.

§ 114. Expression of Opinion by Court on the Evidence in the Charge.

A statement by the court, in reviewing the evidence in the charge to the jury, that "[i]t was elicited on cross examination that the defendant had been convicted of second degree murder, forgery, automobile larceny and one or more assaults", *held* not to constitute an expression of opinion. *S. v. Edwards*, 89.

It is prejudicial error for the court in any manner to convey to the jury his opinion on the evidence, since each defendant is entitled to a fair and im-

partial trial before a neutral and impartial judge and an equally unbiased mind of a properly instructed jury. *S. v. Davis*, 102.

In a prosecution for manslaughter arising out of the operation of an automobile, the defendant having offered no evidence, it is not error for the court to instruct the jury that the defendant contended that he was not the driver of the automobile, since defendant's plea of not guilty puts into issue every element of the offense charged. *S. v. Clayton*, 377.

§ 116. Charge on Failure of Defendant to Testify.

Any inference in the solicitor's argument in regard to defendant's failure to testify in his own behalf *held* cured by the court's immediate instruction upon objection that defendant had the right not to testify and that his failure to do so should not prejudice him, and by the court's instruction to the same effect in the charge to the jury. *S. v. Clayton*, 377.

An instruction that the defendant's failure to testify in his own behalf is a fact and not a circumstance to be considered against him, *held* not erroneous, although an inappropriate choice of words, since the instructions in their entirety correctly charge that the defendant had a legal right to rely upon the weaknesses of the State's case and to elect not to testify in his own behalf. *S. v. Paige*, 417.

§ 118. Charge on Contentions of the Parties.

While ordinarily a misstatement of the contentions must be brought to the attention of the trial court in apt time, if a statement of the contentions contains legal inferences and deductions such as to mislead the jury and prejudice the cause of defendant, they must be held for prejudicial error on exception, notwithstanding absence of objection at the time. *S. v. Davis*, 102.

A misstatement of the contentions of the parties must ordinarily be brought to the attention of the trial court in apt time in order for objection thereto to be considered. *S. v. Feaganes*, 246.

In a prosecution for manslaughter arising out of the operation of an automobile, the defendant having offered no evidence, it is not error for the court to instruct the jury that the defendant contended that he was not the driver of the automobile, since defendant's plea of not guilty puts into issue every element of the offense charged. *Ibid.*

An error in stating the contentions of a defendant ordinarily must be called to the court's attention in apt time to afford opportunity for correction, in order that an exception thereto be considered on appeal. *S. v. Clayton*, 377.

§ 124. Sufficiency and Effect of Verdict in General.

An apparently ambiguous verdict may be given significance and correctly interpreted by reference to the charge, the facts in evidence, the theory of the trial and the instructions of the court. *S. v. Tilley*, 408.

§ 127. Arrest of Judgment.

Sufficiency of a bill of indictment may be raised by motion in arrest of judgment. *S. v. Partlow*, 60.

Where judgment is arrested for fatal defect in the indictment, the State may thereafter put defendant on trial under a proper bill of indictment, if it so elects. *Ibid*; *S. v. Cook*, 728.

Where a fatal defect appears on the face of the record, the Supreme Court will *ex mero motu*, arrest judgment. *S. v. Brower*, 740.

CRIMINAL LAW—*Continued.*

§ 134. Form and Requisites of Judgment or Sentence.

A judgment imposed in a criminal case is not a final judgment as long as the case is pending on appeal. *S. v. Pardon*, 72.

§ 137. Conformity of Judgment to Indictment, Verdict, or Plea.

Where there is a general verdict on a bill of indictment containing two or more counts charging distinct offenses, a judgment of imprisonment imposed thereon will be sustained where the punishment does not exceed the statutory maximum on the count which carried the greater punishment. *S. v. Raynes*, 488.

§ 138. Severity of Sentence and Determination Thereof.

A defendant on trial upon an indictment charging him with being an accessory before the fact may not complain that the judge in the exercise of his discretion failed to sentence the principal felons upon their plea of guilty until the court had heard all of the evidence, including the evidence adduced upon the trial of defendant as an accessory before the fact, since during the term the judgment of the court remains *in fieri*, there being nothing to indicate that any threats or promises of reward were made to any of the witnesses. *S. v. Partlow*, 60.

Where the law under which a defendant was convicted is amended pending appeal so as to reduce the punishment that could be imposed under the prior law, the defendant is entitled to mitigation of sentence in conformity with the new law. *S. v. Pardon*, 72.

Amendment of public drunkenness statute by reducing penalty for violation thereof, such amendment enacted during defendant's appeal, held to inure to his benefit. *Ibid.*

A sentence of imprisonment within the limitation authorized by statute will not be disturbed on appeal. *S. v. Faison*, 146.

The fact that the trial court recommended that defendant be allowed to serve under the Work Release Program in a sentence imposed in one case but that it failed to make such recommendation in a sentence of imprisonment imposed the same day in another case, the two sentences to run consecutively, does not constitute cruel and unusual punishment, since G.S. 148-33.1 authorizes but does not require the court to recommend that the prisoner be granted the privilege of Work Release Program in each case. *S. v. Wright*, 264.

A defendant may not contend that consecutive sentences entered by the court in two separate cases constitute cruel and unusual punishment when the sentences are within the limits of the applicable statute, since the court has authority to provide that such sentences run consecutively. *Ibid.*

Defendant pleaded guilty to a charge of felonious assault and began a sentence of five years imprisonment. Upon the death of the victim of the assault, defendant was convicted of manslaughter and sentenced to a period of imprisonment for not less than 12 nor more than 15 years, the sentence to run concurrently with the first. *Held:* The Supreme Court, in the exercise of its general supervisory jurisdiction, North Carolina Constitution Art. IV, § 10, orders that the defendant be given credit for the time served under the first sentence of imprisonment in computing the length of imprisonment in the judgment for manslaughter. *S. v. Meadows*, 327.

Where a new trial is awarded upon defendant's own application, the fact that the sentence imposed upon conviction at the second trial exceeds the sentence imposed at the first trial is not ground for legal objection, the sentence imposed at the second trial being authorized by statute, but the defendant is

to be given credit for the time served on the sentence imposed at the first trial. *S. v. Paige*, 417.

Where there is a verdict or plea of guilty to more than one count in a warrant or bill of indictment and the court imposes a single judgment thereon, a consolidation of the counts for the purpose of judgment will be presumed, and the punishment may not exceed that permitted on the count carrying the greater punishment. *S. v. McCrowe*, 523.

§ 140. Concurrent and Cumulative Sentences.

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. *S. v. Howard*, 140; *S. v. Meadows*, 327; *S. v. Greenlee*, 651.

§ 144. Modification and Correction of Judgment in Trial Court.

The judgment of the court is *in fieri* during the term in which it is rendered and it may be modified, amended, or reversed at any time during the term. *S. v. Belk*, 517.

§ 146. Nature and Grounds of Appellate Jurisdiction of Supreme Court in Criminal Cases.

The Supreme Court may take notice of a fatally defective warrant or indictment *ex mero motu*. *S. v. Partlow*, 60.

A new trial must be granted by the Supreme Court for incompetent evidence entered in the trial below, since the question for determination by the Supreme Court is not whether there was sufficient competent evidence to convict but whether incompetent evidence of a prejudicial nature was admitted over objection. *S. v. Squires*, 402.

§ 153. Jurisdiction of Lower Court Pending Appeal.

A Superior Court judge is without authority to vacate an order of another Superior Court judge to the effect that a defendant had abandoned his appeal, since any error in the first judgment could only be corrected by the Supreme Court. *S. v. Peeden*, 494.

§ 154. Case on Appeal.

Defendant's case on appeal, although not served upon the State within the prescribed time nor docketed in the Supreme Court at the appropriate Term, is treated as a petition for *certiorari* in this case and decided on its merits as in the case of an authorized belated appeal, notwithstanding the failure of the defendant's court-appointed attorney to explain the delay, since it appears from the case that the defendant is entitled to relief. *S. v. Aycoth*, 48.

§ 156. Certiorari.

Belated case on appeal treated as a petition for *certiorari* in this case. *S. v. Aycoth*, 48.

§ 158. Conclusiveness and Effect of Record and Presumptions as to Matters Omitted.

Where the charge of the court is not set out in the record, it is presumed that the jury was correctly instructed on the law arising out of the evidence. *S. v. McNair*, 130; *S. v. Pinyatello*, 312; *S. v. Davis*, 469; *S. v. Dawson*, 535.

CRIMINAL LAW—*Continued.*

§ 161. Necessity for and Form and Requisites of Exceptions and Assignments of Error in General.

An appeal itself constitutes an exception to the judgment and presents for review the sole question whether error appears upon the face of the record proper. *S. v. Morgan*, 97.

§ 162. Objections, Exceptions, and Assignments of Error to Evidence, and Motions to Strike.

A wife is incompetent to testify against her husband unless the evidence comes within the exceptions of G.S. 8-57, and where the wife is allowed to testify as to matters incriminating to her husband, it is the duty of the court to exclude the testimony notwithstanding defendant's lack of objection, and its failure to do so is reversible error. *S. v. Porter*, 463.

The failure to object in apt time to incompetent testimony will not be regarded as a waiver of objection where the evidence admitted is forbidden by statute. *Ibid.*

§ 163. Exceptions and Assignments of Error to the Charge.

An assignment of error to a portion of the charge containing a number of propositions must fall if the charge is correct as to any one or more of them. *S. v. Robinson*, 271.

§ 164. Exceptions and Assignments of Error to Refusal of Motion for Nonsuit.

Where the jury convicts defendant of a lesser degree of the crime charged, any error relating solely to a higher degree of the offense cannot be prejudicial. *S. v. Frankum*, 253.

§ 166. The Brief on Appeal.

Exceptions and assignments of error not brought forward in the brief are deemed abandoned. *S. v. Pardon*, 72; *S. v. Feaganes*, 246; *S. v. Williams*, 273; *S. v. Davis*, 469.

§ 167. Presumptions and Burden of Showing Error; Harmless and Prejudicial Error in General.

The presumption is in favor of the regularity of the trial below with the burden on defendant to show error affecting the result adversely to him. *S. v. Partlow*, 60.

Any technical error in putting into effect a suspended sentence *held* not prejudicial to the defendant in this case when the sentence is to run concurrently with another sentence of imprisonment imposed upon defendant the same day, it being to defendant's advantage to be freed of the sentence of suspension in this manner. *S. v. Frankum*, 255.

In order to be entitled to a new trial, defendant has the burden of establishing not only that error was committed but that such error was material and prejudicial, since verdict and judgment are not to be set aside for mere technical error. *S. v. Paige*, 417.

§ 168. Harmless and Prejudicial Error in Instructions.

The court's instruction to the jury will be construed contextually, and objections thereto will not be sustained when the charge, so construed, adequately charges the law on each material aspect of the case arising on the evidence and applies the law fairly to the various factual situations presented by the evidence. *S. v. Craddock*, 160.

CRIMINAL LAW—*Continued.*

Where the charge of the court, considered contextually, is free from substantial error, objection thereto will not be sustained, and a single sentence, even though it be subject to criticism when read out of context, will not be held for prejudicial error when it is without harmful effect upon such contextual construction. *S. v. Feaganes*, 246.

An exception to the charge will not be sustained when the charge considered contextually, is free from prejudicial error. *S. v. Leach*, 733.

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

A question propounded by the State to the defendant on cross-examination as to whether the defendant had been indicted for the larceny of an automobile, *held* not prejudicial in view of the defendant's unequivocal negative answer. *S. v. McNair*, 130.

While ordinarily the *quantum* of punishment imposed upon the conviction of another offense is not admissible for purposes of impeachment, there was no prejudicial error in this case in allowing the State to show that the defendant had received a probationary sentence of eighteen months to an offense to which he had pleaded guilty, since such a sentence tended to place defendant in a more favorable light with regard to that particular offense. *Ibid.*

In this prosecution for crime against nature with his stepson, evidence elicited from defendant on cross-examination that he had been fined in a trespass case brought by his wife and ordered to stay out of the county, *held* not prejudicial in view of the fact that defendant's counsel, in failing to renew objection and moving to strike, apparently considered the disclosure helpful as showing a continuing effort, including the instant case, by the wife to get rid of the defendant. *S. v. Cox*, 140.

It will not be held for prejudicial error that an officer was allowed to testify that he stopped the car in which defendants were riding because he was looking for a car of such description in response to a bulletin from the State Bureau of Investigation, incriminating statements in the bulletin not being disclosed to the jury and defendants having brought out the same matter on cross-examination of a State's witness. *S. v. Craddock*, 160.

The admission of testimony over objection is ordinarily harmless when testimony of the same import is theretofore or thereafter introduced without objection, or defendant elicits similar testimony on cross-examination. *S. v. Brown*, 512.

The admission of evidence over objection is ordinarily rendered harmless when the defendant thereafter testifies to evidence of the same import. *S. v. McDaniel*, 556.

The rule that a conviction based upon an incompetent confession cannot be saved by sufficient evidence *aliunde* the confession does not apply when the defendant testifies in his own behalf to the same facts stated in such confession. *Ibid.*

§ 171. Error Relating to One Count or to One Degree of the Crime Charged.

An announcement by the solicitor in open court that the State would prosecute defendant only for manslaughter precludes the State from thereafter prosecuting defendant for murder in the second degree, but the trial court's submission of the charge of second degree murder to the jury, though technically erroneous, *held not to* warrant a new trial in this case, since the jury returned a verdict of guilty of manslaughter, and since the record fails to disclose that

CRIMINAL LAW—*Continued.*

another trial would produce a different or more favorable result. *S. v. Miller*, 243.

§ 176. Review of Judgments on Motions to Nonsuit.

Where defendant introduces evidence, only the correctness of the denial of the motion to nonsuit made at the close of all the evidence is presented on appeal. *S. v. Meadows*, 327.

§ 177. Determination and Disposition of Cause.

Where defendant is convicted under two bills of indictment consolidated for trial, and the judge directs that the sentence upon the second conviction should begin at the expiration of the sentence imposed upon the first, the cause must be remanded for proper judgment when the judgment on the first conviction is arrested for fatal defect in the indictment. *S. v. Partlow*, 60.

§ 181. Post-Conviction Hearing.

Where record discloses that defendant charged with capital offense was not represented by counsel, new trial must be ordered upon post-conviction hearing. *Carpenter v. State*, 84.

DAMAGES.

§ 3. Compensatory Damages for Injury to Person.

When negligence produces some actual physical impact or genuine physical injury, damages may be recovered also for mental or emotional disturbance naturally and proximately resulting therefrom. *King v. Higgins*, 267.

§ 16. Instructions on Measure of Damages.

In a personal injury action, an instruction that the plaintiff, if entitled to recover at all, was to be awarded as damages one compensation in a lump sum for all injuries, past and prospective, caused by defendant's wrongful act, including loss of both bodily and mental powers or for actual suffering both of body and mind,*held*, without error. *King v. Higgins*, 267.

The failure of the court to define mental suffering as including embarrassment, mortification, and disfiguring or humiliating injuries, as requested by plaintiff in her prayer for instructions, is not error in the absence of any evidence that plaintiff had undergone this type of mental suffering. *Ibid.*

In a personal injury action to recover damages sustained by a fourteen year old plaintiff, an instruction to the effect that the jury is not to consider medical expenses and loss of earning capacity during minority in awarding damages to the plaintiff *is held* without error. *Emanuel v. Clewis*, 505.

DEATH.

§ 3. Nature and Grounds of Action for Wrongful Death.

Actions for wrongful death are purely statutory and neither punitive nor nominal damages are allowed, G.S. 28-173, but direct evidence that the deceaseds were in good health, that the *feme* worked for a grocery store and the male was part-owner of a garage in which he had actively worked as a mechanic presents sufficient evidence of pecuniary loss to permit the jury to return a verdict of actual damages. *Reeves v. Hill*, 352.

Nonsuit is properly entered in an action for wrongful death when plaintiff's allegation that he was duly qualified and acting administrator of de-

DEATH—*Continued.*

ceased is denied in the answer and plaintiff offers no evidence in support of his allegation. *Miller v. Wright*, 666.

The wrongful death statute, G.S. 28-173, gives but one cause of action for damages for the death of a person and contemplates that damages be recoverable as one compensation in a lump sum. *Kendrick v. Cain*, 719.

Where plaintiff administrator in an action for wrongful death accepts the sum of money paid over to the clerk of court by one joint tort-feasor in satisfaction of the judgment rendered against him, plaintiff's action against the other joint tort-feasor is thereby extinguished, and plaintiff may not thereafter appeal from a judgment of nonsuit granted in favor of the other tort-feasor. *Ibid.*

§ 4. Time Within Which Action for Wrongful Death Must Be Instituted.

An action for wrongful death instituted within one year after entry of a judgment of voluntary nonsuit in a former action and nearly five years after the accident and death of the intestate is not barred by the statute of limitations where the plaintiff does not allege a cause of action different from the former action. *Exum v. Boyles*, 567.

DEEDS.

§ 4. Competency of Grantor.

The test of the mental capacity to execute a valid deed is whether the grantor understood the nature and consequences of his act in making the deed, and whether he knew what land he was disposing of and to whom. *Hendricks v. Hendricks*, 340.

DISORDERLY CONDUCT AND PUBLIC DRUNKENNESS.

§ 2. Prosecutions.

Prior to the enactment of Chapter 1256, Session Laws of 1967, a sentence of eight months imprisonment, imposed upon a third conviction of public drunkenness within a twelve-month period, was within the two-year maximum sentence permitted for a misdemeanor, and did not constitute cruel and unusual punishment in the constitutional sense. *S. v. Pardon*, 72.

Chapter 1256, Session Laws of 1967, rewriting G.S. 14-335, did not repeal the public drunkenness statute, but had the effect of reducing and making uniform throughout the State the maximum punishment for the offense of public drunkenness, and of establishing chronic alcoholism as an affirmative defense to the offense. *Ibid.*

Amendment decreasing penalty for public drunkenness, enacted pending defendant's appeal, held to inure to defendant's benefit. *Ibid.*

DIVORCE AND ALIMONY.

§ 1. Jurisdiction.

The rendition of absolute divorce does not oust the jurisdiction of a court in which a prior action for alimony without divorce was pending. *Teague v. Teague*, 134.

§ 13. Separation for Statutory Period.

In the husband's action for divorce on the ground that he and his wife had lived separate and apart continuously for a period of one year next preceding the institution of the action, the husband is not required to establish that he

DIVORCE AND ALIMONY—*Continued.*

is the injured party, G.S. 50-6, and the sole defense to the husband's right to divorce on such ground is that the separation was caused by the husband's wilful abandonment of her, which defense the wife must allege and prove. *Overby v. Overby*, 636.

In an action for absolute divorce under G.S. 50-6, appellant's contention that the trial court should have instructed the jury that abandonment imports wilfulness *is held* without merit. *Ibid.*

§ 18. Alimony and Subsistence Pendente Lite.

In an action for alimony without divorce, the refusal of the court to consider defendant's affidavit, filed before time for answer had expired, which affidavit related to his financial ability to make payments, denied defendant his right to be heard on the issue of his ability to pay *pendente* allowances, and the order awarding compensation to plaintiff is vacated and the cause remanded for further hearing. *Josey v. Josey*, 138.

§ 22. Custody and Support of the Children of the Marriage — Jurisdiction and Procedure.

An order awarding custody of the children is not final but is subject to modification upon change of condition. *Gustafson v. Gustafson*, 452.

The use of affidavits by the wife in a hearing to award the custody of the children does not deprive the defendant of a fair hearing, since at the trial of the cause the defendant will be afforded the right to cross-examine the witnesses. *Ibid.*

The provisions of G.S. 8-53 authorizing "the presiding judge of a superior court" to compel a physician to disclose confidential matters is limited to a judge presiding at the trial and does not authorize a judge in a hearing pursuant to G.S. 50-16 to compel the examination of a physician who submitted affidavits in support of the wife. *Ibid.*

The resident judge or the presiding judge of a district has the authority to award the custody of a child. *Ibid.*

§ 23. Support of Children of the Marriage.

The Superior Court has authority to modify an order affecting the custody and support of a minor child when changed circumstances so require, G.S. 50-13, G.S. 50-16, and the court's findings of fact, in modifying such order, are conclusive on appeal if supported by competent evidence. *Teague v. Teague*, 134.

The amount allowed by the court for the support of the children of the marriage will be disturbed on appeal only when there is a gross abuse of discretion, and the court has plenary authority to order the father to turn over to the plaintiff, for the use of the children, the home owned by the parties as tenants by the entireties. *Ibid.*

The court in a divorce action acquires jurisdiction to determine the custody and maintenance of the children of the marriage, both before and after final decree of divorce, and will determine the question of custody in the light of the paramount welfare of the children. *Crosby v. Crosby*, 235.

The order directing the husband to make payments for the support of the minor children of the marriage is *res judicata* only so long as the facts and circumstances remain the same, and the decree is subject to alteration upon change of circumstances affecting the welfare of the children, and the ability of the father to meet the need for such support must also be considered. *Ibid.*

Evidence held insufficient to support order modifying order for support of child of the marriage. *Ibid.*

DIVORCE AND ALIMONY—*Continued.*

Where the court makes no detailed findings in support of its order vacating a prior order for support of the minor child of the marriage in a divorce action, and the evidence of record is insufficient to disclose a change of condition warranting a modification of the order, the cause must be remanded for specific findings. *Ibid.*

§ 24. Custody of the Children of the Marriage.

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EASEMENTS.

§ 3. Creation of Easement by Implication or Necessity.

In an action by a lessor of an office building to recover rent for the lessee's use of a basement as office space, the crucial contention of the parties was whether the basement was included in the premises demised in the lease. The furnace, hot water heater, air conditioning and other utilities were located in the basement; the lease provided that the lessor would be responsible for the furnishing of the utilities. *Held:* The evidence is insufficient to show that the lessee acquired an easement in the basement by implication. *Root v. Insurance Co.*, 580.

EJECTMENT.

§ 6. Nature and Essentials of Ejectment to Try Title.

The doctrine that if plaintiffs in ejectment seek to establish title by showing title from a common source they must prove a better title from that source does not apply when defendants are the common source of title and are estopped from asserting their rights under their prior conveyance and do not attempt to show acquisition of title except under the instrument they are estopped to assert, and do not attempt to show acquisition of an independent title from a third person superior to that of plaintiffs. *Finance Corporation v. Leathers*, 1.

An action in which plaintiff alleges title to the lands in question and that it is entitled to immediate possession thereof, that defendant claimed an interest therein adverse to plaintiff by virtue of an asserted deed, that such deed was void, and that defendant's claim is a cloud on plaintiff's title and that plaintiff is entitled to have the purported deed declared null and void and plaintiff declared the owner of the land, constitutes an action in ejectment, since the crux of the action is the obtaining of possession of the land by plaintiff under his claim of title. *Poultry Co. v. Oil Co.*, 16.

§ 7. Presumptions, Burden of Proof, and Pleadings in Ejectment to Try Title.

In an action in ejectment to recover possession of real property, G.S. 1-56 cannot be applicable, and when defendant does not assert possession under a sheriff's deed upon tax foreclosure G.S. 1-52 does not apply, and G.S. 1-40 does not apply when defendant does not assert that he went into adverse possession for more than 20 years prior to the action. *Poultry Co. v. Oil Co.*, 16.

§ 10. Ejectment to Try Title — Sufficiency of Evidence, Nonsuit and Directed Verdict.

In plaintiff's action in ejectment, it is error for the court to enter judgment dismissing the action upon defendants' pleas of estoppel, laches, and seven

EJECTMENT—*Continued.*

years possession under color of title when the parties do not waive a jury trial and plaintiff does not admit all of the facts tending to establish defendants' pleas in bar. *Poultry Co. v. Oil Co.*, 16.

EMBEZZLEMENT.

§ 1. Nature and Elements of the Offense.

The crime of embezzlement is solely statutory. *S. v. Ross*, 67.

A commissioner who, under authority of and subject to orders of the clerk of the Superior Court, receives and handles money and disburses it to those entitled thereto under the law has substantially the same status as a court-appointed receiver, and as such is a fiduciary in the same sense that a receiver is a fiduciary, and therefore, under the doctrine of *ejusdem generis*, comes within the statutory definition of those who may be prosecuted for embezzlement of funds coming into their hands in trust. *Ibid.*

EMINENT DOMAIN.

§ 13. Actions by the Owner for Compensation or Damages.

Where private property is taken for a public purpose by a governmental agency having the power of eminent domain under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner, in the exercise of his constitutional right, may maintain an action of "inverse condemnation" to obtain just compensation therefor. *Highway Commission v. Reynolds Co.*, 618.

EQUITY.

§ 2. Laches.

Plea of laches is a plea in bar. *Poultry Co. v. Oil Co.*, 16.

Defendant's plea of laches is an affirmative defense upon which defendant has the burden of proof. *Ibid.*

ESCAPE.

§ 1. Elements of, and Prosecutions for, the Offense and for Aiding and Assisting Escape.

An indictment charging that the defendant unlawfully, wilfully, and feloniously harbored an escapee who was serving a sentence of imprisonment when he escaped, is fatally defective in omitting the words "knowing or having reasonable cause to believe that said person was an escapee", G.S. 14-259, and defendant's motion in arrest of judgment is allowed. *S. v. Kirkman*, 143.

ESTOPPEL.

§ 1. Creation and Operation of Estoppel by Deed.

Owners of land held estopped to deny they held title at time they executed second deed of trust on same land. *Finance Corporation v. Leathers*, 1.

Estoppel by deed is recognized in this State when the grantor intends to convey and the grantee expects to acquire a particular estate, even though the deed contains no technical covenants or warranties. *Realty Co. v. Wysor*, 172.

§ 2. After-Acquired Title.

The owners of land executed a deed of trust thereon to secure a debt and executed another deed of trust, subsequently recorded, to their vendor. The deed

ESTOPPEL—*Continued.*

of trust first registered was foreclosed and the land was purchased by the trustors. *Held:* The after acquired title enures to the benefit of the *cestui* in the secondly recorded deed of trust. *Realty Co. v. Wysor*, 172.

§ 4. Equitable Estoppel.

Pleas of estoppel, laches, and the statutes of limitation are pleas in bar. *Poultry Co. v. Oil Co.*, 16.

Defendant's pleas of estoppel, *res judicata* and laches are affirmative defenses upon which defendant has the burden of proof. *Ibid.*

EVIDENCE.

§ 3. Judicial Notice — Facts Within Common Knowledge.

It is a matter of common knowledge, and therefore a matter of which the courts may take judicial notice, that a large-scale transfer of students and teachers from one school to another in the midst of the academic year would entail widespread confusion and disruption in the work of the school. *Huggins v. Board of Education*, 33.

Courts may take judicial notice that telephone companies habitually transmit conversations by electrical impulses without the use of wires. *Utilities Commission v. Radio Service, Inc.*, 591.

§ 14. Privileged Communications Between Physician and Patient.

A medical witness for plaintiff in a custody hearing brought notes relating to his treatment of the wife for mental disability but he did not refer to them during the examination to refresh his memory. *Held:* There was no error in denying defendant's motion that he be allowed to inspect the notes, and further, the notes being in the nature of a privileged communication, the court will not compel the person within the privileged relation to produce them. *Gustafson v. Gustafson*, 452.

The provisions of G.S. 8-53 authorizing "the presiding judge of a superior court" to compel a physician to disclose confidential matters is limited to a judge presiding at the trial and does not authorize a judge in a hearing pursuant to G.S. 50-16 to compel the examination of a physician who submitted affidavits in support of the wife. *Ibid.*

§ 17. Negative Evidence.

The rule relating to the admissibility of hearsay evidence is not applicable to testimony that a particular statement was made by some person other than the witness when the fact sought to be established is the making of the statement itself. *Wilson v. Indemnity Corp.*, 183.

A witness, shown to have been in a position to see or hear what occurred, may testify not only to what he saw and heard but also to what he did not see or hear. *Ibid.*

When the evidence tends to show that plaintiff was traveling east and approached a vehicle which had entered the highway from the south from a driveway and was standing where it had stalled in attempting to make a left turn on a highway, with its rear some three feet from the south shoulder and its front some one or two feet across the center line, the physical evidence discloses that plaintiff driver was not in a position to see lights on the stationary vehicle if they had been burning, and his testimony that he did not see any lights on the stationary vehicle, is without probative force. *Blanton v. Frye*, 231.

EVIDENCE—*Continued.*

The rule relating to hearsay evidence is not applicable where the purpose of offering an extra-judicial statement is to prove that the statement was made and that the litigant should have reasonably known, under the circumstances, that the statement was made. *Koury v. Follo*, 366.

§ 21. Circumstantial Evidence.

Circumstantial evidence is evidence of facts from which other facts may be logically and reasonably deduced. *Phelps v. Winston-Salem*, 24.

§ 31. Best and Secondary Evidence Relating to Writings.

The testimony of a bank officer as to the manner in which a wife and husband deposited their pay checks and in which they made payments on various loan accounts, such transactions being within the personal observation of the officer, does not contravene the best evidence rule when the testimony was not offered to prove the contents of any writing or document. *Overby v. Overby*, 636.

§ 32. Parol or Extrinsic Evidence Affecting Writings.

The mutual agreement of the parties is the contract, and evidence of the unexpressed intent of one party in entering the agreement is properly excluded. *Root v. Insurance Co.*, 580.

Where the words of a contract are susceptible of more than one interpretation, or where a latent ambiguity arises, evidence of prior negotiations of the parties to the written agreement may be competent for the purpose of throwing light on the intent of the parties. *Ibid.*

§ 33. Hearsay Evidence in General.

Evidence of a statement, oral or written, made by a person other than the witness and offered for the purpose of establishing the truth of the matter contained in the statement, is hearsay. *Wilson v. Indemnity Corp.*, 183.

The rule relating to the admissibility of hearsay evidence is not applicable to testimony that a particular statement was made by some person other than the witness when the fact sought to be established is the making of the statement itself. *Ibid.*

Excerpts from medical textbooks and similar publications are incompetent as hearsay evidence to prove the correctness of a statement of fact or theory therein. *Koury v. Follo*, 366.

Testimony of a witness that the plaintiff was an outstanding student is incompetent as hearsay where it appears that the witness had no personal knowledge of the plaintiff's scholastic record and rank in his class. *Emanuel v. Clewis*, 505.

§ 43. Nonexpert Opinion Evidence as to Sanity.

The mental capacity to make a deed is not a question of fact, but is a conclusion which the law draws from certain facts as a premise, and a nonexpert witness may not testify that a grantor lacked sufficient mental capacity to make a deed, since the presence or absence of mental capacity is the very question for the jury. *Hendricks v. Hendricks*, 340.

§ 50. Medical Testimony.

Excerpts from medical textbooks and similar publications are incompetent as hearsay evidence to prove the correctness of a statement of fact or theory therein. *Koury v. Follo*, 366.

It is not error in a malpractice action for injury to a child to admit in

EVIDENCE—*Continued.*

evidence a manufacturer's label on a drug container stating "Not Safe for Pediatric Use" nor to admit printed instructions to the same import, since they are relevant to prove the existence of a warning which the physician should have seen and taken into account. *Ibid.*

§ 58. Cross-Examination.

Where a respondent, in a proceeding to determine whether his license as a physician should be revoked for unprofessional conduct, testifies in his own behalf, it is competent to cross-examine him as to prior misconduct as bearing upon his credibility. *In re Kincheloe,* 116.

FIRES.

§ 3. Negligence in Causing Fires.

Proof of the origin of the fire causing the damages in suit may be shown by circumstantial evidence, but the evidence in order to be sufficient to be summitted to the jury must have sufficient probative force to justify the jury in finding that the fire was proximately caused by the negligence of the defendant. *Phelps v. Winston-Salem,* 24.

Evidence that defendant allowed combustible materials to accumulate held insufficient to support a jury finding of defendant's negligence in causing fire. *Ibid.*

Proof of the burning alone is insufficient to establish liability for damage to property by fire, since, nothing else appearing, the presumption is that the fire was the result of accident or some providential cause. *Ibid.*

FORGERY.

§ 1. Nature and Elements of the Crime.

The false making of checks with fraudulent intent, which checks are capable of effecting a fraud, constitutes forgery. G.S. 14-119. *S. v. Greenlee,* 651.

The offense of uttering a forged instrument consists in offering to another the forged instrument with knowledge of the falsity of the writing and with intent to defraud. G.S. 14-120. *Ibid.*

§ 2. Prosecution and Punishment.

Evidence tending to show that defendant broke into an office of a corporation and took therefrom several blank checks bearing the firm's name and a designated account at a named bank, and that thereafter defendant filled in, endorsed and cashed one of the checks, which was falsely signed with the purported signature of the firm's owner, *held* sufficient to be submitted to the jury on the issue of defendant's guilt of the forgery of the check and of uttering the forged check. *S. v. Greenlee,* 651.

FRAUD.

§ 2. Constructive or Legal Fraud.

The term "confidential relationship" implies a preferential position, and while the children in a family ordinarily enjoy a confidential relationship with their father, yet the mere relationship of parent and child does not raise the presumption of undue influence or of fraud. *Hendricks v. Hendricks,* 340.

GIFTS.

§ 2. Presumption of Gift from Husband to Wife.

The fact that a wife deposited in her individual bank account funds borrowed jointly by the husband and wife does not create the presumption that the husband intended the funds to be a gift to the wife, and a special instruction to that effect is properly refused by the trial court. *Overby v. Overby*, 636.

GOODWILL.

A person who builds up a business by his skill and industry acquires a property right in the good will of his patrons, and he may sell his right of competition to the full extent of the field from which he derives his profit and for a reasonable length of time. *Jewel Box Stores v. Morrow*, 659.

GRAND JURY.

§ 1. Selection and Qualification.

While defendant, prior to pleading to the indictment, is ordinarily entitled to present evidence in support of a motion to quash on the ground that members of defendant's race were systematically excluded from the grand jury, the action of the trial court in declining to hear the evidence of defendant in this case *is held* without error when the court, after verdict, judgment and notice of appeal had been given, offered defendant an opportunity, which he declined, to present evidence during the term in support of the motion. *S. v. Belk*, 517.

HIGHWAYS.

§ 7. Construction of Highways: Signs and Warnings; Liability of Contractor.

A contractor employed by the Highway Commission cannot be held liable by the owner of land for damages resulting from the construction of a highway in strict compliance with the contract with the Commission, the Commission being primarily liable for damages resulting from the exercise of eminent domain, but the contractor may be held liable for damages resulting from negligence in the manner in which he performs the contract. *Highway Commission v. Reynolds Co.*, 618.

The Highway Commission brought action against a contractor to recover for compensation paid to the owner of a building damaged by the contractor in the construction of a highway for the Commission. The contract between the parties provides that the contractor indemnify the Commission for all claims of damages sustained as a result of the contractor's performance. The stipulated facts are to the effect that the contractor constructed the highway in strick compliance with the specifications of the Commission and under the supervision of Commission employees. *Held:* It was not contemplated by the parties that the contractor, in the absence of negligence on his part proximately causing damage, would be liable for sums paid by the Commission in discharge of its primary liability, and the ruling of the trial court denying recovery by the Commission is without error. *Ibid.*

HOMICIDE.

§ 1. In General.

An accused may not be placed in jeopardy for homicide until the death of the injured victim has occurred. *S. v. Meadows*, 327.

HOMICIDE—*Continued.*

Defendant, prior to his victim's death, pleaded guilty to an indictment charging a felonious assault, G.S. 14-32, and was sentenced therefor. Subsequently, upon the victim's death, defendant was indicted for murder in the second degree, and defendant entered a plea of *autrefois convict* to the charge. *Held:* Defendant's plea in bar of "former conviction" was properly overruled, since at the time of his conviction for felonious assault the defendant could not have been placed in jeopardy for homicide. *Ibid.*

§ 4. Murder in the First Degree.

A specific intent to kill, while a necessary constituent of the elements of premeditation and deliberation in first degree murder, is not an element of murder in the second degree or manslaughter. *S. v. Meadows*, 327.

§ 5. Murder in the Second Degree.

A specific intent to kill, while a necessary constituent of the elements of premeditation and deliberation in first degree murder, is not an element of murder in the second degree or manslaughter. *S. v. Meadows*, 327.

§ 6. Manslaughter.

Manslaughter is the unlawful killing of a human being without malice and without premeditation or deliberation. *S. v. Benge*, 261.

§ 9. Self-Defense and Defense of Habitation.

While ordinarily a person free from fault is under no duty to retreat when attacked in his own home, regardless of the character of the assault against him, even so, he may not use excessive force in repelling the attack and overcoming his adversary. *S. v. Benge*, 261.

§ 13. Presumptions and Burden of Proof.

When the State satisfies the jury from the evidence beyond a reasonable doubt that the defendant intentionally killed the deceased with a deadly weapon, there arise the presumptions that the killing was unlawful and with malice, constituting the offense of murder in the second degree. *S. v. Swann*, 215.

When evidence of the State amply supports a jury finding that the defendant intentionally shot the deceased with a deadly weapon, and thereby proximately caused his death, the presumptions arise that the killing was unlawful and with malice, thereby constituting the offense of murder in the second degree. *S. v. Meadows*, 327.

§ 14. Relevancy and Competency of Evidence in General.

Evidence that deceased was a special internal revenue agent who was not permitted or required to carry a gun in the performance of his duties *held* competent in a prosecution for his murder. *S. v. Feaganes*, 246.

§ 15. Dying Declarations.

In order for a declaration to constitute a dying declaration the declarant must, at the time of the making of the statement, have full apprehension of his danger of imminent and inevitable death, and a mere showing that the declarant was at the point of death and in great agony is insufficient. *S. v. McDaniel*, 556.

§ 20. Sufficiency of Evidence and Nonsuit.

Evidence in this case held sufficient to sustain verdicts of defendant's guilt of assaults with a deadly weapon and murder in the first degree. *S. v. Olds*, 42.

HOMICIDE—*Continued.*

Evidence in this case held for jury on question of defendant's guilt of murder in the second degree. *S. v. Swann*, 215.

Evidence in this case held sufficient to go to the jury on the issue of defendants' guilt of murder in the first degree. *S. v. Johnson*, 239.

Evidence that the four defendants agreed to assault a designated person and take his money, that one of the defendants stayed outside as a lookout while the other defendants went into the house and committed the robbery and murder, *held* sufficient to sustain the conviction of the lookout as an aider and abettor, notwithstanding he received no benefit from the stolen money, and such defendant's youth and retarded mentality are matters to be considered by the parole authorities at the proper time. *Ibid.*

Evidence favorable to the State in this case which tended to show that defendant and deceased willingly entered into a fight, and that immediately after they had stepped out of the room where they had been drinking beer, defendant shot deceased twice, inflicting fatal injury, *held* sufficient to support conviction for murder in the second degree, notwithstanding defendant's evidence tending to show that he killed in self-defense. *S. v. Feaganes*, 246.

Evidence permitting inferences that deceased came to the home in which defendant resided, renewing threats against defendant, the defendant armed himself with a pistol, went to the door and shot deceased, that defendant followed deceased outside defendant's habitation and shot him at least three times as deceased lay on the ground, and that defendant admitted that he never saw a weapon in deceased's hands, *is held* sufficient to sustain conviction of manslaughter, since it tends to show that defendant used excessive force in repelling the attack. *S. v. Benge*, 261.

Evidence in this case held sufficient for jury on issue of defendant's guilt of murder in the second degree. *S. v. Robinson*, 271; *S. v. Meadows*, 327.

§ 30. Verdict and Sentence.

A judgment imposing a prison sentence of not less than 12 nor more than 15 years upon conviction of manslaughter is authorized by G.S. 14-18. *S. v. Meadows*, 327.

HUSBAND AND WIFE.

§ 14. Estates by the Entireties in General.

An instruction to the jury that if the wife furnishes the entire purchase price of land from her own and separate funds and has the conveyance deeded to the wife and husband jointly, then the husband would be declared to hold the land in trust for the benefit of the wife, *held* to give the wife a more favorable instruction than she is entitled, and her exception thereto cannot be sustained. *Overby v. Overby*, 636.

§ 17. Estate by the Entireties — Termination and Survivorship.

In an estate held by the entireties neither the husband nor the wife can defeat the other's right of survivorship in the land by a conveyance or an encumbrance to a third party, but if the conveying spouse survives the other spouse, the grantee will acquire title by estoppel. *Council v. Pitt*, 222.

A conveyance from one spouse to the other of an interest in an estate by the entireties is valid as an estoppel when the conveyance is validly executed, and the conveying spouse, and those claiming under him as his heirs at law, are estopped by his deed to claim the interest conveyed. *Ibid.*

Surviving spouse held estopped from asserting right of survivorship in land conveyed to husband. *Ibid.*

HUSBAND AND WIFE—*Continued.*

Subsequent to the effective date of the 1957 statute, a conveyance from one spouse to the other of real property, or any interest therein, held by them as tenants by the entirety dissolves such tenancy in the property or interest conveyed and vests such property or interest formerly held by the entirety in the grantee. *Ibid.*

INDICTMENT AND WARRANT.

§ 1. Preliminary Proceedings.

A preliminary hearing is not an essential prerequisite to the finding of an indictment in this State. *S. v. Hartsell*, 710.

§ 4. Evidence and Proceedings Before the Grand Jury.

An indictment is not subject to quashal on the ground that the testimony of the witnesses who appeared before the grand jury was based upon hearsay. *S. v. Hartsell*, 710.

§ 6. Issuance of Warrants.

The issuance of a warrant by a justice of the peace who had not given bond upon appointment to the office in compliance with G.S. 7-141.1 is the act of a justice of the peace *de facto*, and the warrant is not subject to collateral attack. *S. v. Porter*, 463.

A warrant issued by a desk officer appointed by a chief of police is a void warrant and may not support a criminal prosecution based thereon. *S. v. Hundley*, 491.

§ 9. Charge of Crime.

An indictment must charge the offense with sufficient certainty to identify the offense and to protect the accused from being put in jeopardy for the same offense, and enable the accused to prepare for trial, and to enable the court, upon conviction or plea of *nolo contendere*, to pronounce sentence, since defendant is entitled to preserve his constitutional right not to be put in jeopardy upon a subsequent prosecution which is for the same offense both in law and fact. *S. v. Partlow*, 60.

Where a statute charges an offense in general terms, as indictment therefor must particularize and identify the crime so as to protect defendant from a subsequent prosecution for the same offense. *Ibid.*

In a criminal prosecution for a statutory offense, including the violation of a municipal ordinance, the warrant or indictment is sufficient if it follows the language of the statute or ordinance and thereby charges each essential element of the offense in a plain, intelligible, and explicit manner; however, if the words of the statute or ordinance fail to set forth every essential element of the offense, they must be supplemented by allegations which charge the offense plainly, intelligibly and explicitly. *S. v. Dorsett*, 227; *S. v. Cook*, 728.

The purpose of a warrant or indictment is to give defendant notice of the charge against him to the end that he may prepare his defense and be in a position to plead former acquittal or former conviction in the event he is again brought to trial for the same offense, and to enable the court to know what judgment to pronounce in case of conviction. *Ibid; S. v. Pinyatello*, 312.

Warrants held to charge violation of ordinances against disturbing the peace with noise. *Ibid.*

An indictment is sufficient if it alleges all essential elements of the offense with sufficient particularity to apprise the defendant of the specific accusations against him so as to enable him to prepare his defense and to protect him from a subsequent prosecution. *S. v. Bowden*, 481; *S. v. Gallimore*, 528.

INDICTMENT AND WARRANT—*Continued.*

A warrant which is fatally defective because of its failure to charge a criminal offense is not cured by a reference in the warrant to the statute. *S. v. Cook*, 728.

§ 10. Identification of Accused.

A difference between the spelling of defendant's alias in the indictment and in a check forged by him in the name of the alias is not fatal, the defendant's correct name appearing also on the indictment and being admitted to by defendant during the trial. *S. v. Greenlee*, 651.

§ 13. Bill of Particulars.

A disclosure by police officers to defendant's attorney of the evidence upon which the State would rely in a conspiracy prosecution, which evidence includes the names of the other conspirators, is the equivalent of a bill of particulars. *S. v. Gallimore*, 528.

§ 14. Time of Making of Motions to Quash.

A motion to quash a warrant made for the first time in the Superior Court on appeal from a conviction in an inferior court may be determined by the judge of the Superior Court in his discretion. *S. v. Hundley*, 491.

§ 15. Grounds for Motion to Quash in General.

The sufficiency of a bill of indictment may be raised by motion to quash or by motion in arrest of judgment, or the Supreme Court may take notice of a fatally defective warrant *ex mero motu*. *S. v. Partlow*, 60.

§ 17. Variance Between Averment and Proof.

There is a fatal variance between pleading and proof where the indictment alleges the forcible opening of a safe of a named person, and the evidence is that the safe is owned solely by a corporation, and it was error to deny defendant's motion of nonsuit at the close of all the evidence. *S. v. Watson*, 526.

INJUNCTIONS.

§ 1. Nature and Elements.

While a preliminary mandatory injunction may be issued to restore a status, wrongly disturbed, the issuance of such an order rests in the sound discretion of the court and is generally deemed to require a clear showing of substantial injury to the plaintiff, pending the final hearing, if the existing status is allowed to continue to such hearing. *Huggins v. Board of Education*, 33.

§ 12. Issuance of Temporary Orders.

An application for a temporary injunction is ordinarily addressed to the sound discretion of the court. *Huggins v. Board of Education*, 33.

§ 13. Issuance of Temporary Orders Upon a Hearing.

Application for a temporary injunction is properly denied where the injury likely to be sustained by the plaintiff from the continuance of the conduct of which he complains, pending the final hearing of the matter, is substantially outweighed by the injury which will be done the defendant by the prevention of such conduct during the litigation. *Huggins v. Board of Education*, 33.

Court may take into account probable injuries to persons not parties to the action and to the general public. *Ibid.*

Where the sole or main relief demanded in an action is an injunction, and

INJUNCTIONS—*Continued.*

upon the hearing to show cause the facts appearing in the pleadings and by affidavits of the respective parties are conflicting, the temporary restraining order should ordinarily be continued to the hearing when plaintiff would suffer irreparable injury if the temporary order be dissolved and defendant would not suffer any considerable injury if it should be continued to the hearing, since in such instance dissolution of the temporary order would amount to a determination on the merits. *Realty Corp. v. Kalman*, 201.

Temporary order restraining foreclosure should be continued upon controverted facts. *Ibid.*

§ 14. Hearing on the Merits and Judgment.

The findings of fact and other proceedings upon a hearing to determine whether a temporary injunction should issue are not proper matters for the consideration of the court or jury in passing upon such issues at the final hearing and are, therefore, not binding upon them. *Huggins v. Board of Education*, 33.

The decision of the Supreme Court upon an appeal from an order denying a temporary injunction does not determine any other right of the parties that might be raised at a later stage of the proceedings. *Ibid.*

INSURANCE.

§ 2. Brokers and Agents.

In an insurance company's action to recover advancements made to its general agent pursuant to a contract of agency, defendant's counterclaim alleging that he was unjustly deprived of commissions as a result of plaintiff's negligence in processing and in servicing applications from insurable persons, *held* to constitute a counterclaim permissible under G.S. 1-137(1). *Insurance Co. v. Falconer*, 702.

§ 3. Construction and Operation of Policies in General.

An insurance company generally has the right to fix the conditions upon which it will become liable, and the patron the right to accept or refuse them. *Saunders v. Insurance Co.*, 110.

An insurance policy is a contract between the insurer and the insured, and its provisions will govern the rights of the parties unless the provisions are in conflict with the law of the State. *Harrelson v. Insurance Co.*, 603.

Statutory provisions applicable to a policy of insurance are to be read into the policy as if written therein. *Ibid.*

§ 35. Visible Contusion or Wound.

The policy in suit provided additional benefits if insured sustained visible bodily injuries solely through external, violent and accidental means, resulting directly and independently of all other causes in death. The evidence was to the effect that the five-month-old insured was found dead in his bed in which he had slept with his eight-year-old sister, and the only evidence as to the cause of death was that the child had smothered. *Held:* The evidence fails to bring insurer's liability within the additional coverage. *Saunders v. Insurance Co.*, 110.

§ 53. Payment and Satisfaction, Subrogation, and Action Against Tort-Feasor.

Payment by the insurer to the insured subrogates the insurer *pro tanto* to insured's claim against the tort-feasor causing the damage; where insurer pays

the full damages it is subrogated to the entire cause of action and alone may sue; where the sum paid is partial compensation of the damages the insured must bring the suit in his own name; and where the insured refuses to bring the suit, the insurer may bring it and join insured as a defendant. *Ins. Co. v. Sheek*, 484.

§ 53.2. Construction and Operation of Liability Policies in General.

The provisions of the Motor Vehicle Financial Responsibility Act of 1957 must be read into a policy issued pursuant to the Assigned Risk Plan and construed liberally to effectuate its purpose of providing financial protection to persons injured by the negligent operation of a motor vehicle. *Harrelson v. Insurance Co.*, 603.

§ 54. Vehicles Insured Under Liability Policies.

It is mandatory that the owner of a registered motor vehicle maintain proof of financial responsibility throughout the registration of the vehicle, G.S. 20-309, and such proof may be satisfied by a policy of automobile liability insurance, G.S. 20-314, G.S. 20-279.19, which may be procured by compliance with the Assigned Risk Plan, G.S. 20-314. *Harrelson v. Insurance Co.*, 603.

§ 57. Drivers Insured Under Liability Policies.

Testimony of plaintiff's witness that he failed to hear the owner of an automobile impose a limitation upon the bailee's use of the vehicle is properly excluded where such testimony clearly establishes the possibility that such witness did not hear the entire conversation relating to the grant of permission to use the automobile. *Wilson v. Indemnity Corp.*, 183.

There is no inconsistency in allowing an owner of an automobile to testify as to statements made by him to the bailee of the car imposing limitations upon the use of the car, and in excluding testimony by other witnesses that they did not hear such a statement, where the testimony of such other witness establishes that they did not hear the entire conversation. *Ibid.*

The bailee of an automobile is covered under the "omnibus clause" of an automobile liability policy only where his use of the vehicle at the time of the accident is within the scope of the permission granted to him, and a material deviation from the grant of permission by the bailee is not a permitted use within the meaning of the omnibus clause. *Ibid.*

In action to recover under the omnibus clause of an automobile liability policy, plaintiff has the burden to show that the bailee's use of the automobile was within the scope of permission. *Ibid.*

Permission to use an automobile may be express or implied, and evidence of strong social relationships between the owner and the bailee is relevant to show the extent of an implied permission, but the proof of such relationships cannot overcome the effect of limitations expressly imposed by the owner of the car upon the bailee. *Ibid.*

Evidence in this case held sufficient to support an instruction of "material duration". *Ibid.*

In this State coverage of a driver under the "omnibus clause" in an automobile liability policy extends only to use of an automobile by the driver with the express or implied permission of the owner, and while a slight deviation from the permission given is not sufficient to exclude the driver from coverage, a material deviation is a use without permission. *Rhiner v. Insurance Co.*, 737.

Evidence that the owner of an automobile agreed to allow the bailee to use his automobile to go to a store less than ten blocks away, that the bailee

INSURANCE—*Continued.*

was instructed to return and bring the owner a bottle of liquor, but that the bailee left the city and drove a distance of some twenty miles where he was involved in an accident some two hours later, *held* insufficient to show that the use of the automobile was with the permission, express or implied, of the owner. *Ibid.*

§ 61. Whether Liability Policy Is in Force at Time of Accident.

A policy of insurance issued pursuant to the Assigned Risk Plan may be cancelled by the insurer only when it has been shown that (1) there has been a nonpayment of premium or a suspension of the insured's driver's license, and (2) the Commissioner of Insurance has approved the cancellation. *Harrelson v. Insurance Co.*, 603.

The failure of an insured under the Assigned Risk Plan to pay his insurer a fee for a certificate of financial responsibility (Form SR-22) with the Department of Motor Vehicles is not a nonpayment of premium within the purview of G.S. 20-279.34 for which the insurer may cancel a policy of automobile liability insurance. *Ibid.*

INTOXICATING LIQUOR.

§ 15. Sufficiency of Evidence and Nonsuit on Charge of Illegal Possession and Possession for Purpose of Sale.

Evidence of the State that two jars of nontaxpaid whiskey were found in the grille of defendant's automobile and that defendant was seen in the immediate vicinity of the automobile at the time of discovery, *held* sufficient to show a constructive possession of the liquor, and defendant's motion for judgment as of nonsuit is properly denied. *S. v. Leach*, 733.

JUDGMENTS.

§ 2. Time and Place of Rendition of Judgment.

In the present case the record disclosed that the court heard argument for all parties upon defendants' motion to set aside the verdict, and that counsel agreed that the "order and appeal entries may be signed out of the district and out of the term." *Held:* The judge was authorized to enter an order out of the district and after the term setting aside the verdict as a matter in his discretion. *Goldston v. Chambers*, 53.

§ 29. Parties Concluded or Estopped by Judgment.

Where one has sued a principal for damages alleged to have been caused by the negligent acts and omissions of an agent in the operation of a motor vehicle, and judgment has been rendered in favor of the principal on the ground that plaintiff had failed to establish the negligence of the agent, such plaintiff is not prevented from thereafter suing and recovering from the agent upon identical allegations of damages and negligence, since the former judgment is not a bar, the agent not having been a party to the former action. *Sumner v. Marion*, 92.

§ 33. Judgments as of Nonsuit.

An entry of a judgment of voluntary nonsuit is not *res judicata* in a subsequent action on the same cause of action. *Exum v. Boyles*, 567.

JUDGMENTS—*Continued.*

§ 38. Conclusiveness of Judgments and Estoppel — Pleas of Bar.

Defendant's pleas of estoppel, *res judicata* and laches are affirmative defenses upon which defendant has the burden of proof. *Poultry Co. v. Oil Co.*, 16.

§ 47. Payment and Discharge of Judgments.

Payment to the clerk by the party liable on a judgment discharges the judgment even though the clerk fails to enter the satisfaction thereof upon the judgment index, the judgment debtor being under no duty to require the clerk to make the entries of payment and the clerk being in effect the statutory agent of the owner of the judgment. *Kendrick v. Cain*, 719.

JURY.

§ 2. Special Venires.

Upon a finding that a disproportionately small number of Negroes had been included in the jury box from which the jury panel had been drawn, an order by the trial court dismissing the regular panel and directing the sheriff to summon a special venire of fifty persons without regard to race, *held* expressly authorized by G.S. 9-11, it not being a requisite to the calling of the tales jurors under the statute that their use be restricted to supplement an insufficient number of regular jurors. *S. v. Wiggins*, 147.

A special venire is not rendered invalid by reason that the sheriff who summoned it was subsequently a witness for the State in the case. *Ibid.*

LANDLORD AND TENANT.

§ 5. Enjoyment, Use and Possession.

In an action by a lessor of an office building to recover rent for the lessee's use of a basement as office space, the crucial contention of the parties was whether the basement was included in the premises demised in the lease. The furnace, hot water heater, air conditioning and other utilities were located in the basement; the lease provided that the lessor would be responsible for the furnishing of the utilities. *Held:* The evidence is insufficient to show that the lessee acquired an easement in the basement by implication. *Root v. Insurance Co.*, 580.

The lease agreement described the premises demised to the lessee as a building "erected at 747 Hillsboro St., comprising an area of 1772 square feet, for use as offices." The lessee contended that the lease conveyed all of the space in the building at that address, including a basement converted by lessee for office use. The lessor contended that the specific language of the lease conveyed only 1772 square feet of floor space, which embraced the ground floor only. *Held:* The terms of the lease being ambiguous as to the property demised, it is for the jury to say what the parties meant, and the granting of lessee's motion of nonsuit in lessor's action to recover rent for the basement is error. *Ibid.*

§ 16. Actions for Rent.

The lease agreement described the premises demised to the lessee as a building "erected at 747 Hillsboro St., comprising an area of 1772 square feet, for use as offices." The lessee contended that the lease conveyed all of the space in the building at that address, including a basement converted by lessee for office use. The lessor contended that the specific language of the lease conveyed only 1772 square feet of floor space, which embraced the ground floor only. *Held:* The terms of the lease being ambiguous as to the property demised,

LANDLORD AND TENANT—*Continued.*

it is for the jury to say what the parties meant, and the granting of lessee's motion of nonsuit in lessor's action to recover rent for the basement is error. *Root v. Insurance Co.*, 580.

LARCENY.

§ 3. Degrees of the Crime.

In a prosecution for the larceny of goods of a value of more than $200 and for the felonious breaking and entering of a home, the failure of the court to instruct the jury that they should convict only for misdemeanor larceny if they find the value of the goods stolen to be less than $200 *is held* not erroneous, since larceny in consequence of a felonious breaking and entering is a felony regardless of the value of the property stolen. *S. v. Raynes*, 488.

§ 7. Sufficiency of Evidence and Nonsuit.

Evidence, together with confession, held sufficient to go to the jury on the issue of guilt of larceny. *S. v. Bishop*, 283.

§ 8. Instructions.

In a prosecution for the larceny of goods of a value of more than $200 and for the felonious breaking and entering of a home, the failure of the court to instruct the jury that they should convict only for misdemeanor larceny if they find the value of the goods stolen to be less than $200 *is held* not erroneous, since larceny in consequence of a felonious breaking and entering is a felony regardless of the value of the property stolen. *S. v. Raynes*, 488.

An instruction in a larceny prosecution to the effect that, where a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances will support conviction, *held* not error, since immediately before the challenged instruction the court correctly instructed the jury as to the presumption arising from the possession of recently stolen goods. *Ibid.*

LIBEL AND SLANDER.

§ 2. Words Actionable Per Se.

A false charge that one has been arrested for a crime is libelous *per se*. *Woody v. Broadcasting Co.*, 459.

Words imputing a violation of the liquor laws are actionable *per se*. *Ibid.*

§ 14. Sufficiency of Evidence and Nonsuit.

Plaintiff's evidence was to the effect that a news broadcast over defendant's radio station recited that plaintiff had been arrested by Federal agents and charged with violation of the prohibition laws, that plaintiff's wife notified defendant that plaintiff was on a business trip in another state at the time of the alleged offense and requested that the publication not be repeated, that defendant refused to withdraw the item unless the agents repudiated the story, and that the publication was repeated that evening. *Held:* The evidence is sufficient to be submitted to the jury in plaintiff's action for libel. *Woody v. Broadcasting Co.*, 459.

Evidence relating to the making of a retraction or an apology is a matter of defense and is not to be considered on motion to nonsuit in an action for libel or slander. *Ibid.*

LIBEL AND SLANDER—*Continued.*

§ 16. Damages and Verdict.

Punitive damages are not recoverable as a matter of right in an action for libel or slander but may be awarded as punishment for intentional acts which are wanton, wilful and in reckless disregard of plaintiff's rights. *Woody v. Broadcasting Co.*, 459.

LIMITATION OF ACTIONS.

§ 1. Nature and Construction of Statutes of Limitations in General.

Plea of the statutes of limitation is a plea in bar. *Poultry Co. v. Oil Co.*, 16.

§ 12. Institution of Action, Discontinuance and Amendment.

An action for wrongful death instituted within one year after entry of a judgment of voluntary nonsuit in a former action and nearly five years after the accident and death of the intestate is not barred by the statute of limitations where the plaintiff does not allege a cause of action different from the former action. *Exum v. Boyles*, 567.

Where the complaint alleges negligence by defendant and that it was a proximate cause of intestate's death, an amendment which alleges facts raising the last clear chance doctrine does not amount to a statement of a new cause of action, and therefore the action is not barred when the complaint is filed within the time limited, even though the amendment is filed thereafter. *Ibid.*

MARSHALLING.

The doctrine of marshalling of assets ordinarily applies when a common debtor holds separate funds and one creditor has a lien on both, while the other has a lien on one only; the doctrine does not apply if the holder of the superior lien would be forced to expose himself to the possibility of costly litigation or suspend his immediate right to proceed against the fund subject to his lien. *Realty Co. v. Wysor*, 172.

Where trustor purchases at foreclosure of first recorded deed of trust, *cestui* in a second deed of trust is entitled to payment of his debt out of surplus. *Ibid.*

MASTER AND SERVANT.

§ 32. Liability of Employer for Injuries to Third Persons in General.

Where the jury finds that the engineer on defendant's train was not guilty of negligence in failing to keep a proper lookout at a crossing in respect to the approach of the minor plaintiff on a bicycle, such finding does not exonerate the railroad company sought to be held liable under the doctrine of *respondeat superior* where plaintiff pleads and proves that other employees of the defendant were negligent in failing to warn the engineer of the approaching child. *Moss v. R. R. Company*, 613.

§ 53. Injuries Compensable Under Workmen's Compensation Act.

The death of an employee is compensable under the Workmen's Compensation Act only if it results from an injury by accident arising out of and in the course of his employment. *Clark v. Burton Lines*, 433.

To be compensable under the Workmen's Compensation Act the injury must have resulted from accident. *Jackson v. Highway Commission*, 697.

§ 54. Causal Relation Between Employment and Injury in General.

The words "out of" refer to the origin or cause of the accident, and the

words "in the course of" to the time, place and circumstance under which the accident occurred. *Clark v. Burton Lines*, 433.

Findings that the deceased, an employee of a trucking line, was instructed by the company dispatcher to drive to a truck terminal and await the arrival of another employee in order that they might together return a trailer to the home office, that the deceased arrived at the terminal, had dinner, went to a movie and returned to the trailer for the night, and that the other employee found the deceased the next morning in the trailer dead of suffocation from a smoldering fire, *held* sufficient to show a causal relation between the employment and the death. *Ibid.*

§ 65. Heart Disease and Heart Failure.

Where the evidence discloses that the employee was carrying on his usual work in the usual and customary way, his death as the result of a heart attack is not the result of an accident within the meaning of the North Carolina Workmen's Compensation Act. *Jackson v. Highway Commission*, 697.

§ 69. Computation of Average Weekly Wage in Exceptional Cases.

Where the method of computing the average weekly wage set out in the first section of G.S. 97-2(5) would be unfair because of exceptional circumstances, the Industrial Commission is authorized to use such other method of computation as would most nearly approximate the amount the injured employee would be earning if he were living. *Clark v. Burton Lines*, 433.

Evidence held sufficient to constitute an exceptional reason to employ the method of computation used by the commission in this case. *Ibid.*

§ 93. Review in the Superior Court.

The findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence. *Clark v. Burton Lines*, 433.

Except for jurisdictional findings, the findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence which would support findings to the contrary, but finding of fact resulting from a misapprehension of the law are not conclusive. *Bailey v. Dept. of Mental Health*, 680.

When findings of the Industrial Commission are not supported by evidence or when findings are insufficient to enable the court to determine the rights of the parties, the cause must be remanded to the Commission for proper findings. *Ibid.*

Ordinarily, the Superior Court is without authority to remand a cause to the Industrial Commission for the taking of additional evidence except upon a proper showing by affidavit that newly discovered evidence will be introduced. *Ibid.*

The findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, but the Commission's legal conclusions are reviewable. *Jackson v. Highway Commission*, 697.

MONEY RECEIVED.

An action for money had and received may be maintained whenever the defendant has money in his hands which belongs to the plaintiff and which in equity and good conscience he ought to pay to the plaintiff. *Ridley v. Jim Walter corp.*, 673.

Allegations of a complaint to the effect that plaintiffs executed a note se-

MONEY RECEIVED—*Continued.*

cured by a deed of trust and payable in 72 monthly installments, that upon default by plaintiffs some nine months after the execution of the note the holder accelerated the monthly payments and received from the foreclosure sale the entire balance due on the note, including the interest which would have been payable for the remaining life of the note,*held* sufficient to state a cause of action for money had and received to recover the excess paid as interest for the remaining life of the note. *Ibid.*

MORTGAGES AND DEEDS OF TRUST.

§ 19. Right to Foreclose and Defenses.

If a note secured by a deed of trust is in default, the *cestui* is entitled to demand foreclosure notwithstanding that the balance due of the note is small, and it is the legal duty of the trustee, upon such demand, to advertise and sell. *Development Co. v. Pitts*, 196.

The trustor in a deed of trust is entitled to restrain foreclosure if the note secured by the instrument is not in default. *Realty Corp. v. Kalman*, 201.

Temporary order restraining foreclosure should be continued upon controverted facts. *Ibid.*

§ 28. Parties Who May Bid in at Foreclosure Sale and Purchase the Property.

An officer of a corporation may lend money to the corporation and take a deed of trust as security therefor where no unfair advantage is taken, and therefore has the right to purchase at the foreclosure of such deed of trust. *Poultry Co. v. Oil Co.*, 16.

The grantor in a deed of trust may purchase the property at the foreclosure sale conducted by the trustee. *Realty Co. v. Wysor*, 172.

§ 29. Bids and Rights of Bidders at the Foreclosure Sale.

The trustee may, after advertisement and before sale, hold a bid by a third person, and this is proper procedure so long as the trustee is not acting as agent for such third person but is performing the duties of his trust, and the trustee, in the absence of bids at the sale, may declare such third person the purchaser. *Development Co. v. Pitts*, 196.

§ 33. Disposition of Proceeds and Surplus.

Surplus remaining in the hands of the trustee after payment of the debt secured by the deed of trust and costs may be turned over to the clerk of the Superior Court. *Realty Co. v. Wysor*, 172.

Where trustor purchases at foreclosure of first recorded deed of trust, *cestui* in a second deed of trust is entitled to payment of his debt out of surplus. *Ibid.*

§ 39. Suits to Set Aside Foreclosure.

Where the *cestui* in the second deed of trust does not allege any misconduct on the part of the trustee in the foreclosure of a prior deed of trust on the land, and alleges that such trustee sold after default of the note secured by the prior instrument upon demand by the *cestui* therein, the foreclosure may not be set aside without allegations of fact permitting a legitimate inference that the sale and deed made pursuant thereto were fraudulent and that the trustors were parties to the fraud. *Development Co. v. Pitts*, 196.

Complaint in this case held insufficient to state cause of action attacking foreclosure sale under prior deed of trust. *Ibid.*

MORTGAGES AND DEEDS OF TRUST—*Continued.*

Inadequacy of consideration, standing alone, is not sufficient to justify setting aside a foreclosure sale. *Ibid.*

§ 41. Title and Rights of Purchaser.

Ordinarily, the purchaser at the foreclosure sale of a deed of trust acquires title free from subsequent encumbrances. *Realty Co. v. Wysor*, 172.

The owners of land executed a deed of trust thereon to secure a debt and executed another deed of trust, subsequently recorded, to their vendor. The deed of trust first registered was foreclosed and the land was purchased by the trustors. *Held:* The after acquired title enures to the benefit of the *cestui* in the secondly recorded deed of trust. *Ibid.*

MUNICIPAL CORPORATIONS.

§ 2. Territorial Extent and Annexation.

When a municipal corporation is established it takes control of the territory and affairs over which it is given authority to the exclusion of other governmental agencies. *Taylor v. Bowen*, 726.

§ 12. Liability for Injuries from Defects and Obstructions in Streets or Sidewalks.

While a municipality is ordinarily responsible for the conditions of its sidewalks, G.S. 160-54, the owner or occupant of abutting property may be held liable for injuries resulting from a defect in the sidewalk created by it. *Dunning v. Warehouse Co.*, 723.

§ 17. Municipal Contracts, Purchase, Use and Sale of Property.

The pleadings and evidence showed that the defendant municipality leased property to be used for off-street parking and that the rental therefor was to be based on the "proceeds from the operation of the parking meters" and the "revenue derived from the meters." Ordinances of the municipality prescribed penalties for violation of meter parking. Plaintiff lessor brought this action to recover its proportionate share of the monies collected by the municipality as penalties under the authority of the ordinances. *Held:* The terms of the contract, in the absence of any provision to the contrary, contemplates that the revenue and proceeds derived from the meters relate solely to coins inserted in the meters for the use of the parking spaces and not to penalties. *Kent Corporation v. Winston-Salem*, 395.

§ 25. Zoning Ordinances and Building Permits.

A municipal board of adjustment is an administrative agency which acts in a *quasi*-judicial capacity and not as a law making body, and it has no authority to prohibit the construction of a building permitted by a zoning ordinance. G.S. 160-178. *In re Application of Construction Co.*, 715.

Zoning ordinances are in derogation of the rights of private property and should be liberally construed in favor of freedom of use. *Ibid.*

Where a zoning ordinance permits in a zoned district any use not inherently dangerous to urban areas and then further provides that mixing plants for concrete or paving materials are permitted in the district, the board of adjustment is without authority to deny an application for the construction of an asphalt mixing plant in the zoned district. *Ibid.*

In enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State. *Taylor v. Bowen*, 726.

MUNICIPAL CORPORATIONS—*Continued.*

Where property within the zoning authority of one municipal corporation is lawfully annexed by another municipal corporation, the zoning authority of the prior municipality becomes ineffectual immediately upon the annexation. *Ibid.*

§ 27. Regulations Relating to Public Morals and Welfare.

Warrants held to charge violation of ordinances against disturbing the peace with noise. *S. v. Dorsett*, 227.

NARCOTICS.

§ 4. Sufficiency of Evidence and Nonsuit.

Evidence in this case *held* amply sufficient to support defendant's conviction of illegal possession of marijuana on the dates specified in the indictments. *S. v. Alston*, 278.

NEGLIGENCE.

§ 1. Acts and Omissions Constituting Negligence in General.

The law does not charge a person with all the possible consequences of his negligence, nor that which is merely possible; if the connection between the negligent act and the injury appears unnatural, unreasonable and improbable in the light of common experience, the negligence, if deemed a cause of the injury at all, is to be considered a remote rather than a proximate cause. *Phelps v. Winston-Salem*, 24.

Negligence is the failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances in which they are placed, and the breach of duty may be by a negligent act or by a negligent failure to act. *Dunning v. Warehouse Co.*, 723.

§ 7. Proximate Cause and Foreseeability of Injury.

The law does not charge a person with all the possible consequences of his negligence, nor that which is merely possible; if the connection between the negligent act and the injury appears unnatural, unreasonable and improbable in the light of common experience, the negligence, if deemed a cause of the injury at all, is to be considered a remote rather than a proximate cause. *Phelps v. Winston-Salem*, 24.

§ 10. Proximate Cause — Doctrine of Last Clear Chance.

The doctrine of last clear chance applies when the court finds defendant guilty of contributory negligence as a matter of law as well as when the jury answers the issue of contributory negligence in the affirmative; but the doctrine does not apply unless there is negligence on the part of plaintiff and contributory negligence on the part of defendant, and defendant has time and opportunity to avoid the injury after discovering the peril. *Presnell v. Payne*, 11.

Where a defendant under a duty to maintain a proper lookout could have discovered the plaintiff's helpless peril in time to avoid injuring him by the exercise of due care, defendant is liable under the doctrine of last clear chance if he fails to take such action to avoid the injury. *Exum v. Boyles*, 567.

The statement in former decisions to the effect that the "original negligence" of a defendant cannot serve as a basis for recovery under the last clear chance doctrine since this negligence is barred by the plaintiff's contributory negligence is expressly disapproved by the Supreme Court. *Ibid.*

The last clear chance doctrine must be pleaded by the plaintiff in order to

NEGLIGENCE—*Continued.*

be available as a basis for recovery, and the burden of proof on this issue is on him. *Ibid.*

A plaintiff ordinarily pleads the doctrine of last clear chance in reply to the answer alleging contributory negligence. *Ibid.*

§ 11. Contributory Negligence in General.

As a general rule, one who has capacity to understand and avoid a known danger and fails to take advantage of this opportunity, and injury results, is chargeable with contributory negligence which bars recovery. *Presnell v. Payne*, 11.

Where defendant relies upon contributory negligence, he is required specifically to plead in his answer the acts and omissions of plaintiff relied upon as constituting contributory negligence and to prove them at the trial. *Dennis v. Voncannon*, 446; *Lawson v. Benton*, 627.

Contributory negligence is negligence on the part of plaintiff which concurs with the negligence of the defendant as alleged in the complaint, and contributory negligence does not negate negligence as alleged in the complaint but presupposes the existence of such negligence. *Dennis v. Voncannon*, 446.

§ 16. Contributory Negligence of Minors.

An infant between the ages of seven and fourteen is presumed incapable of contributory negligence, but the presumption is rebuttable. *Hoots v. Beeson*, 644.

The test for determining contributory negligence of a minor is whether the child acted as a child of its age, capacity, discretion, knowledge and experience would ordinarily have acted under similar circumstances. *Ibid.*

In the trial of an issue relating to the contributory negligence of a child between the ages of seven and fourteen, it is incumbent upon the trial court to instruct the jury on the rebuttable presumption that such child is incapable of contributory negligence, and his failure to do so constitutes prejudicial error. Overruling *Leach v. Varley*, 211 N.C. 207. *Ibid.*

§ 26. Nonsuit for Contributory Negligence.

Nonsuit on the ground of contributory negligence should be denied when the relevant facts are in dispute or opposing inferences are permissible from plaintiff's proof, but may be properly entered only when plaintiff's own evidence establishes this defense as the sole reasonable conclusion. *Mims v. Dixon*, 256; *Anderson v. Carter*, 426; *Lassiter v. Williams*, 473; *Perkins v. Cook*, 477.

§ 28. Instructions in Negligence Actions.

In the trial of an issue relating to the contributory negligence of a child between the ages of seven and fourteen, it is incumbent upon the trial court to instruct the jury on the rebuttable presumption that such child is incapable of contributory negligence, and his failure to do so constitutes prejudicial error. *Overruling Leach v. Carley*, 211 N.C. 207. *Hoots v. Beeson*, 644.

An instruction on the issue of contributory negligence incorrectly charging an eleven-year-old boy with the same standard of care as an adult *is held* not cured by a subsequent instruction which charges that such child is rebuttably presumed incapable of contributory negligence but which omits the factors of capacity, discretion, knowledge and experience as determinative of the child's ability to avoid danger. *Ibid.*

NEGLIGENCE—*Continued.*

§ 34. Negligence in the Condition and Maintenance of Sidewalks.

While a municipality is ordinarily responsible for the condition of its sidewalks, G.S. 160-54, the owner or occupant of abutting property may be held liable for injuries resulting from a defect in the sidewalk created by it. *Dunning v. Warehouse Co.*, 723.

Evidence that defendant constructed a drainage culvert under a sidewalk adjoining its warehouse, that defendant placed over the excavation a covering of concrete supported by a thin metal sheet, that the concrete had become broken but that the metal sheet was intact, although corroded, and that plaintiff's heel was injured when the sheet gave way under plaintiff's weight, *held* sufficient to be submitted to the jury on the issue of defendant's negligence and insufficient to show that plaintiff was contributorily negligent as a matter of law. *Ibid.*

NOTICE.

§ 1. Necessity for Notice.

If an answer is subject to amendment, the allowance of such amendment is addressed to the sound discretion of the trial court, and where motion for leave to amend is made at term, notice is not required. *Insurance Co. v. Sheek*, 484.

PARENT AND CHILD.

§ 4. Right to Earnings of Child and Right of Parent to Recover for Injuries to Child.

In an action to recover for injuries to a minor child, an instruction to the jury that the negligent injury of a minor gives rise to two separate causes of action, one in the child for pain and suffering and for loss of earning capacity after his minority, the other in the father for medical expenses and loss of earnings during minority, *is held* without error. *Emanuel v. Clewis*, 505.

PARTIES.

§ 8. Joinder of Additional Parties.

Where an action to recover a loss partially compensated by insurance is brought in the name of the insurer, the court is without authority to allow an amendment to permit the insured to be made an additional party, since, the sole right to sue being in the insured, the court may not allow an amendment amounting to a substitution or entire change of parties. *Insurance Co. v. Sheek*, 484.

PAYMENT.

§ 4. Evidence and Proof of Payment.

While payment should be pleaded with sufficient certainty and particularity to give the debtor notice, trustor's allegations in this case asserting that it had made all installment payments within the time allowed in the note secured by the deed of trust and chattel trust indentures securing the notes, and that the *cestuis* had refused such payment, *held* sufficient, since a general allegation of payment is ordinarily a sufficient plea of payment. *Realty Corp. v. Kalman*, 201.

PHYSICIANS AND SURGEONS.

§ 1. What Constitutes Practicing Medicine and Prosecutions for Practicing Without License.

Where a physician himself injects into the hearing of charges for the revocation of his license previous misconduct which had resulted in the suspension of his license, he may not object that evidence relating to the prior suspension was introduced in evidence, even though such evidence be incompetent, since error in the admission of evidence is cured when evidence of substantially the same import is theretofore admitted without objection. Further, the admission of such evidence could not be prejudicial in view of the record disclosing that the members of the Board already had knowledge of the previous proceedings. *In re Kincheloe*, 116.

Where a respondent, in a proceeding to determine whether his license as a physician should be revoked for unprofessional conduct, testifies in his own behalf, it is competent to cross-examine him as to prior misconduct as bearing upon his credibility. *Ibid.*

An acquittal of a physician on a charge of rape does not bar a subsequent proceeding by the Board of Medical Examiners to determine whether the physician's license should be revoked for unprofessional conduct in regard to the same incident upon which the charge of rape was founded, the nature and scope of the two proceedings being entirely disparate. *Ibid.*

It is not required that respondent be represented by counsel in a Medical Board proceeding relating to alleged unethical conduct. *Ibid.*

Physician found prone to engage in lascivious conduct with female sex held properly denied license to practice. *Ibid.*

Evidence in this case held sufficient to support order of Medical Board revoking respondent's license for unprofessional conduct. *Ibid.*

§ 11. Nature and Extent of Liability of Physician or Surgeon for Malpractice.

A physician or surgeon may be held liable only for such damage as proximately results from his failure to possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess, or his failure to exercise reasonable care and diligence in his application of his knowledge and skill to the patient's case, or his failure to use his best knowledge in his treatment and care of the patient. *Koury v. Follo*, 366; *Starnes v. Taylor*, 386.

A physician who holds himself out as a specialist in the field of pediatrics is required to bring to the treatment of an infant a degree of knowledge, not required of a general practitioner, as to the probable effect of drugs upon so young a patient. *Koury v. Follo*, 366.

A specialist in a given field of medical practice is not, in the absence of an extraordinary contract or representation, a guarantor of the success of his treatment. *Ibid; Starnes v. Taylor*, 386.

It is negligence for a physician to prescribe as a remedy for an illness of a nine-month old baby a drug which he knows, or in the exercise of reasonable care should know, may produce a different or worse ailment without advising the parents of the possibility of adverse results from the use thereof, and especially so where possible danger from the drug's use would be unknown to the parents. *Ibid.*

§ 16. Sufficiency of Evidence and Applicability of Doctrine of Res Ipsa Loquitur in Malpractice Cases.

Mere proof that a patient does not survive a treatment prescribed or administered by a physician or surgeon, whether a specialist or general practi-

PHYSICIANS AND SURGEONS—*Continued.*

tioner, or that the patient emerges from the treatment in an untoward condition, is insufficient to impose liability therefor, the doctrine of *res ipsa loquitur* being inapplicable. *Koury v. Follo*, 366.

§ 19. Sufficiency of Evidence of Negligence in Failing to Visit and Look After Patient.

Nothing else appearing, the surgeon's duty to his patient does not end with the termination of the operation, and in the subsequent treatment of the patient the surgeon must give him such attention as the necessity of the case demands. *Starnes v. Taylor*, 386.

Evidence that the defendant surgeon performed an esophagoscopy upon the plaintiff and that he did not detect any break or lesion in the esophagus wall during the course of the examination, that some pain was normally anticipated following such an examination but that a perforation of the esophagus wall was highly unlikely, that plaintiff was left in the care of a nurse with instructions concerning the relief of pain, and that, upon plaintiff's complaint of severe pain in the throat and chest, defendant discovered a perforation in the esophagus and promptly closed the opening by an operation, *held* insufficient to justify a finding of negligence. *Ibid.*

§ 20. Sufficiency of Evidence that Alleged Malpractice was the Result of Negligence.

Evidence held sufficient to show that deafness of a 9-month old infant was caused by pediatrician's negligence in prescribing drug. *Koury v. Follo*, 366.

Evidence held insufficient to show that plaintiff's esophagus was perforated by negligence. *Starnes v. Taylor*, 386.

In a malpractice action, evidence that defendant surgeon had performed some two thousand esophagoscopic examinations and that the occurrence of a perforation of the esophagus in such procedure is unusual, and that the defendant gave plaintiff his customary warning that any surgical procedure is accompanied by some risk, *held* insufficient to show that defendant was negligent in advising the plaintiff of the consequences of the examination. *Ibid.*

PLEADINGS.

§ 2. Statement of Cause of Action in General.

The nature of an action is not determined by what either party calls it, but by the issues arising on the pleadings and the relief sought. *Poultry Co. v. Oil Co.*, 16.

A cause of action consists of the facts alleged in the complaint. *Exum v. Boyles*, 567.

Plaintiff is not required in his complaint to anticipate a defense and undertake to avoid it. *Ibid.*

§ 7. Form and Contents of Answer and Pleas in Bar.

Ordinarily it is for the trial judge to determine in its discretion whether in the circumstances of a particular case a plea in bar is to be disposed of prior to trial on the merits. *Poultry Co. v. Oil Co.*, 16.

The effect of a plea in bar is to destroy plaintiff's action. *Ibid.*

§ 8. The Answer — Counterclaims and Cross-Actions.

An original defendant is not entitled to the joinder of additional defendants against whom the original defendant claims no right to relief when plain-

PLEADINGS—*Continued.*

tiff's action against the original defendant may be finally determined without their joinder. *Quenby Corp. v. Conner Co.*, 208.

Contractor, asserting no right against subcontractors, may not join them in suit by owner for breach of contract of construction. *Ibid.*

The purpose of G.S. 1-137(1) is to permit the trial in one action of all causes of action arising out of any one contract or transaction. *Insurance Co. v. Falconer*, 702.

§ 12. Office and Effect of Demurrer.

In passing upon a demurrer, the facts properly alleged in the complaint must be accepted as true. *Development Co. v. Pitts*, 196.

If a complaint, liberally construed, alleges facts sufficient to constitute a cause of action, demurrer thereto must be overruled, but if the complaint is deficient in factual averments sufficient to sustain its legal conclusions, the demurrer must be sustained, since a demurrer does not admit legal conclusions. *Ibid.*

A motion to dismiss the complaint on the ground that it fails to state a cause of action is equivalent to a demurrer. *Ridley v. Jim Walter Corp.*, 673.

Upon demurrer, the allegations of a counterclaim must be taken as true for the purpose of testing its validity. *Insurance Co. v. Falconer*, 702.

In an action *ex contractu* defendant may assert a counterclaim in tort if the claim and the counterclaim arise out of the same contract or the same transaction. *Ibid.*

In an insurance company's action to recover advancements made to its general agent pursuant to a contract of agency, defendant's counterclaim alleging that he was unjustly deprived of commissions as a result of plaintiff's negligence in processing and in servicing applications from insurable persons, *held* to constitute a counterclaim permissible under G.S. 1-137(1). *Ibid.*

§ 19. Demurrer for Failure of the Complaint to State a Cause of Action.

Where both defendants join in a demurrer to the complaint upon the ground that it fails to set forth a good cause of action, the demurrer will be overruled if the complaint sets forth a good cause of action as to one of the defendants. *Ridley v. Jim Walter Corp.*, 673.

§ 24. Motions to Amend.

The Supreme Court may in its discretion allow plaintiff to amend his complaint so that the pleadings conform to the proof where it appears that the defendant was not taken by surprise by such proof and that he failed to object to the admission thereof. Rule of Practice in the Supremt Court 20(4). *Anderson v. Carter*, 426.

If an answer is subject to amendment, the allowance of such amendment is addressed to the sound discretion of the trial court, and where motion for leave to amend is made at term, notice is not required. *Insurance Co. v. Sheek*, 484.

§ 25. Scope of Amendment to Pleadings.

Where the complaint alleged negligence by defendant and that it was a proximate cause of intestate's death, an amendment which alleges facts raising the last clear chance doctrine does not amount to a statement of a new cause of action, and therefore the action is not barred when the complaint is filed within the time limited, even though the amendment is filed thereafter. *Exum v. Boyles*, 567.

PLEADINGS—*Continued.*

§ 28. Variance Between Proof and Allegation.

Defendant must make out his cross action *secundum allegata. Dennis v. Voncannon*, 446.

Allegation without proof and proof without allegation are equally fatal. *Lawson v. Benton*, 627.

§ 29. Issues Raised by the Pleadings and Necessity for Proof.

In the absence of appropriate allegations in the answer as to the negligence of plaintiff's intestate in riding in an automobile operated by defendant while defendant was in a state of intoxication, the trial court was not required to submit that issue of intestate's contributory negligence to the jury. *Lawson v. Benton*, 627.

PROPERTY.

§ 4. Criminal Prosecutions for Wilful or Malicious Destruction of Property.

Evidence of the State tending to show that the padlocked door of a home had been pried open, that the letters KKK had been sprayed with paint both on the inside and outside of the house, that the defendant and three friends were seen riding in a truck in the immediate neighborhood on the night of the defacing, and that a can of spray paint found in the truck was similar in composition to the paint discovered on the walls of the house, *held* insufficient to be submitted to the jury on the issue of defendant's guilt of violating G.S. 14-144, since the circumstantial evidence raises no more than a suspicion that defendant defaced the dwelling. *S. v. Dawson*, 535.

The indictment in this case *held* sufficient to charge the offense of unlawfully and wilfully defacing a house in violation of G.S. 14-144. *Ibid.*

Evidence of the State tending to show that three or four shots were fired into a home by the occupants of a truck, that 60 feet from the dwelling were found empty casings for a rifle and pistol, and that a test conducted by a ballistics expert revealed that the casings had been fired from guns found in defendant's truck, *held* sufficient to be submitted to the jury on the issue of defendant's guilt of the offense of wilfully injuring a house. *Ibid.*

PUBLIC OFFICERS.

§ 7. De Facto Officers.

A *de facto* officer is one who exercises the duties of his office under color of a known and valid appointment or election but who has not conformed to some precedent requirement or condition. *S. v. Porter*, 463.

The acts of a *de facto* officer are valid in law in respect to the rights of third persons or of the public. *Ibid.*

The issuance of a warrant by a justice of the peace who had not given bond upon appointment to the office in compliance with G.S. 7-141.1 is the act of a justice of the peace *de facto*, and the warrant is not subject to collateral attack. *Ibid.*

QUASI-CONTRACTS.

§ 1. Elements and Essentials of Right of Action.

A *quasi*-contractual obligation is one created by law for reasons of justice and it rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. *Root v. Insurance Co.*, 580.

QUIETING TITLE.

§ 1. Nature and Grounds of Remedy.

An action in which plaintiff alleges title to the lands in question and that it is entitled to immediate possession thereof, that defendant claimed an interest therein adverse to plaintiff by virtue of an asserted deed, that such deed was void, and that defendant's claim is a cloud on plaintiff's title and that plaintiff is entitled to have the purported deed declared null and void and plaintiff declared the owner of the land, constitutes an action in ejectment, since the crux of the action is the obtaining of possession of the land by plaintiff under his claim of title. *Poultry Co. v. Oil Co.*, 16.

RAILROADS.

§ 1. Acquisition of Rights of Way by Statutory Presumption.

A right of way for railroad purposes may be established by statutory presumption, and the burden is upon the railroad company to show by a preponderance of the evidence that, pursuant to its charter, it entered upon the land and constructed its tracks in the absence of any contract with the owner and that the owner did not apply for compensation within two years from the completion of the road. *Keziah v. R. R.*, 299.

Railroad right of way held acquired by statutory presumption. *Ibid.*

§ 3. Extent of Easement for Right of Way and Use of Facilities.

Where a railroad company has acquired an easement by statutory presumption, such easement extends for the full width of the right of way provided by its charter, and when its charter provides for a 200 foot right of way it may exercise its use of the right of way to its full width for purposes necessary for its railroad business, notwithstanding occupation of a part of the right of way by the owner or any other person, or the registration of subsequent deeds or maps. *Keziah v. R. R.*, 299.

§ 5. Crossing Accidents — Injuries to Drivers.

Where the jury finds that the engineer on defendant's train was not guilty of negligence in failing to keep a proper lookout at a crossing in respect to the approach of the minor plaintiff on a bicycle, such finding does not exonerate the railroad company sought to be held liable under the doctrine of *respondeat superior* where plaintiff pleads and proves that other employees of the defendant were negligent in failing to warn the engineer of the approaching child. *Moss v. R. R. Company*, 613.

Evidence that bushes and weeds permitted to grow near the crossing partially obstructed plaintiff cyclist's view of an oncoming train imposes a duty of increased vigilance on behalf of the railroad's employees in approaching the crossing. *Ibid.*

RAPE.

§ 17. Elements of Offense of Assault with Intent to Commit Rape.

In a prosecution for assault on a female under the age of consent, it is not required that defendant intend to force sexual relations notwithstanding any resistance the child might make, and there is no requirement of force, an intent on the part of defendant to commit rape being sufficient. *S. v. Hartsell*, 710.

In an indictment charging each element of the offense of assault with in-

RAPE—*Continued.*

tent to commit rape upon a female child below the age of consent, the use in the indictment of the words "by force and against her will" will be treated as surplusage. *Ibid.*

§ 18. Prosecutions for Assault with Intent to Commit Rape.

In a prosecution for assault with intent to commit rape upon a female child, testimony of the prosecutrix that defendant had previously attacked her at unspecified times cannot be considered incompetent on grounds of remoteness when it appears that the child was eight years old. *S. v. Hartsell*, 710.

Evidence in this case *held* sufficient to be submitted to the jury on the issue of defendant's guilt of assault with intent to commit rape. *Ibid.*

RECEIVING STOLEN GOODS.

§ 1. Nature and Elements of the Offense.

The essential elements of the offense of receiving stolen goods are the receiving of goods which had been feloniously stolen by some person other than the accused, with knowledge by the accused at the time of the receiving that the goods had been theretofore feloniously stolen, and the retention of the possession of such goods with a felonious intent or with a dishonest motive. G.S. 14-71. *S. v. Tilley*, 408.

§ 5. Sufficiency of Evidence and Nonsuit.

Evidence of the State held sufficient to go to the jury on the issue of defendant's guilt of receiving stolen goods. *S. v. Tilley*, 408.

§ 7. Verdict and Judgment.

Where the indictment charges defendant with feloniously receiving stolen goods of a value of $2500, but the theory of the trial, the evidence and the charge of the court, all relate solely to defendant's guilt of receiving stolen goods of a value less than $200, a misdemeanor, a verdict of guilty as charged is sufficient to support a conviction of a misdemeanor only and to bar a subsequent prosecution. *S. v. Tilley*, 408.

ROBBERY.

§ 2. Indictment.

An indictment charging defendant with being an accessory before the fact to an armed robbery committed by named persons on a specified date, without any factual averments as to the identity of the victim, the property taken or the manner or method in which defendant counseled, incited, induced or encouraged the principal felons, is fatally defective, since such indictment is too indefinite to protect defendant from a prosecution for any other armed robbery which might have been committed by the principal felons on the same day. *S. v. Partlow*, 60.

§ 4. Sufficiency of Evidence and Nonsuit.

Evidence in this case held insufficient to be submitted to jury on issue of defendant's guilt in aiding and abetting armed robbery. *S. v. Aycoth*, 48.

Evidence was sufficient in this case to go to jury on issue of defendant's guilt of common law robbery. *S. v. McNair*, 130.

Shoe print evidence held sufficient to show defendant guilty of safecracking. *S. v. Pinyatello*, 312.

ROBBERY—*Continued.*

§ 6. Verdict and Sentence.

A judgment of imprisonment for not less than 5 nor more than 30 years upon conviction of armed robbery is authorized by G.S. 14-87. *S. v. Paige*, 417.

SAFECRACKING.

§ 1. Elements of the Offense.

The elements of the offense defined by G.S. 14-89.1 include (1) the felonious opening by explosives or tools of a safe used for storing money or valuables, or (2) the felonious picking of the combination of a safe containing money or other valuables, and it is not a prerequisite to a prosecution under the statute that the safe broken into have a combination lock. *S. v. Pinyatello*, 312.

The offense of safecracking is the forcing open of a safe used for the storing of money or other valuables. *S. v. Hill*, 439.

§ 2. Prosecutions.

The indictment in this case *held* sufficient to charge the offense of safecracking, G.S. 14-89.1, and it was not necessary to allege that the safe broken into possessed a combination lock. *S. v. Pinyatello*, 312.

Evidence of the State that the defendant forced open a newly acquired safe not yet used by the owner to store money or other chattels, *is held* insufficient to be submitted to the jury on the issue of defendant's guilt of the offense of safecracking. *S. v. Hill*, 439.

Evidence in this case held sufficient to go to the jury on the issue of defendant's guilt of safecracking. *Ibid.*

There is a fatal variance between pleading and proof where the indictment alleges the forcible opening of a safe of a named person, and the evidence is that the safe is owned solely by a corporation, and it was error to deny defendant's motion of nonsuit at the close of all the evidence. *S. v. Watson*, 526.

Evidence of the State tending to show that the safe of a corporation was forced open by a crowbar and other tools, that money was taken therefrom, and that three days later defendants were found in possession of burglary tools, including a crowbar which was identified by expert testimony as the one used to open the safe, *held* insufficient to be submitted to the jury on the issue of defendants' guilt of safecracking, since the evidence left the identity of the perpetrators a matter of speculation and conjecture. *S. v. Burton*, 687.

SCHOOLS.

§ 1. Maintenance and Operation of Schools in General.

The State may impose reasonable restraints upon the freedom of speech and movement in order to protect its paramount interests of educating its children. *S. v. Wiggins*, 147.

§ 4. Duties and Authority of Boards of Education in General.

Application for restraining order which would result in transfer of pupils and teachers during school year held properly denied. *Huggins v. Board of Education*, 33.

§ 15. Disturbing Classes and Defacing School Property.

The statute, G.S. 14-273, making it unlawful wilfully to interrupt or disturb any school, is not void for vagueness in failing to define "interrupt" or "disturb", since the words, when read in conjunction with "school", convey to a

person of ordinary intelligence the meaning of a substantial interference with and the disruption of, the operation of a school in the instruction of pupils enrolled therein. *S. v. Wiggins*, 147.

The elements of the offense punishable by G.S. 14-273 embrace some act or conduct by the defendant within or without the school, resulting in an actual and material interference with part or all the program of the school, and with the intent by the defendant that his act or conduct have such result. *Ibid.*

Warrants charging violation of G.S. 14-273 held sufficient in this case. *Ibid.*

Evidence in this case case held sufficient to go to the jury on the issue of defendant's guilt in wilfully disturbing a public school. *Ibid.*

It is irrelevant that defendants' motives in picketing a school was to improve the educational process when their activities disrupted classes in violation of statute. *Ibid.*

Lack of violence does not mitigate the offense of wilfully disturbing the classes of a public school. *Ibid.*

SEARCHES AND SEIZURES.

§ 1. Necessity for Search Warrant and Waiver.

No search warrant is required to render competent in evidence an object seen through the glass window of a car with the aid of a flashlight without opening the door of the car, since in such instance no search is required. *S. v. Craddock*, 160.

A car was stopped by officers of the law who, having ascertained that the driver and his companions were unarmed, had holstered their revolvers, and the driver then voluntarily gave his consent to a search of the automobile and, upon request, took the keys out of the ignition switch and came back to the trunk of the automobile and unlocked it. *Held:* The search was by consent. In this case the court found on the *voir dire* that there was no duress used at the time of the alleged consent. *Ibid.*

Immunity to unreasonable searches and seizures is a personal privilege which may be waived, and such waiver is not against public policy. *Ibid.*

Where the driver of an automobile gives voluntary assent to a search of the vehicle by officers, other occupants of the car have no right to object. *Ibid.*

Articles found under authority of a valid search warrant are competent in evidence. *Ibid.*

It is not required that the driver of a vehicle in giving consent to the search of the vehicle at the request of police officers be represented by counsel. *Ibid.*

Where the person in the possession and control of an automobile voluntarily consents to the search of the vehicle, he cannot thereafter object to the admission of articles found therein. *S. v. Bishop*, 283.

Evidence in this case *held* sufficient to show a free and intelligent consent to the search of an automobile. *Ibid.*

The search of a defendant's room without a search warrant is unlawful, and it is error to admit in evidence the shotgun shells found therein which tend to implicate defendant, and further error for the court to instruct the jury in regard to such evidence obtained without a search warrant. *S. v. Squires*, 402.

Where testimony on the *voir dire* discloses that evidence is obtained by a search of an automobile with the consent of the owner, a defendant who was merely a passenger in the automobile may not object to the admission of incriminating articles found therein. *S. v. Raynes*, 488.

SEARCHES AND SEIZURES—*Continued.*

Where officers approaching defendant's automobile find three jars of nontaxpaid whiskey within two feet of the front right wheel, and upon shining his light upon the front of the car one officer sees two jars of liquor in the grille of the car, the officers have a right to seize the liquor without a search warrant and the evidence obtained thereby is competent. *S. v. Leach*, 733.

STATE.

§ 4. Actions Against the State.

Where private property is taken for a public purpose by a governmental agency having the power of eminent domain under circumstances such that no procedure provided by statute affords an applicable or adequate remedy, the owner, in the exercise of his constitutional right, may maintain an action of "inverse condemnation" to obtain just compensation therefor. *Highway Commission v. Reynolds Co.*, 618.

STATUTES.

§ 5. General Rules of Construction.

The doctrine of *ejusdem generis* that where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be restricted by the particular designations so as to include only things of the same kind, character and nature as those specifically enumerated, is a rule of construction to be used only as an aid in ascertaining the legislative intent. *S. v. Ross*, 67.

Words of a statute having a clear and definite meaning cannot be ignored in its construction, since it must be presumed that the General Assembly used the words advisedly to express its intent. *Ibid.*

In the construction of a statute words are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise. *S. v. Wiggins*, 147.

§ 10. Construction of Criminal Statutes.

Statutes creating criminal offenses must be strictly construed. *S. v. Ross*, 67; *S. v. Hill*, 439.

Penal statutes must be construed strictly against the State and liberally in favor of the citizen with all conflicts and inconsistencies resolved in his favor, but the court will not adopt an interpretation which will lead to a strained construction of the statute or to a ridiculous result. *S. v. Pinyatello*, 312.

TORTS.

§ 6. Judgment Against Tort-Feasors.

Where plaintiff administrator in an action for wrongful death accepts the sum of money paid over to the clerk of court by one joint tort-feasor in satisfaction of the judgment rendered against him, plaintiff's action against the other joint tort-feasor is thereby extinguished, and plaintiff may not thereafter appeal from a judgment of nonsuit granted in favor of the other tort-feasor. *Kendrick v. Cain*, 719.

§ 7. Release from Liability and Covenants not to Sue.

Since there can be only one recovery by the injured party for a single tort, a release of one tort-feasor releases all. *Thrift v. Trethewey*, 692.

TORTS—*Continued.*

A covenant not to sue does not extinguish a cause of action for tortious injury, and therefore a covenant not to sue one joint tort-feasor does not release the others, although the others are entitled to a credit for the amount paid as consideration for the covenant on any judgment thereafter obtained against them by the injured party. *Ibid.*

Pursuant to a covenant not to sue executed in favor of one tort-feasor, plaintiff, her employer and its insurance carrier applied to the Industrial Commission for an order distributing the funds received by plaintiff in consideration for her covenant not to sue. The order of the Commission recited in part that the sum of money paid to plaintiff is in full satisfaction of all her rights against the named tort-feasor. *Held:* The order of the Commission is ineffectual to extinguish the tort-feasor's liability to plaintiff or to bar the plaintiff from maintaining the present action against the other tort-feasor, since the agreement underlying the order relates solely to rights and liabilities as between plaintiff and her employer and its carrier. *Ibid.*

A release of one joint tort-feasor releases all. *Kendrick v. Cain*, 719.

TRESPASS.

§ 1. Trespass to Realty in General.

Evidence of the plaintiff that the defendant railroad company parked one of its trucks on the plaintiff's land some 125 feet from the center of the railroad track, that the entry upon the land was unauthorized, and that the defendant admitted that its right of way extended only 100 feet from the center of its track, *held* sufficient to go to the jury in plaintiff's action for trespass upon the land, although the damages would seem to be nominal. *Keziah v. R. R.*, 299.

Any unauthorized entry on the land in the actual or constructive possession of another constitutes a trespass, irrespective of degree of force used or whether actual damage is done, and such entry entitles the aggrieved party to at least nominal damages. *Ibid.*

TRIAL.

§ 15. Objections and Exceptions to Evidence and Motions to Strike.

Ordinarily, objection to the admission of evidence must be made at the time of its introduction. *Reeves v. Hill*, 352.

§ 18. Province of the Court and Jury in General.

It is the function of the jury to determine the credibility and weight of the evidence and to determine the facts upon which the plaintiff's right to recover must stand or fall. *Koury v. Follo*, 366.

§ 21. Consideration of Evidence on Motion to Nonsuit.

The court may not weigh the evidence on motion to nonsuit, but it may consider defendant's evidence which is not in conflict with that of plaintiff in ascertaining whether the evidence is sufficient to raise the issue for the jury. *Blanton v. Frye*, 231.

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 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 will not be considered. *Mims v. Dixon*, 256; *Koury v. Follo*, 366; *Anderson v. Carter*, 426; *Perkins v. Cook*, 477.

TRIAL—*Continued.*

Upon motion to nonsuit, discrepancies in plaintiff's evidence must be resolved in his favor, but plaintiff may not avail himself of both conflicting accounts simultaneously. *Miller v. Wright*, 666.

§ 29. Voluntary Nonsuit.

When the defendant has asserted no counterclaim and demanded no affirmative relief, the plaintiff may take a voluntary nonsuit as a matter of right at any time before the verdict. *Mitchell v. Jones*, 499.

Voluntary nonsuit as to resident defendant deprives nonresident of right to demand change of verdict. *Ibid.*

§ 31. Directed Verdict and Peremptory Instructions.

An instruction that the jury should answer an issue in a specified way if the jury should find the facts to be as the evidence tends to show is a peremptory instruction, and such instruction is improperly given where the evidence bearing on the issue is in conflict. *Dennis v. Voncannon*, 446.

§ 33. Instructions — Statement of Evidence and Application of Law Thereto.

It is error for the court to charge on an abstract principle of law not supported by any evidence in the case. *Hendricks v. Hendricks*, 340.

An instruction to the jury relating to a factual situation of which there is no evidence is erroneous. *Dennis v. Voncannon*, 446.

§ 37. Instructions — Statement of Contentions.

An exception on the ground that the court misstated the contentions of the appellant will not be sustained when the error is not called to the attention of the court in time to afford opportunity for correction. *Emanuel v. Clewis*, 505.

§ 38. Requests for Instructions.

The court is not required to charge the jury in the precise language of the instructions requested so long as the substance of the request is included in the charge. *King v. Higgins*, 267.

The court may properly refuse a requested instruction which is not a correct statement of the law applicable to the evidence, and the court is under no duty to modify or qualify it so as to remedy the defect therein. *Ibid.*

§ 48. Power of Court to Set Aside Verdict in General.

Although the verdict of the jury should not be set aside without material consideration, the trial court has the power to set aside a verdict in whole or in part in the exercise of his sound discretion, G.S. 1-207, and his order doing so is not reviewable on appeal in the absence of abuse of discretion. *Goldston v. Chambers*, 53.

§ 56. Trial and Hearing by the Court.

Where trial is had in the inferior court without a jury, the resolution of conflicting evidence is a matter for the court, and where the evidence is sufficient to support the findings and when error of law does not appear upon the face of the record proper, the judgment will not be disturbed on appeal. *Wall v. Timberlake*, 731.

§ 57. Findings and Judgments of the Court, Appeal and Review.

While it is irregular for the court, in a trial by the court under agreement of the parties, to submit issues to itself, such procedure is harmless error where

TRIAL—*Continued.*

the findings of facts and the conclusions of law drawn therefrom can be ascertained in the judgment. *Harrelson v. Insurance Co.*, 603.

UNLAWFUL ASSEMBLY.

The constitutional guaranty of the right to bear arms, N. C. Constitution, Art. I, § 24, does not abrogate the common law offense of going armed with unusual weapons to the terror of the people. *S. v. Dawson*, 535.

An indictment alleging that the defendant armed himself with unusual and dangerous weapons for the unlawful purpose of terrorizing the people of the county and that, thus armed, the defendant went about the public highways of the county in a manner to cause terror to the people, *held* sufficient to charge the common law offense. *Ibid.*

The evidence in this case *held* sufficient to be submitted to the jury on the issue of defendant's guilt of the offense of going armed with unusual and dangerous weapons to the terror of the people. *Ibid.*

USURY.

§ 1. Contracts and Transactions Usurious.

Allegations of a complaint to the effect that plaintiffs executed a note secured by a deed of trust and made payable in 72 monthly installments, that upon default by plaintiffs some nine months after the execution of the note the holder accelerated the monthly payments and received from the foreclosure sale the entire balance due on the note, including the interest which would have been payable for the remaining life of the note, *held* sufficient to state a cause of action for money had and received to recover the excess paid as interest for the remaining life of the note. *Ridley v. Jim Walter Corp.*, 673.

UTILITIES COMMISSION.

§ 7. Hearings and Orders in Respect to Services.

The Utilities Commission has no statutory authority to compel a telephone company to interconnect its system of line telephones with the system of a mobile radio service. *Utilities Commission v. Radio Service, Inc.*, 591.

A certificate of public convenience and necessity authorizing its holder to render telephone service grants to the holder the right to adopt new methods of telephonic communications, including a mobile radio telephone service. *Ibid.*

Courts may take judicial notice that telephone companies habitually transmit conversations by electrical impulses without the use of wires. *Ibid.*

Where a public utility has a certificate of convenience and necessity for telephone service in a certain area and is ready and able to provide such area a mobile radio service, the Utilities Commission should deny an application for a certificate of public convenience and necessity to an applicant who proposes to render substantially the same mobile radio service in the area, and the fact that the applicant proposes to offer an electronic personal paging service as an auxiliary to its mobile radio service is not a sufficient difference to justify the issuance of the certificate when it appears that the Commission can compel the established utility to install such a service when the public convenience so requires. *Ibid.*

Neither a telephone answering nor a message relaying service is a public utility within the purview of G.S. 62-3(23) and cannot therefore be determin-

ative upon the question of whether an applicant's proposed telephone service is substantially the same as that of the existing franchise holder. *Ibid.*

§ 9. Appeal and Review.

The findings of fact of the Utilities Commission are conclusive upon the reviewing court if supported by competent, material and substantial evidence. *Utilities Commission v. Radio Service, Inc.*, 591.

The Superior Court may, in proper cases, remand the cause to the Utilities Commission for additional findings upon a question of fact to which the Commission made no finding, or the Court may reverse or remand where a finding is not supported by competent or material evidence, but the court cannot reverse the Commission for failure to find facts which the reviewing court believes it should have found. *Ibid.*

VENUE.

§ 1. Definition and Nature of Venue.

Where plaintiff fails to bring suit in the proper county, defendant waives the right to remove the cause to the proper venue unless he demands in writing before time for answer has expired that the venue be changed. *Mitchell v. Jones*, 499.

§ 2. Residence of Parties.

Where none of the parties to an action for personal injury resides in the State, the suit may be tried in any county designated by the plaintiff; where plaintiff is a nonresident and any defendant is a resident, the action must be tried in the county in which the defendant resides. *Mitchell v. Jones*, 499.

The residence of a domestic corporation formed after July 1, 1957, for the purpose of determining venue of an action instituted by it, is the county in which the registered office of the corporation is located. *Jewel Box Stores v. Morrow*, 659.

§ 5. Actions Involving Title to or Right to Possession of Property.

The form of action alleged in the complaint determines whether a cause is local or transitory. *Thompson v. Horrell*, 503.

An action to recover monetary damages for the breach of a contract to construct a house is not a local action within the purview of G.S. 1-76(1), and the cause may not be transferred as a matter of right to the county wherein the house is located. *Ibid.*

An action is local and must be tried in the county wherein the land is located if the judgment to which the plaintiff would be entitled upon the allegations of the complaint will affect the title to the land; otherwise, the action is transitory and must be tried in the county where one or more of the parties reside at the commencement of the action. *Ibid.*

§ 7. Motions to Remove as Matter of Right.

When demand for change of venue as a matter of right is made in apt time and in the required manner, the court has no discretion as to the removal. *Mitchell v. Jones*, 499.

Voluntary nonsuit as to resident defendant deprives nonresident of right to demand change of venue. *Ibid.*

§ 8. Removal for Convenience of Parties and Witnesses.

In an action brought by plaintiff in his resident county to recover damages for breach of contract in constructing a house located in another county, it is

VENUE—*Continued.*

premature for the court to grant a motion for change of venue for the convenience of witnesses before the defendant has filed any pleadings, since until the allegations of the complaint are traversed there is no basis for the court to exercise its discretionary power to order change of venue. *Thornton v. Horrell*, 503.

WILLS.

§ 21. Mental Capacity.

A nonexpert witness, in a caveat proceeding, may give his opinion in evidence upon the issue of the mental capacity of another person where it is shown that he has observed such other person and has had a reasonable opportunity to form an opinion as to the mental condition of such person. *In re Will of Cauble*, 706.

§ 22. Instructions Generally in Caveat Proceedings.

A charge instructing the jury to answer the issue of mental capacity in the negative if the caveator has established by the greater weight of the evidence the lack of any one element of mental capacity *is held* without error. *In re Will of Cauble*, 706.

WITNESSES.

§ 1. Age.

The competency of a girl who at the time of the trial was seven years old, and at the time of the rape was six years old, is addressed to the sound discretion of the trial court, and where the record discloses that upon the *voir dire* the court inquired into the child's intelligence and understanding and admitted her testimony upon evidence supporting the conclusion of competency, the discretionary action of the court will not be disturbed on appeal. *S. v. Bowden*, 481.

GENERAL STATUTES, SECTIONS OF, CONSTRUED.

1-40. Is not applicable when defendant does not assert that he was in adverse possession for more than 20 years. *Poultry Co. v. Oil Co.*, 16.

1-52. Is not applicable when defendant fails to assert possession under a sheriff's deed upon tax foreclosure. *Poultry Co. v. Oil Co.*, 16.

1-56. Is not applicable in an action in ejectment to recover possession of real property. *Poultry Co. v. Oil Co.*, 16.

1-69, 1-73. An original defendant is not entitled to joinder of additional defendants when plaintiff's action against the original defendant may be finally determined without joinder. *Quenby Corp. v. Conner Co.*, 208.

1-76(1). An action to recover damages for breach of contract to construct a house is not a local action. *Thompson v. Horrell*, 503.

1-79. The residence of a domestic corporation after July 1, 1957 is the county in which its registered office is located. *Jewel Box Stores v. Morrow*, 659.

1-82. An action is local and must be tried in the county wherein the land is located if the judgment to which plaintiff would be entitled will affect title to the land. *Thompson v. Horrell*, 503.
Where plaintiff is a nonresident and any defendant is a resident, the action must be tried in the county of the defendant's residence. *Mitchell v. Jones*, 499.

1-83. Where plaintiff fails to bring suit in the proper county, defendant must demand in writing before time for answer has expired that the venue be changed. *Mitchell v. Jones*, 499.

1-83(2). A motion that the cause be removed to another county for the convenience of witnesses is addressed to the discretion of the court. *Mitchell v. Jones*, 499.

1-137(1). In an insurance company's action to recover advance payments to its agents, the defendant may properly counterclaim in tort for the negligent handling of his customer's policies. *Ins. Co. v. Falconer*, 702.
Permits the trial in one action of all causes of action arising out of any one contract or transaction. *Ins. Co. v. Falconer*, 702.

1-139. Defendant must specifically plead and prove contributory negligence. *Lawson v. Benton*, 627.

1-176. Defendant's motion for continuance is properly denied where no affidavit is filed detailing facts as a basis for the motion. *S. v. Moses*, 510.

1-180. It is prejudicial error for the court to convey in any manner its opinion of the evidence. *S. v. Davis*, 102.

1-207. The trial court has the power to set aside a verdict in whole or in part. *Goldston v. Goldston*, 53.

1-239. Payment to the clerk by the party liable on a judgment discharges the judgment since the clerk is the statutory agent of the judgment owner. *Kendrick v. Cain*, 719.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

7-141.1. Issuance of a warrant by a justice of the peace who had not complied with statutory bond requirements is act of justice of the peace *de facto*. *S. v. Porter*, 463.

8-50.1. In a prosecution for wilful refusal to support an illegitimate child in which no mention of a blood test has been made, it is error for the court to read the statute to the jury. *S. v. Davis*, 102.

8-53. The judge at a child custody hearing has no authority to compel a physician to disclose confidential matters. *Gustafson v. Gustafson*, 452. Court's finding that the testimony of defendant's family physician was necessary for a proper administration of justice takes the physician's evidence out of the privileged communications rule. *S. v. Howard*, 519.

8-57. Unless the evidence comes within the statutory exception, a wife is incompetent to testify against her husband. *S. v. Porter*, 463.

9-11. Trial court has authority to dismiss regular jury panel and to direct the sheriff to summon a special venire without regard to race. *S. v. Wiggins*, 147.

14-18. A sentence of 12 to 15 years upon conviction of manslaughter is lawful. *S. v. Meadows*, 327.

14-32. Offense of felonious assault consists of an assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death. *S. v. Meadows*, 327.

14-54. The breaking of a store window with intent to commit a felony completes the statutory offense even though the building is not actually entered. *S. v. Jones*, 108.
A breaking or entering without an intent to commit a felony constitutes a misdemeanor and is a less degree of the offense of unlawful breaking with intent to commit a felony. *S. v. Dickens*, 515.

14-55. A lock pick is a burglary tool. *S. v. Craddock*, 160.
The State has the burden of showing that defendant possessed housebreaking implements without lawful excuse. *S. v. Craddock*, 160; *S. v. Davis*, 469.

14-71. Offense of receiving stolen goods defined. *S. v. Tilley*, 408.

14-87. A sentence of imprisonment for five to thirty years upon conviction of armed robbery is lawful. *S. v. Paige*, 417.

14-89.1. Elements of the offense of safecracking. *S. v. Pinyatello*, 312.
Evidence of safecracking held sufficient to go to jury on issue of defendant's guilt. *S. v. Pinyatello*, 312.

14-119, 14-120. Evidence of defendant's guilt of forgery and uttering a forged instrument is sufficient to be submitted to the jury. *S. v. Greenlee*, 651.

14-144. The indictment sufficiently charged the offense of unlawfully and wilfully defacing a house. *S. v. Dawson*, 535.

14-273. Wilful disruption of classes of a school constitutes a criminal offense. *S. v. Wiggins*, 147.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

14-335. Punishment for a second conviction of public drunkenness within a 12-month period is decreased and, in addition, the defense of chronic alcoholism is created. Session Laws of 1967, Chapter 1356. *S. v. Pardon*, 72.

15-1. The issuance of a void warrant in a misdemeanor prosecution does not toll the running of the statute of limitations. *S. v. Hundley*, 491.

15-140.1. Where defendant waives indictment, the prosecution must be based upon an information signed by the solicitor. *S. v. Bethea*, 521.

15-152. Trial court has the discretion to consolidate indictments against four defendants. *S. v. Craddock*, 160.

15-153. A warrant charging the offense substantially in the language of the statute is ordinarily sufficient. *S. v. Cook*, 728.

20-28(a). A warrant charging that defendant operated his automobile while his license was revoked must also charge that the defendant operated the car on a public highway. *S. v. Cook*, 728.

20-38(12), 20-155(b). Accident held to have occurred within the intersection of two streets. *Mims v. Dixon*, 256.

20-71.1. Evidence by one defendant that title to the car driven by the other defendant was registered in her name is *prima facie* proof of ownership. *Perkins v. Cook*, 477.

20-129, 20-131. The function of automobile lights is to produce a sufficient driving light to enable the operator to see 200 feet ahead. *Miller v. Wright*, 666.

20-140.1. The driver of an automobile must exercise due care to avoid injury, regardless of whether the vehicle is upon a public highway or elsewhere. *McCall v. Warehousing, Inc.*, 190.

20-146, 20-148. Evidence held sufficient to show that driver was traveling in deceased's lane of travel when the collision occurred. *Lassiter v. Williams*, 473.

20-148, 20-146. Physical facts at scene of accident sufficient to carry issue of negligence to jury in failing to yield one-half of highway to vehicle approaching from opposite direction. *Reeves v. Hill*, 352.

20-153(a), 20-154, 20-149(a). Evidence discloses contributory negligence in passing truck on its right side at an intersection. *Almond v. Bolton*, 78.

20-161. The requirement that flares or lanterns be placed to the front and rear of a disabled vehicle does not apply to an automobile. *Exum v. Boyles*, 567.

20-173(a), 20-174(a). Evidence disclosed that plaintiff was not within a marked or unmarked crosswalk and was therefore required to yield the right of way to vehicular traffic. *Anderson v. Carter*, 426.

20-279.19, 20-309, 20-314. The owner of a registered motor vehicle has an absolute duty to maintain proof of financial responsibility throughout

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

the registration of the vehicle, and this may be satisfied by a policy of automobile liability insurance. *Harrelson v. Ins. Co.*, 603.

20-279.34. Failure of an Assigned Risk insured to pay a fee for certification of financial responsibility is not a nonpayment of premium within the purview of the statute. *Harrelson v. Ins. Co.*, 603.

25-3-306. One who acquires a note without paying consideration therefor is not a holder in due course. *Ridley v. Jim Walter Corp.*, 673.

28-173. A wrongful death action contemplates that damages be recoverable as one compensation in a lump sum. *Kendrick v. Cain*, 719.
Punitive and nominal damages are not authorized in wrongful death actions. *Reeves v. Hill*, 352.

39-133.3(c). A conveyance from one spouse to the other of real property held as tenants by the entirety dissolves such tenancy. *Council v. Pitt*, 222.

40-19, 40-20. In condemnation proceedings the amount of compensation is for determination *de novo* by jury trial. *Redevelopment Comm. v. Smith*, 250.

45-21.31(b). Surplus remaining after foreclosure may be turned over to the clerk of Superior Court. *Realty Co. v. Wysor*, 172.

45-21.34. The trustor in a deed of trust may restrain foreclosure if the note secured by the deed is not in default. *Realty Corp. v. Kalman*, 201.

50-6. The husband need not establish that he is the injured party in his action for divorce on the ground of one year's separation. *Overby v. Overby*, 636.

50-13, 50-16. Superior Court has authority to modify order affecting custody and support of a minor when changed conditions so require. *Teague v. Teague*, 134.

62-3(23). Neither a telephone answering nor a message relaying service is a public utility within the purview of the statute. *Utilities Comm. v. Radio Service*, 591.

75-4, 75-5(d). A covenant not to engage in the same business in competition with another is valid and enforceable. *Jewel Box Stores v. Morrow*, 659.

90-14.6. The record in this case fails to disclose that the Board of Medical Examiners permitted incompetent prejudicial evidence in its hearing to revoke a physician's license. *In re Kincheloe*, 116.

122-91. Authorizes the resident judge to commit defendant to a State hospital to determine his mental capacity to stand trial. *S. v. Old*, 42.

148-33.1. The trial court has the discretion to recommend that defendant be granted the privilege of the Work Release Program. *S. v. Wright*, 264.

153-9(44). Where a county is covered by liability insurance, the issue of governmental immunity for torts does not apply. *Cook v. Burke County*, 94.

GENERAL STATUTES, SECTIONS OF, CONSTRUED—*Continued.*

160-54. A municipality is ordinarily responsible for the condition of its sidewalks, but the owner of abutting property may be held liable. *Dunning v. Warehouse Co.*, 723.

160-178. A municipal zoning board has no authority to prohibit the construction of a building permitted by a zoning ordinance. *In re Application of Construction Co.*, 715.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

I, § 11. A defendant charged with a capital offense has the right to be represented by counsel. *Carpenter v. State*, 84.

I, § 17. An indictment must sufficiently charge the offense to protect defendant from being placed in jeopardy upon a subsequent prosecution for the same offense. *S. v. Partlow*, 60.
Statute prohibiting the wilful disruption of classes is not discriminatory. *S. v. Wiggins*, 147.

I, § 24. Does not abrogate the common law offense of going armed with unusual weapons to the terror of the people. *S. v. Dawson*, 535.

IV, § 10. The Supreme Court in its general supervisory jurisdiction may order that defendant be given credit for time served under a previous sentence. *S. v. Meadows*, 327.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED.

First Amendment. Does not sanction the disruption of classes in a public school. *S. v. Wiggins*, 147.

Fourteenth Amendment. A defendant charged with a capital offense has the right to be represented by counsel. *Carpenter v. State*, 84.
Statute prohibiting the wilful disruption of classes is not discriminatory. *S. v. Wiggins*, 147.